

Issues Paper | He Puka Kaupapa 44

Review of the Property (Relationships) Act 1976: Preferred Approach

**Te Arotake i te Property
(Relationships) Act 1976:
He Aronga i Mariu ai**



The Law Commission | Te Aka Matua o te Ture is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible, and that reflects the heritage and aspirations of the people of New Zealand.

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Foreword

In our Issues Paper, *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* we asked whether the existing rules in the Property (Relationships) Act 1976 are still achieving a just division of property at the end of a relationship.

We received extensive feedback on this question from members of the public as well as experts working in the area. We have also been helped by the results of a survey of public attitudes and values on relationship property division in New Zealand which was carried out by the University of Otago and funded by the Michael and Suzanne Borrin Foundation.

We have concluded that there need to be changes to the Property (Relationships) Act 1976 to ensure that we have law which New Zealanders think is fair for most people most of the time.

Our preferred package of reforms is set out in this paper. Please read it and share your opinions with us about whether you agree with the proposals or not. We are open to altering the proposals if it is shown that they will not work as intended or that there is a better approach. The feedback we receive will influence the final recommendations we make to the Government in 2019.



Douglas White
President

Have your say

This paper setting out our preferred approach to reform of the Property (Relationships) Act 1976 is available online at www.lawcom.govt.nz.

We want to know what you think about this preferred approach. Do you agree or disagree with our preferred approach? Please also explain the reasons for your views.

Submissions or comments (formal or informal) on our preferred approach should be received by **14 December 2018**.

You can email your submission to pra@lawcom.govt.nz.

You can post your submission to:

Property (Relationships) Act Review

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Acknowledgements

The Law Commission gratefully acknowledges the contributions of people and organisations that have shaped our preferred approach. A list of the organisations that made submissions on our Issues Paper *Dividing relationship property: time for change? Te mātatoha rawa tokorau – Kua eke te wā?* is set out in Appendix 2.

In particular, we acknowledge the generous contributions of time and expertise from our Expert Advisory Group:

- Professor Bill Atkin, Victoria University of Wellington
- Judge Andrew Becroft, Children’s Commissioner
- Mr Stephen van Bohemen, Barrister
- Mr David Goddard QC
- Mr Greg Kelly, Greg Kelly Law
- Professor Nicola Peart, University of Otago
- Judge Laurence Ryan, former Principal Family Court Judge
- Professor Jacinta Ruru, University of Otago
- Ms Renika Siciliano, McCaw Lewis
- Ms Kirsty Swadling, Barrister and Mediator

We also acknowledge the additional assistance provided by Chief Judge Jan-Marie Doogue and the Acting Principal Family Court Judges following Judge Ryan’s retirement.

We have been further assisted by the expertise kindly shared with us by Ms Joanna Miles, Reader in Family Law & Policy, University of Cambridge, England; Dr Jens Scherpe, Reader in Comparative Law, University of Cambridge, England; Professor Carol Rogerson, University of Toronto, Canada; Professor Rollie Thompson QC, Dalhousie University, Canada; Ms Vivienne Crawshaw, Barrister, Auckland; and Ms Suzanne Robertson QC, Auckland.

We acknowledge with thanks the work of the Parliamentary Counsel Office Te Tari Tohutohu Pāremata in preparing several draft legislative provisions for inclusion in this paper.

We are also grateful for the support and guidance of the Māori Liaison Committee to the Law Commission.

The lead Commissioner on this project is Helen McQueen. The advisers who have worked on this paper are Emma Bassett, John-Luke Day, Nichola Lambie, Lisa Yarwood and Karen Yates. The clerks who have worked on this Issues Paper are Maddy Nash, Oralia Rona, Kate Wilson and Tasneem Haradasa.

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List of proposals

CHAPTER 1: INTRODUCTION

PROPOSALS

P1

A new statute, entitled the Relationship Property Act, should apply to relationships ending on separation.

P2

The rules that apply to relationships ending on death should be the subject of further consideration, within a broader review of succession law.

P3

The purpose of the new Relationship Property Act should be to provide for a just division of property between partners when a relationship ends on separation.

P4

The new Relationship Property Act should include a revised statement of principles to guide the achievement of the purpose of the Act.

Note: For ease of reading, the proposals in the rest of the paper will continue to refer to the Property (Relationships) Act 1976 (PRA) rather than a new statute.

CHAPTER 2: CLASSIFICATION**PROPOSALS****P5**

Property owned by either or both partners should be classified as relationship property if it:

- a. was acquired before the relationship, for the partners' common use or common benefit;
- b. was acquired during the relationship, other than as a third party gift or inheritance; or
- c. is a family chattel.

P6

Property acquired by one partner before the relationship began, or from a third party as a gift or inheritance during the relationship, should be classified as separate property.

P7

Payments received under the Accident Compensation Act 2001 or under a private insurance policy for a personal injury should be classified as separate property, except to the extent the payment compensates for loss of income during the relationship.

P8

Any increase in the value of any separate property, or any income or gains derived from separate property, that is attributable to the application of relationship property or to the actions of either or both partners, should be classified as relationship property. Section 15A should be repealed.

P9

When the family home is separate property, any increase in the value of the family home occurring during the relationship should be classified as relationship property in every case.

P10

The burden of proof of establishing whether property is separate property should be on the owning partner.

CHAPTER 3: DIVISION

PROPOSALS

P11

The PRA should continue to provide that each partner is entitled to share equally in all relationship property, subject to limited exceptions.

P12

The PRA should be amended to clarify that a court can take into account a partner's misconduct that satisfies the threshold in section 18A(3) when deciding whether there are extraordinary circumstances which make equal sharing repugnant to justice under section 13.

P13

The Government should consider the division of property at the end of a relationship under the PRA, in the context of its wider response to family violence.

CHAPTER 4: QUALIFYING RELATIONSHIPS

PROPOSALS

P14

The PRA should apply in the same way to all marriages, civil unions and qualifying de facto relationships.

P15

The eligibility criteria for de facto relationships should retain the existing definition of de facto relationship and the existing three year qualifying period.

P16

The provisions for short-term relationships should be repealed and the ordinary rules of division should apply to all marriages, civil unions and qualifying de facto relationships.

P17

A "qualifying de facto relationship" should include a de facto relationship that does not satisfy the three year qualifying period if it meets the following additional eligibility criteria:

- a. there is a child of the relationship, and a court considers it just to make an order for division; or
- b. the applicant has made substantial contributions to the relationship, and a court considers it just to make an order for division.

CHAPTER 5: SECTION 15

PROPOSALS

- P18** Section 15 of the PRA and maintenance under Part 6 of the Family Proceedings Act 1980 should be repealed and replaced with a new, limited entitlement to share future family income through a Family Income Sharing Arrangement or FISA.
- P19** A partner (Partner A) should be entitled to a FISA in the following circumstances:
- a. the partners have a child together; or
 - b. the relationship was 10 years or longer; or
 - c. during the relationship:
 - (i) Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or
 - (ii) Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.
- P20** The amount and duration of a FISA should be determined by a statutory formula that equalises the partners' incomes for a period of time that is approximately half the length of the relationship, up to a maximum of five years.
- P21** Entitlement to a FISA should arise from the date of separation and default rules should provide for the implementation of a FISA by way of monthly periodic payments, unless the partners agree otherwise.
- P22** Partners should be able to make their own agreement as to the amount, duration and implementation of a FISA. The PRA should specify when an agreement should be regarded as a settlement agreement under section 21A, requiring compliance with the safeguards in section 21F in order for it to be enforceable.
- P23** A court should be able to adjust a FISA and depart from the statutory formula and/or default rules of entitlement if satisfied failure to grant the application would result in serious injustice, having regard to a number of specified considerations.
- P24** Partners should be able to contract out of the FISA provisions before or during the relationship under section 21 of the PRA.
- P25** Strict enforcement measures should be put in place to ensure that, when partners cannot reach agreement, a FISA is implemented in accordance with the statutory formula and default rules of implementation or as otherwise ordered by the court.
- P26** The Government should consider extending the existing administration and enforcement role of the Inland Revenue Department under the Child Support Act 1991 to include the administration and enforcement of FISAs.

CHAPTER 6: TRUSTS

PROPOSALS

- P27** Section 44C of the PRA should be amended to provide a single, comprehensive remedy that will enable a court to grant relief when a trust holds property that was produced, preserved or enhanced by the relationship.
- P28** An amended section 44C would apply in three different situations:
- where either or both partners have disposed of property to a trust, at a time when the qualifying relationship was reasonably contemplated or since the qualifying relationship began, and that disposition has had the effect of defeating the claim or rights of either or both of the partners under any other provision of the PRA; or
 - where trust property has been sustained by the application of relationship property or the actions of either or both partners; or
 - where any increase in the value of trust property, or any income or gains derived from the trust property, is attributable to the application of relationship property or the actions of either or both partners.
- P29** The court should have broad powers that include ordering one partner to pay compensation to the other, ordering the trustees to distribute capital from the trust, varying the terms of the trust, and resettling some or all of the trust property on a new trust or trusts.
- P30** A court must be satisfied that making an order is "just", having regard to a number of specified considerations. These considerations are designed to ensure the amended section 44C achieves an appropriate balance between protecting partners' entitlements under the PRA and the preservation of trusts.
- P31** Partners should be able to agree not to make any claim under section 44C for the purposes of contracting out of the PRA under section 21, and to settle claims for the purposes of section 21A.
- P32** Section 182 of the Family Proceedings Act 1980 should be repealed.
- P33** Section 44 should remain unchanged and should continue to provide a remedy for other avoidance mechanisms.

CHAPTER 7: CHILDREN'S INTERESTS

PROPOSALS

P34

Children's best interests should be a primary consideration under the PRA. This should be given effect through:

- a. a statutory principle, to guide the achievement of the purpose of the PRA;
- b. an overarching obligation on the courts to have regard to the best interests of any minor or dependent children of the relationship (replacing the existing obligation in section 26); and
- c. procedural rules, to ensure a court is provided with the information it needs in order to effectively perform its obligation at (b) above, and to promote to parents, practitioners and the court the importance of considering children's best interests and the tools available for meeting children's needs.

P35

A court should have the power to set relationship property aside for the benefit of any minor or dependent children of the relationship, if it considers it just (replacing the existing power in section 26). The court should be directed to have particular regard to any unmet needs of the child or children during minority or dependency.

P36

There should be a presumption in favour of granting a temporary or interim occupation or tenancy order on application by the primary caregiver of any minor or dependent children of the relationship. A court may decline to make an order if the respondent partner satisfies the court that an application is not in the child's best interests, or would otherwise result in serious injustice.

P37

The other tools available to meet children's needs should be improved by:

- a. broadening the jurisdiction of furniture orders to include family chattels as defined in section 2, and clarifying that a court must have particular regard to children's needs when making furniture orders;
- b. requiring a court to postpone vesting, if immediate vesting would cause undue hardship for any minor or dependent child of the relationship; and
- c. clarifying that an order made to benefit children under current sections 26, 27 or 28A is not grounds for departure from formula-assessed child support obligations under the Child Support Act 1991.

P38

Children's participation in proceedings should be strengthened by lowering the threshold for appointing a lawyer for child to "necessary or desirable", consistent with the Family Proceedings Act 1980.

P39

There is a need to review the effectiveness of the Child Support Act 1991 in meeting children's needs and setting the level of financial support to be provided by parents for their children.

CHAPTER 8: CONTRACTING OUT AND SETTLEMENT AGREEMENTS

PROPOSALS

P40

The PRA should continue to enable partners to make their own agreement about how to divide their property during or in anticipation of entering into a relationship, and in order to settle any differences that arise between them. The procedural requirements in section 21F should continue to apply.

P41

A new provision should be included in Part 6 of the PRA to the effect that a lawyer may use audio-visual technology to witness a partner signing a contracting out or settlement agreement under section 21F(4).

P42

Section 21E of the PRA and the Property (Relationships) Model Form of Agreement Regulations 2001 should be repealed.

P43

A court should have the additional powers under section 21J to set aside an agreement in part, or to vary an agreement if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.

P44

Section 21J(4) should be amended to require a court to have regard to the best interests of any minor or dependent children of the relationship in deciding whether giving effect to a contracting out or settlement agreement would cause serious injustice.

CHAPTER 9: TIKANGA MĀORI

PROPOSALS

- | | |
|-----|--|
| P45 | The PRA framework should continue to accommodate and respond to matters of tikanga Māori. |
| P46 | Consideration should be given to providing remedies in relation to family homes built on Māori land through Te Ture Whenua Māori Act 1993. |
| P47 | Taonga should be defined in the PRA within a tikanga Māori construct. |
| P48 | Taonga should be classified as a special item of separate property that cannot become relationship property in any circumstances, and a court should not be able to make orders requiring a partner to relinquish taonga as compensation to the other partner. |
| P49 | The Family Court should be enabled to appoint a person to make an inquiry into matters of tikanga Māori and report to the Court. |
| P50 | Family Court judges should receive education on tikanga Māori. |
| P51 | Further consideration should be given to warranting Māori Land Court judges to sit alongside judges in the Family Court where there is a difficult matter of tikanga Māori at issue. |

CHAPTER 10: RESOLUTION

PROPOSALS

P52

The Ministry of Justice should develop a comprehensive information guide for separating partners that explains the PRA and provides information about the different options for resolving PRA matters.

P53

The Ministry of Justice should consider funding community organisations to provide person-to-person support for people who have difficulty accessing, navigating and applying the information guide in order to enable first steps in the resolution process to be identified and taken.

P54

The Ministry of Justice should review the existing provision and funding for legal advice on PRA matters in order to ensure appropriate access to affordable legal advice when resolving PRA matters out of court.

P55

Voluntary out of court dispute resolution for PRA matters should be promoted by:

- including in the PRA statutory endorsement of voluntary dispute resolution to resolve PRA matters out of court;
- including new "pre-action procedures" in the Family Court Rules 2002 (proposed under Proposal 59 below), including a requirement to make a genuine effort to resolve PRA matters out of court prior to making an application to court; and
- requiring applicants to court to acknowledge in court application forms that they have received information about the availability of out of court dispute resolution services.

P56

The Government should consider extending a voluntary, modified Family Dispute Resolution service or other form of State-funded dispute resolution service to PRA matters following the outcome of the review of the 2014 family justice reforms.

P57

The PRA should include an express duty of disclosure.

P58

A Family Court Rules Committee should be established for the purpose of developing specific procedural rules and guidance for PRA matters.

PROPOSALS

P59

The Family Court Rules should be amended to include:

- a. pre-action procedures that set out dispute resolution and disclosure requirements prior to making an application to the court; and
- b. a clear procedure for initial and subsequent disclosure tailored to the needs of PRA proceedings.

P60

Clearer and stricter consequences for non-disclosure should be provided. We propose that:

- a. the consequences for non-compliance with disclosure obligations should be clearly set out in the Family Court Rules;
- b. guidance should be provided on the imposition of costs and other consequences for non-disclosure; and
- c. case management processes that facilitate application for, and imposition of, costs for non-disclosure should be considered.

P61

The Ministry of Justice should:

- a. provide clearer guidance to parties about how to complete key court documentation, including information about the potential consequences of non-compliance; and
- b. develop process guides to better prepare self-represented litigants for court processes.

P62

The Family Court Rules should be amended to include case management procedures tailored to the needs of PRA proceedings.

P63

The PRA and Family Court Rules should be amended to:

- a. clarify the powers of a person appointed by the Family Court under section 38; and
- b. enable the Court to inquire into such matters it considers may assist it to deal effectively with the matters before it.

P64

Guidance should be provided on the imposition of costs and other consequences for non-compliance with procedural requirements and for the exercise of the Court's discretion to make costs orders that are not for the purpose of penalising non-compliance.

P65

A separate scale of costs for PRA cases should be established.

P66

The Ministry of Justice should consider reducing the application and hearing fees for PRA proceedings.

CHAPTER 11: CREDITORS

PROPOSALS

P67

The Government should undertake further policy work that considers the options for amending or repealing the protected interest provisions within a broader investigation into the relationship between the insolvency regime and the interests of partners under the PRA. Such an investigation should also:

- a. reach a concluded policy decision on the availability of retirement savings to creditors in bankruptcy;
- b. consider whether to give greater rights to bankrupts and their families over unsecured creditors in the Insolvency Act 2006; and
- c. progress the repeal of the Joint Family Homes Act 1964.

P68

The PRA should clarify that a creditor may only challenge an agreement, disposition or other transaction between the partners that has the effect of defeating the rights of creditors as void within two years of the agreement, disposition or transaction being made.

P69

The Official Assignee should be able to treat an agreement, disposition or other transaction between the partners as an insolvent transaction under the Insolvency Act 2006 if it:

- a. enabled a partner to receive more than they would in the other partner's bankruptcy; and
- b. was made within the two years immediately before the partner is adjudicated bankrupt.

P70

An application by the Official Assignee to set aside an insolvent transaction should displace any claims by other creditors that an agreement, disposition or other transaction has the effect of defeating creditors' rights.

P71

A court should not be able to order recovery from a partner who receives property under a section 21A agreement if the recipient:

- a. received the property in good faith from the other partner;
- b. did not suspect the other partner was insolvent; and
- c. gave value for the property or altered their position in the reasonably held belief that the transfer of property was valid and would not be cancelled.

CHAPTER 1

Introduction

IN THIS CHAPTER, WE:

- introduce our preferred approach to reforming the Property (Relationships) Act 1976 (PRA);
- explain the scope of the Law Commission's review; and
- set out our general approach to reforms, including proposals to improve the PRA framework and raise public awareness of the PRA.

INTRODUCING OUR PREFERRED APPROACH

- 1.1 Dividing property when relationships end is often a challenging task, and one which typically comes at a time of emotional upheaval.¹ When relationships end as a result of separation, both partners will generally be worse off financially, because the resources that were being used to support one household must now support two. How property is divided can significantly affect the financial recovery of partners and their children. Different issues arise when a relationship ends on the death of one partner. The interests of the surviving partner may have to be balanced against competing interests, for example the interests of any children of the deceased.
- 1.2 The Property (Relationships) Act 1976 (PRA) sets out the rules for how property is to be divided when relationships end. In our Issues Paper, *Dividing relationship property: time for change? Te ātotoha rawa tokerau – Kua eke te wā?*, we asked whether, in contemporary New Zealand, the PRA is achieving a just division of property at the end of relationships.
- 1.3 This paper sets out our preferred approach in respect of the key issues arising from our review.
- 1.4 We think a just division of property remains the right objective for the PRA. A qualifying relationship is treated as a family joint venture, to which the partners contribute equally,

¹ In this paper we use the term "relationship" to refer to marriages, civil unions and de facto relationships, unless we are referring to a specific relationship type. Likewise, we use the term "partner" to refer to a spouse, civil union partner or de facto partner. Often the discussion in this paper concerns situations arising after a relationship ends, but for simplicity we will continue to refer to "partners" rather than "former partners". In this paper we also anonymise some court decisions under the Property (Relationships) Act 1976, by replacing the names of parties with initials, when our discussion of the facts of a case includes sensitive information which could identify individuals who may be vulnerable.

although perhaps in different ways. Each partner is therefore entitled to an equal share in the "fruits" of the family joint venture if the relationship ends.

- 1.5 We also think that a regime that is based on clear statutory rules, rather than judicial discretion, remains appropriate for New Zealand. Couples should know how they are to divide property after they separate. They can then decide whether they want to make their own agreement as to how their property should be divided, instead of relying on the rules in the PRA. Clear statutory rules also reduce the need to go to court to resolve disagreement.
- 1.6 Some of the PRA's key rules remain sound. In particular, we think that the PRA should continue to apply to all marriages, civil unions and qualifying de facto relationships, although we propose simplifying the eligibility criteria by abolishing the separate regimes for short-term relationships (see Chapter 4: Qualifying relationships). We also think that the PRA should continue to provide that each partner is entitled to share equally in all relationship property, subject to limited exceptions (see Chapter 3: Division). In addition, the PRA should continue to enable partners to make their own agreement about how to divide their property during or in anticipation of entering into a relationship, and in order to settle any differences that arise between them (see Chapter 8: Contracting out and settlement agreements).
- 1.7 But significant changes to some of the rules are needed to better ensure that the regime reflects the reasonable expectations of New Zealanders. Our key proposals will change the pool of resources to be divided on separation and emphasise sharing the fruits of the family joint venture in a way we think is consistent with those expectations. In particular, we propose that:
 - (a) Partners should only share property that was acquired during the relationship, or before the relationship began if it was acquired for the partners' common use and common benefit (see Chapter 2: Classification). We think that property should no longer be shared simply because it is used by the partners during the relationship.² This would mean that the family home is no longer to be automatically shared equally if it was owned by one partner before the relationship began.
 - (b) Partners should share future income in some situations, in order to ensure the economic advantages and disadvantages arising from a relationship or its end are shared (see Chapter 5: Section 15). We propose that this replaces the current compensatory provision in section 15 and the maintenance regime in the Family Proceedings Act 1980.
 - (c) The courts should have greater powers to grant relief where a trust holds property that was produced, preserved or enhanced by the relationship (see Chapter 6: Trusts). This will make it easier to access the pool of resources that reflects the fruits of the relationship, on separation.
- 1.8 In this paper we also make proposals that intend to give children's interests greater priority in PRA proceedings (see Chapter 7: Children's interests). We address problems with resolving PRA matters in practice and propose a range of measures to promote just and efficient resolution and to address behaviour that causes delay and increases costs (See Chapter 10: Resolution). We also make proposals in relation to key areas where the

² We propose retaining the current approach in relation to family chattels. In the absence of any strong call for reform, we think that treating all family chattels as relationship property to be shared equally deters arguments over what are generally assets of low value, and will promote settlement of disputes.

PRA and tikanga Māori interact (see Chapter 9: Tikanga Māori), and in relation to how the rights of creditors are affected by the PRA (see Chapter 11: Creditors).

- 1.9 These changes will be best achieved in a new statute, following modern drafting practice to make the law as clear and accessible as possible.
- 1.10 Our preferred approach presents a package of reforms. The proposals in this paper are designed to work together to achieve a regime that meets most New Zealanders' expectations of fairness when a relationship ends on separation.
- 1.11 This paper focuses on our preferred approach for the division of property when relationships end on separation. The context for dividing property on the death of a partner is different. As a result, tensions arise in attempting to apply the rules of the PRA on the death of a partner. We think the just division of property on the death of a partner is best set out in a separate statute in the context of succession law and discuss this further below at paragraphs 1.33 to 1.38.
- 1.12 We invite feedback on whether or not people agree with the proposals outlined in this paper. We are open to altering the proposals if it is shown that they will not work as intended or that there is a better approach.

OUR REVIEW

The terms of reference

- 1.13 The terms of reference for this review are set out in Appendix 1. They are wide-ranging, and require consideration of the PRA rules and how PRA matters are resolved in practice.
- 1.14 The terms of reference do not include other areas of family and social legislation such as the child support regime in the Child Support Act 1991, the maintenance regime in the Family Proceedings Act or the social security regime in the Social Security Act 1964. Nonetheless the PRA cannot be considered in isolation from these regimes. We discuss the maintenance regime in Chapter 5: Section 15, and propose its repeal. We also discuss the child support regime in Chapter 7: Children's interests, where we propose a review of the effectiveness of the regime in meeting children's needs and setting the level of financial support to be provided by parents for their children.

Our process so far

- 1.15 The terms of reference were published in May 2016. In October 2017, following extensive research and preliminary consultation, we published the Issues Paper *Dividing relationship property: time for change? Te ātotoha rawa tokerau – Kua eke te wā?* (NZLC IP41, 2017). We also researched the social context, and published our findings in the accompanying Study Paper *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017). We prepared a Consultation Paper, which summarised the key issues identified in the Issues Paper for members of the public. We created a consultation website, which enabled people to tell us their own story about how the PRA has affected them and to answer any of the consultation questions online.
- 1.16 The Commission received 313 submissions, which included 255 submissions from individual members of the public, 24 submissions from individual legal practitioners, judges, academics and other experts and 34 submissions from organisations, including

Government organisations, law firms, dispute resolution service providers and community organisations. A list of organisations who submitted is at Appendix 2.

- 1.17 In addition to receiving submissions, the Commission hosted 16 public consultation meetings throughout the country, at which we received many useful contributions. We also met with lawyers, academics, Judges of the Family Court and the Māori Land Court and other experts.
- 1.18 Given the breadth and depth of issues arising out of the review, we concluded that a paper which set out our preferred approach on key matters would help us refine our recommendations and provide an opportunity for further focused consultation.
- 1.19 Throughout this process we have been guided by an Expert Advisory Group and have sought guidance from the Law Commission's Māori Liaison Committee on those matters that may be of particular concern to Māori.
- 1.20 Our final report to the Minister Responsible for the Law Commission will be completed in 2019.

Key themes from consultation

- 1.21 Consultation on the Issues Paper and related documents provided valuable insights into the way the PRA works for New Zealanders. Consultation identified some key themes:
 - (a) **Equal sharing of pre-relationship property after three years is unfair.** This was the most common concern raised by members of the public. It was also identified as an issue by individual practitioner and academic experts, and some organisations. Many submitters thought that equal sharing of pre-relationship property after three years was particularly unfair in the case of de facto relationships, as there has been no deliberate decision by the partners to formalise their relationship by getting married or entering a civil union. Most submitters were concerned in particular with the family home, and how, under the PRA, it is shared equally regardless of whether it was owned by one partner before the relationship. We address this theme in Chapter 2: Classification.
 - (b) **Section 15 (orders to redress economic disparity) requires reform.** This was a strong theme in submissions from individual practitioner and academic experts, organisations, as well as from some members of the public. Submitters generally agreed on the need for reform to achieve a just outcome that recognises the reality of what one partner had gained and one partner had given up in terms of their respective careers and the contributions made during the relationship. Many submitters mentioned the inadequacy of child support and maintenance. Submitters in favour of some form of redress for economic disadvantage noted it should be accessible and should be available without a long and expensive court dispute. We address this theme in Chapter 5: Section 15.
 - (c) **Partners should not be able to avoid the PRA through the use of a trust.** Most submitters who commented on trusts agreed that they are often used to avoid the property sharing rules under the PRA, and that the existing remedies in respect of trust property are complex. We address this theme in Chapter 6: Trusts.
 - (d) **The PRA should give more priority to children's interests.** There were diverse views on whether the PRA gives children's interests adequate priority. Many submitters thought the PRA should do more to recognise children's interests and meet their needs, but some felt that, while children's needs must be provided for

after separation, this was not the role of the PRA but of other, more child-centred legislation, such as the Child Support Act and the Care of Children Act 2004. We address this theme in Chapter 7: Children's interests.

- (e) **The PRA does not facilitate inexpensive, simple and speedy resolution.** Many submitters told us that resolution of PRA disputes is expensive and slow, that power and information imbalances between former partners impair access to justice, and that people want more freedom to resolve PRA matters themselves. We address this theme in Chapter 10: Resolution.
- (f) **Better education about the PRA is needed.** The need for more public awareness about how the PRA operates was a common submission among members of the public, lawyers and other experts in the area. Some submissions also demonstrated a need for better understanding of some of the key PRA rules and requirements, including when the PRA applies, what property is divided, how property is divided, what happens when one partner dies, and the requirements for contracting out of the PRA. We address this theme below.

Borrin Foundation research on relationship property matters

- 1.22 The Law Commission has had the benefit of a survey of public attitudes and values on relationship property division in New Zealand, carried out by the University of Otago and funded by the Michael and Suzanne Borrin Foundation (the Borrin Survey). The results of the Borrin Survey have been published in *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey*.³ The Borrin Survey is the first time research of this nature has been carried out in New Zealand.
- 1.23 The Borrin Survey was a nationwide, statistically representative telephone survey of 1,361 individuals, designed to address the Commission's need for information about how New Zealanders think couples should share their property following separation. Results of the Borrin Survey provide a sound basis for measuring and analysing:
 - (a) public awareness of, and general support for key PRA rules;
 - (b) whether the PRA reflects what most people think is fair on separation; and
 - (c) the prevalence of contracting out of the PRA.
- 1.24 Results of the Borrin Survey are referred to throughout this paper where relevant.
- 1.25 The University of Otago is carrying out a second phase of research, also funded by the Michael and Suzanne Borrin Foundation, which is due to be completed in May 2020.⁴ This research will investigate how separating couples divide their relationship property and resolve any disputes that arise. This will provide an invaluable evidence base for assessing how the PRA is operating in practice. Similar research has been undertaken in Australia,⁵ but comparable research has not previously been carried out in New Zealand.

³ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018).

⁴ Michael and Suzanne Borrin Foundation "Relationship property division research" <www.borrinfoundation.nz>.

⁵ See for example Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014).

PREFERRED APPROACH TO GENERAL ISSUES

P1

A new statute, entitled the Relationship Property Act, should apply to relationships ending on separation.

P2

The rules that apply to relationships ending on death should be the subject of further consideration, within a broader review of succession law.

P3

The purpose of the new Relationship Property Act should be to provide for a just division of property between partners when a relationship ends on separation.

P4

The new Relationship Property Act should include a revised statement of principles to guide the achievement of the purpose of the Act.

- 1.26 The PRA is social legislation, reflecting the State's expectations as to how the wealth and resources of a family should be shared when relationships end. As former Principal Family Court Judge Peter Boshier has said:⁶

The State ... carries an overarching responsibility to provide a blueprint for societal values which impact the way people live, behave and interact, both with each other and with their children. Within the umbrella of family law, it is appropriate to express such values from time to time. Accordingly, countries amend their laws to reflect perceptions of changing social norms and obligations and this is further carried out through how the courts interpret and apply the law.

- 1.27 Our preferred approach is intended to achieve a property sharing regime that meets most New Zealanders' expectations of fairness when a relationship ends on separation. It has been informed by what we have learned about New Zealanders' attitudes, values and expectations of property sharing through consultation and the Borrin Survey. It is also informed by what we know about New Zealand's changing social context, and in particular the way in which relationships and families are formed, how they operate and what happens when relationships end.⁷

- 1.28 We address our preferred approach to general issues arising from our review below.

A new Relationship Property Act

- 1.29 We propose that the PRA should be repealed and replaced with a new statute, entitled the Relationship Property Act.
- 1.30 The PRA was first enacted in 1976 as the Matrimonial Property Act 1976, but few of its provisions have survived unaltered. Significant amendments have been made to both the property sharing rules as well as the scope of those rules, extending over time to capture relationships ending on death, de facto relationships and civil unions. As a result of significant and multiple amendments over the past 42 years, the PRA is an unwieldy and

⁶ Peter Boshier and others "The Role of the State in Family Law" (2013) 51 Family Court Review 184 at 190.

⁷ New Zealand's changing social context, now and into the future, is explored in Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

unnecessarily complex statute, which does not meet modern standards of legislative drafting.

- 1.31 We propose that the new Relationship Property Act should, wherever possible, adopt relationship and gender neutral terms (see Issues Paper at [4.54]–[4.56]). This was supported in submissions from the New Zealand Law Society (NZLS), one practitioner and two members of the public, while another practitioner proposed that for simplicity, the PRA should use "marital" and "spouse" to describe all relationships.
- 1.32 In order to minimise confusion, in the rest of this paper we describe our proposals as reforms of the PRA, even though we propose that a new statute is desirable.

A separate statute for property division on the death of a partner and the need for further review by the Law Commission

- 1.33 Our preferred approach is that the new Relationship Property Act should apply only to relationships ending on separation. The rules that apply when a relationship ends on the death of a partner should be the subject of further consideration, within a broader review of succession law.
- 1.34 As we explained in Chapter 36 of the Issues Paper, the context for dividing property on the death of a partner is different to the context for dividing property when a relationship ends by separation. There may be tension between the competing interests of all those potentially affected by the death of a partner, including:
 - (a) the deceased's freedom to deal with property under a will as they choose and the deceased's rights under the PRA;
 - (b) the rights of a surviving partner under the deceased's will, the rules of intestacy, the PRA, the Family Protection Act 1955 and/or the Law Reform (Testamentary Promises) Act 1949;
 - (c) the rights of the deceased and the surviving partner to hold property in joint ownership or to have entered a contracting out agreement under section 21 of the PRA; and
 - (d) the rights of third parties who may benefit under the will or the rules of intestacy, or who may have a claim under the Family Protection Act or the Law Reform (Testamentary Promises) Act.
- 1.35 These competing interests need to be considered and resolved as matters of policy before reaching a view on the rules that ought to apply when a relationship ends on the death of a partner. This is something we have been unable to do in a review that is solely focused on the PRA.
- 1.36 It is our view that a single, separate statute is needed to deal comprehensively with relationship property claims, testamentary promises claims and family protection claims on death.⁸ This would make the law more accessible and coherent. It would also allow proper consideration of the interests of surviving partners, deceased partners, beneficiaries under a will or the rules of intestacy and potential claimants against the estate. It would likely also assist those advising on estate planning and those administering estates.

⁸ A similar proposal was made by the Law Commission in its report *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

- 1.37 Submissions we received on this issue were strongly in favour of a separate succession statute. Many submitters noted concerns about balancing the interests of a surviving partner with the interests of any children of the deceased partner. A common theme in submissions and consultation meetings was the lack of understanding among the public and some practitioners about how the PRA applies on the death of a partner. Practitioners also consistently raised many of the more technical issues we identified in the Issues Paper.
- 1.38 We recognise the unsatisfactory nature of recommending reform of the law in relation to the division of property on separation, while leaving the current law to govern the division of property on the death of one partner.⁹ We therefore propose that the Minister Responsible for the Law Commission ask the Law Commission to undertake a separate review of succession law as a matter of priority in our next annual programme.¹⁰ This review should address the division of property on the death of a partner, alongside the Family Protection Act, the Law Reform (Testamentary Promises) Act and the Administration Act 1969 as it relates to intestate estates. It should also consider how relationship property rights should interact with succession in a Māori context.¹¹

Improving the PRA framework

- 1.39 The PRA sets out the rules that govern how property owned by either or both partners is divided when a relationship ends. These rules sit within a broader framework of policy, theory and principles (see Issues Paper at [3.1]–[3.12]).
- 1.40 In the Issues Paper we identified that the policy of the PRA is the just division of property at the end of a relationship. We explained that this policy is underpinned by several theories that explain why division pursuant to the rules of the PRA is a just division.¹² The primary theory of the PRA is based on the entitlement of each partner to an equal share in the property of the relationship. This is supplemented by two secondary theories. The compensation theory recognises that in certain circumstances one partner should receive an additional share of the other's property in order to compensate them for economic disadvantages a partner suffers from the relationship. The needs theory recognises that certain resources could help meet the needs of a partner or children of the relationship. The principles of the PRA (both explicit and implicit) then form the basis for the PRA's rules.
- 1.41 Few submitters addressed the general framework of the PRA. Those who did thought the policy of a just division and theory of entitlement were broadly appropriate. Some noted that other approaches may be necessary to do justice in the circumstances, particularly in light of the greater diversity of relationships.

⁹ A similar situation occurred when the Matrimonial Property Act 1976 was enacted but did not apply on the death of a spouse, meaning that the Matrimonial Property Act 1963 continued to apply to relationships ending on death until 2001: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [34.16]–[34.23].

¹⁰ Law Commission Act 1985, s 7.

¹¹ For a discussion of possible issues that arise for Māori on the death of one partner see Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 487–490.

¹² For further discussion see Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268.

- 1.42 We propose retaining a rules-based property sharing regime and improving the PRA framework by providing that:
- (a) the PRA is based on the theory that each partner is entitled to share in the fruits of the family joint venture;
 - (b) the purpose of the PRA is to provide for a just division of property between the partners when a relationship ends on separation (replacing section 1M with a new purpose statement); and
 - (c) a revised statement of principles should guide the achievement of the purpose of the PRA (replacing section 1N).

Retaining a rules-based regime

- 1.43 Jurisdictions around the world recognise the need for special rules of property division when relationships end, but differ on what shape these rules should take (Issues Paper at [3.34]–[3.40]). New Zealand, Canada and most European jurisdictions adopt a rules-based approach, while other jurisdictions that New Zealand often compares itself with (Australia, England and Wales and Ireland) adopt a discretionary approach.¹³ Scotland falls somewhere in the middle, adopting a discretionary approach that is limited by a set of statutory principles.¹⁴
- 1.44 We think a rules-based approach continues to be appropriate for New Zealand. It brings greater certainty and predictability, which in turn promote people's ability to make decisions without having to go to court. The PRA will continue to have some discretionary aspects, which act as essential safety valves. With the diversity of human relationships and behaviour, it would be unrealistic to expect that a statute could set rules for every circumstance.

Simplifying the theory of the PRA – sharing the fruits of the family joint venture

- 1.45 Our key proposals in this paper, outlined at paragraph 1.7, redefine what property partners should share at the end of the relationship. These proposals are based on the theory that a "qualifying relationship", being a marriage, civil union or de facto relationship that satisfies the eligibility criteria,¹⁵ is a family joint venture, to which the partners contribute equally, but in different ways. During the relationship, partners contribute to the family joint venture with the expectation that they will continue to share in the fruits of that joint venture – the product of their combined contributions – into the future. If that family joint venture breaks down, the PRA governs the just division of property deriving from the family joint venture.
- 1.46 We consider that an entitlement to share the fruits of the family joint venture should be the central underpinning theory of the PRA. We also consider that the theory of compensation should no longer play a role in explaining what property should be shared when relationships end. This is because our proposals in Chapter 5: Section 15 move

¹³ Under a discretionary approach, the partners hold property separately during the relationship, but if that relationship ends a court has discretion to alter the partners' property interests if it considers it just to do so. See Family Law Act 1975 (Cth), s 79; Matrimonial Causes Act 1973 (UK); and Family Law (Divorce) Act 1996 (Ireland).

¹⁴ Family Law (Scotland) Act 1985, ss 9(1) and 10(1).

¹⁵ In Chapter 4: Qualifying relationships we propose that a de facto relationship is a qualifying relationship if it satisfies the definition in s 2D of the Property (Relationships) Act 1976 and either (a) satisfies the three year qualifying period, or (b) there is a child of the relationship, and a court considers it just to make an order for division, or (c) the applicant has made substantial contributions to the relationship, and a court considers it just to make an order for division.

away from requiring one partner to compensate the other when the division of functions during the relationship result in economic disparity on separation. Instead, we propose that partners should share future income in some situations, in order to ensure the economic advantages and disadvantages arising from a relationship or its end are shared.

- 1.47 The theory of need may continue to play a role in the PRA in relation to children's interests, given our proposals in Chapter 7: Children's interests to make the best interests of children a primary consideration, and to continue to enable a court to settle relationship property on a child.

A new statutory purpose

- 1.48 The purpose statement in the PRA requires reform to conform to modern drafting requirements for legislation.¹⁶ Importantly, the purpose statement should reflect the policy objective of the legislation, so that the policy objective is clearly defined and discernible.¹⁷ We propose replacing section 1M of the PRA with a purpose provision that states that the purpose of the PRA is to provide for a just division of property between partners when a relationship ends on separation.

New statutory principles

- 1.49 We propose that the PRA include a revised statement of principles to guide the achievement of the purpose of the Act. We anticipate that some of the principles in section 1N may need to be revised or removed, and new principles added.
- 1.50 As a matter of good drafting practice, legislation that substitutes the general law and introduces rules based on distinct values should include a statement of principles to guide the interpretation and application of that legislation (Issues Paper at [4.18]).¹⁸
- 1.51 In the Issues Paper we observed that the statement of principles in section 1N of the PRA is incomplete, as it does not include many of the implicit principles of the PRA (Issues Paper at [3.9]–[3.10]). We said that our preliminary view was that, broadly speaking, the principles of the PRA (explicit and implicit) remain sound, but that some principles may need to change to better reflect people's changing values and expectations about what is fair when relationships end (Issues Paper at [4.13]).
- 1.52 We continue to hold the view that the statutory principles should reflect the reasonable expectations of New Zealanders. We will explore, for the final report, what these

¹⁶ See Legislation Design and Advisory Committee *Legislation Guidelines: 2018 edition*, especially ch 2. See also *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [143] confirming the relevance of the statutory purpose and principles to any proceedings under Property (Relationships) Act 1976.

¹⁷ Section 5(1) of the Interpretation Act 1999 provides that "[t]he meaning of an enactment must be ascertained from its text and in the light of its purpose". The Legislation Bill 2017 (275-2) currently before Parliament proposes to repeal and replace the Interpretation Act 1999. Clauses 10–12 of the Bill propose to continue the principle that the meaning of legislation must be ascertained from its text and in the light of its purpose and its context.

¹⁸ See Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990) at [229]; Law Commission *The Format of Legislation* (NZLC R27, 1993) at 9; Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [30]. See also R I Carter Burrows and Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 122–123. See also Law Commission *Review of the Search and Surveillance Act 2012 Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017) at [3.1]–[3.8]; and Law Commission *Reforming The Law Of Contempt Of Court: A Modern Statute – Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at [3.4]–[3.9].

principles should be, having regard to the results of consultation and the Borrin Survey, and our final recommendations for reform.

Raising public awareness of the PRA

- 1.53 Consultation on the Issues Paper highlighted a clear need for greater public education about the PRA. This was also reflected in the results of the Borrin Survey, which identified that, while public awareness of equal sharing was high (79 per cent of all respondents said that they were aware of equal sharing), less than half of all respondents knew that equal sharing applies to couples who have lived together for three years or longer.¹⁹ The need for education will be even greater should the recommendations for reform we make in our final report be adopted into law.
- 1.54 In our final report we will make recommendations as to how best to educate the public about their rights and obligations under the PRA. This may include a public education campaign and the provision of information about the PRA at different points of interaction with Government departments (such as when applying for a marriage or civil union licence). In Chapter 10: Resolution we make a number of proposals intended to improve access to information about the PRA for separating couples.

OTHER MATTERS TO BE ADDRESSED IN THE FINAL REPORT

- 1.55 This paper sets out our preferred approach in respect of the key issues arising from our review.
- 1.56 Our final report will also address further issues including:
 - (a) specific types of relationships;
 - (b) specific items of property;
 - (c) other exceptions to equal sharing (sections 16 to 18C);
 - (d) valuation;
 - (e) relationship and separate debt;
 - (f) the court's powers to make orders under the PRA;
 - (g) jurisdiction of the courts; and
 - (h) cross-border issues.

¹⁹ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [108] and [112].

CHAPTER 2

Classification

IN THIS CHAPTER, WE CONSIDER:

what property should be shared when relationships end, and in particular:

- whether the family use approach to classification remains appropriate in contemporary New Zealand;
- how increases in the value of separate property, and income and gains on separate property, should be classified;
- whether gifts and inheritances should be treated differently to other types of separate property;
- how entitlements under the Accident Compensation Act 2001 or under a private insurance policy should be classified; and
- how the rules of classification in sections 8 to 10 can be modernised and simplified.

INTRODUCTION

- 2.1 The purpose of the PRA is to achieve a just division of property at the end of a relationship. The first question that must be addressed in our review of the PRA is what property should be divided, and what property should be kept separate.

CURRENT LAW

- 2.2 The PRA classifies property as either "relationship property" or "separate property". Relationship property is shared equally under the PRA, unless one of the limited exceptions discussed in Chapter 3: Division applies.²⁰ Separate property is generally excluded from division.²¹
- 2.3 Relationship property is defined in section 8 of the PRA. The types of property defined as relationship property reflect two approaches to classification:
- (a) **Property acquired or produced by either partner during the relationship.** We refer to this as the fruits of the relationship approach to classification. It is based on

²⁰ Property (Relationships) Act 1976, ss 13–18C.

²¹ Subject to the court's power, in some limited circumstances, to make orders in respect of separate property: ss 15A, 18B and 18C.

the theory that a qualifying relationship is a family joint venture, to which the partners contribute equally, although perhaps in different ways.²² The equal contribution of each partner entitles them to an equal share in the fruits of the family joint venture.

- (b) **Property which is central to family life.** We refer to this as the "family use" approach to classification. Under this approach, the core family assets (the family home and chattels) are always classified as relationship property, as well as any property acquired for the common use and benefit of the partners.²³

2.4 Separate property is defined broadly in section 9(1) as all property that is not relationship property. This includes new property acquired out of separate property, the proceeds of any dispositions of separate property, any increase in the value of separate property, and any income or gains derived from separate property.²⁴ As a general rule, separate property falls under one of three categories:

- (a) **Pre-relationship property.** Consistent with the fruits of the relationship approach to classification, the PRA treats property acquired by one partner before the relationship began as separate property, on the basis that it was not acquired through the efforts of either partner during the relationship.
- (b) **Third party gifts and inheritances.** Property acquired from a third person by way of succession, survivorship, gift, or because the partner is a beneficiary under a trust settled by a third person is separate property under section 10(1). Throughout this chapter we refer to these items of property as "gifts and inheritances". This is also consistent with the fruits of the relationship approach to classification.
- (c) **Special types of property.** These are specific items that would ordinarily be relationship property, but for which the PRA makes specific provision. This includes property that one partner receives by gift from the other partner (section 10(3)), and certain chattels such as heirlooms or taonga (section 2).

2.5 Separate property will not always remain separate to the relationship. When separate property is used by the partners, the family use approach can result in that property being classified as relationship property. For example, pre-relationship property and third party gifts and inheritances can still be classified and divided as relationship property if they are used as the family home or family chattels, or if they are used to acquire property for the common use or common benefit of both partners.²⁵

2.6 The PRA also recognises other ways in which separate property can be converted into relationship property:

- (a) When a third party gift or inheritance is, with the owning partner's express or implied consent, so intermingled with other relationship property that it is unreasonable or impracticable to regard that property as separate property, it will be treated as relationship property under section 10(2).
- (b) When separate property, other than third party gifts or inheritances, is used with the owning partner's express or implied consent to acquire, improve, or increase the value of or the amount of any interest of either partner in relationship property. In

²² This is reflected in the statutory purpose and principles of the Property (Relationships) Act 1976, ss 1M(b) and 1N(b).

²³ Sections 8(1)(a)–(b), (d) and (ee). Note that s 8(1)(c) also classifies as relationship property all property owned jointly or in common in equal shares by the partners.

²⁴ Sections 9(2)–(3) and 10(1)(b)–(c).

²⁵ Sections 8(1)(a)–(b), (d), (ee) and 10(4). However s 8(1)(ee) is subject to s 10.

these cases, that separate property will become relationship property, either by general operation of the rules of classification²⁶ or by specific operation of section 9A(3).

- (c) When any increase in the value of separate property, or any income or gains derived from separate property is attributable to the application of relationship property or the actions of the non-owning partner, that increase (or income or gains) is relationship property under sections 9A(1) or 9A(2).

2.7 The classification of debts can be equally as important as the classification of property, as the value of the pool of relationship property to be divided between the partners is calculated by first ascertaining the total value of the relationship property, and then deducting from that total any relationship debts owed by either or both partners (section 20D). Debts are classified in a similar way to relationship and separate property. A relationship debt is defined in section 20(1) and includes debts that have been incurred for some family purpose. A personal debt is defined broadly as any debt that is not a relationship debt.

ISSUES

2.8 There are several issues with the rules of classification in the PRA. The key issue relates to the family use approach, and in particular how it can result in the division of pre-relationship, gifted and inherited property. Other issues relate to the different rules that apply when increases in the value of separate property are attributable to the relationship, the different treatment of gifts and inheritances compared to other types of separate property, how entitlements under the Accident Compensation Act 2001 or under a private insurance policy should be classified, and the complex and confusing way in which the classification rules are drafted. We explore these issues below before outlining our preferred approach to classification.

Concerns with the family use approach to classification

- 2.9 In the Issues Paper we observed that the fruits of the relationship approach to classification remains appropriate because it reflects contemporary social values and relationship norms (Issues Paper at [9.15]). It is also consistent with an almost universal understanding in comparable jurisdictions that property acquired or produced by either partner during the relationship ought to be shared equally.²⁷ We discuss below the approach to classification in comparable jurisdictions.
- 2.10 The concern is that the family use approach no longer reflects public values and expectations as to what property ought to be shared when some relationships end. This is because it can produce outcomes that many people would consider unjust, where it results in the division of property due simply to the fact that it was used by the partners during the relationship, regardless of when it was originally acquired.

²⁶ In *Hyde v Hyde* [2011] NZFLR 35 (HC) at [39] Ellis J observed that "where separate property is applied to enhance relationship property, the operation of some other provision of the Act will usually transmogrify the separate, into relationship, property in any event".

²⁷ Joanna Miles and Jens M Scherpe "The legal consequences of dissolution: property and financial support between spouses" in John Eekelaar and Rob George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, Abingdon, 2014) 138 at 152.

- 2.11 The basis for the family use approach is unclear.²⁸ The theory underpinning the fruits of the relationship approach is relatively straightforward and is embedded in the purpose and principles of the PRA (see paragraph 2.3(a) above). The rationale for sharing assets which are central to family life is not so clearly identifiable, because it applies regardless of when or why those assets were acquired.
- 2.12 It might be that the partners' use of that property signals their intention to treat that property as "theirs", or that such conduct leads the partner who is not the legal owner of the property ("the non-owning partner") to believe that they share that property and to reasonably rely on that belief. Alternatively, the family use approach might simply be a means of identifying those items of property to which the partners can be presumed to have contributed, due to their centrality to family life, therefore justifying an equal entitlement. Another possibility is that the family use approach is based on the theory that certain assets could help meet the future needs of a partner or children, by recognising the special significance of core family assets to the support of the partners and children at the end of the relationship.
- 2.13 Fisher argues that the explanation of the family use approach is historical, the family home being "the battleground on which women's property rights were first developed".²⁹ He argues that once equal sharing was extended beyond the family home and chattels to all items of relationship property in 2001,³⁰ the reason for the family use approach disappeared.³¹

The risk of unjust outcomes

- 2.14 A particular issue with the family use approach is how it results in the classification of the family home as relationship property, whenever acquired.³² This does not usually create problems when the family home was purchased by one or both partners after the relationship began, using funds acquired during the relationship, because the home would likely be classified as relationship property under the fruits of the relationship approach in any event.³³ But the family use approach can result in unjust outcomes where the family home was owned by one partner before the relationship began, or was

²⁸ See discussion in Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 329 at 337–340. See also Law Reform Commission of British Columbia *Working Paper on Property Rights on Marriage Breakdown* (Working Paper No 63, 1989) at 13–15.

²⁹ Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 329 at 339. Fisher notes that the Matrimonial Property Act 1976 sought to address the concern that the law failed to give adequate recognition to the wife's typically non-monetary contributions to the marriage. The home was the obvious starting point for making inroads to that problem, as it was the asset with which both parties were most closely associated and the property where the wife spent most of her time.

³⁰ The Matrimonial Property Act 1976 originally established two classes of matrimonial property: "domestic assets", namely the family home and chattels, which were subject to equal sharing; and "general assets", which comprised all other matrimonial property and was shared on the basis of each spouse's contribution to the marriage partnership: AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 7–8. In 2001 the two classes of matrimonial property were abolished and the general rule of equal sharing was extended to all items of relationship property: Property (Relationships) Act 1976, s 11.

³¹ Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 329 at 339.

³² Property (Relationships) Act 1976, s 8(1)(a).

³³ Section 8(1)(e).

received by one partner as a third party gift or inheritance. It might also lead to unjust outcomes where the family home was purchased during the relationship, but with one partner's pre-relationship savings, or gifted or inherited funds.

2.15 Whether the family use approach results in an unjust outcome in any given situation is subjective, but it will be influenced by a range of factors, such as:

- (a) **The value of the property subject to division.** The family home represents the biggest asset for most New Zealand households.³⁴ The greater the net value of the property that is attributable to one partner's pre-relationship, gifted or inherited property, the more likely the non-owning partner will be seen as enjoying a "windfall" when the relationship ends.
- (b) **How long the partners used the property for.** Under the family use approach property is classified according to how it was being used before the relationship ended, rather than looking at the partners' use of the property throughout the relationship.³⁵ Therefore a decision to move into, or out of, a home that was one partner's pre-relationship property, gift or inheritance shortly before separating could significantly affect partners' property entitlements under the PRA.³⁶
- (c) **The nature of the relationship.** The PRA captures a wide range of relationships, and might include relationships where the partners have no expectation of sharing property, or they drifted into a qualifying relationship without appreciating the property consequences. Some might think it is unjust to be required to share their property without making a deliberate decision to do so.
- (d) **The duration of the relationship.** The risk of unjust outcomes is higher in shorter relationships. The shorter the relationship, the less likely the non-owning partner's contributions during the relationship will be considered by some as properly entitling them to a share in the other partner's property.
- (e) **The age of the partners.** The older the owning partner was when the relationship began and ended, the greater the risk of injustice. For older New Zealanders who enter a new relationship later in life, their pre-relationship property is likely to have been accumulated over a significant period of their lifetime and may in some cases represent the product of one or more previous relationships. Further, the older the owning partner, the less likely they are able to financially recover to their pre-relationship position.
- (f) **Whether the partners have other separate property.** The outcome might be considered unjust if the family home represents the owning partner's only significant asset. The sense of injustice will also be greater if the other partner is able to retain

³⁴ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at 48.

³⁵ Property (Relationships) Act 1976, s 2H.

³⁶ See *Oakley v Oakley* (1980) 3 MPC 127 (HC); and *Buljan v Buljan* (1981) 4 MPC 30 (CA). However, contrast these with *F v F* [2017] NZHC 1450, [2017] NZFLR 768 where the family home used for most of the relationship was Mr F's pre-relationship property, but the partners had moved out approximately 9 months before they separated. The Family Court accepted that the home was no longer the family home, and was therefore Mr F's separate property. However, on appeal the High Court overturned the decision and said that, notwithstanding the family's relocation, the former home remained the family home within the meaning of the Property (Relationships) Act 1976. The Court reasoned, at [35], that the family had not been living away from the home for a considerable period of time, nor had they clearly intended to move away from the home on a permanent basis. Had this been the case – for example, if the home had been sold so there was no possibility of returning – a different outcome might have been reached.

their own pre-relationship, gifted or inherited property simply because the property was not used as the family home or chattels.

- (g) **The non-owning partner's contributions to the relationship.** The non-owning partner might have made substantial contributions to the relationship, or to the family home directly, including monetary and non-monetary contributions. Examples include caring for the partners' children, or using income or separate property to meet the couple's living expenses. In those cases it might be just for the non-owning partner to be entitled to a share in the family home.
 - (h) **Whether there are children.** The presence of children can be an important factor in whether the family use approach results in an unjust outcome. For example, if the owning partner has minor or dependent children from a previous relationship, this might increase the injustice of sharing the family home if it is pre-relationship property. Or if the owning partner has adult children from a previous relationship, those children may feel their expectation to their parent's property through inheritance is greater than the other partner's rights under the PRA. In contrast, the family use approach might be considered to result in a just outcome if the partners have children together, and raise them in the family home.
- 2.16 A further issue with the family use approach is that it can be easily avoided if a person is familiar with the law or takes legal advice. A partner could prevent their pre-relationship, gifted or inherited property becoming relationship property simply by ensuring that it is not used by the couple during the relationship, or even perhaps by ceasing to use the property before the relationship ends.³⁷ This suggests the current law is not setting the right incentives, as "a rational and economically driven actor would be encouraged to keep their separate property fully separate rather than have the family benefit from it".³⁸ People unfamiliar with the law are also at a disadvantage, as they may not appreciate the consequences of willingly sharing their property for family use.
- 2.17 The risk of unjust outcomes under the family use approach is not new. As enacted, the Matrimonial Property Act 1976 mitigated this risk through several exceptions to equal sharing, which remain in the PRA today:
- (a) First, in marriages of less than three years' duration, the general rule of equal sharing does not apply to the family home and chattels that were one spouse's pre-relationship property, or a gift or inheritance from a third party (section 14). Instead, that property is divided in accordance with the contribution of each spouse to the marriage.³⁹ De facto relationships of less than three years' duration are normally excluded from the PRA, unless special circumstances apply (section 14A).
 - (b) Second, a court can adjust the shares of the partners in any relationship property where both partners owned a home that was capable of being the family home at the date the relationship began, but only one home is included in the relationship property pool at the time of division (section 16). This does not apply to other types of pre-relationship property, such as savings and investments.

³⁷ See cases discussed at n 36 above.

³⁸ Jens M Scherpe "Contracting Out of the Default Relationship Property Regime – Comparative Observations" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 357 at 371. See also Law Reform Commission of British Columbia *Working Paper on Property Rights on Marriage Breakdown* (Ministry of Attorney General, Vancouver, 1989) at 14.

³⁹ A mirror provision applies in respect of civil unions: Property (Relationships) Act 1976, s 14AA.

- (c) Third, the Act provides a general exception to equal sharing for extraordinary circumstances that render equal sharing repugnant to justice (section 13). However early case law established that the bare fact that the family home was one partner's pre-relationship property is not grounds for departure as an extraordinary circumstance.⁴⁰

The changing social and legal context

- 2.18 In the Issues Paper we described New Zealand's changing social context as follows (Issues Paper at [9.23]):

In the 1970s the paradigm relationship was one in which children were raised and wealth was accumulated over time. Today people are generally marrying later in life, and are more likely to separate and re-partner. In 1971, just 16 per cent of marriages were remarriages. Since 1982 however, approximately one third of all marriages in New Zealand have been remarriages. These statistics do not capture people who enter a de facto relationship after separation. This is likely to be a significant group. One New Zealand study identified that 80 per cent of women who had re-partnered within five years of separation had entered into a de facto relationship rather than remarrying. That study also found that within two years of separation from a first marriage, 30 per cent of women had re-partnered, and that women who separated later in the study period (1950-1995) were increasingly more likely to re-partner. While this study is now over 20 years old, it indicates that re-partnering has become increasingly common in New Zealand.

- 2.19 As a result of the changing social context, more people are entering new relationships later in life, and are therefore more likely to have already accumulated some property. Situations where one or both partners bring property into a relationship (such as a house) might be more common.
- 2.20 Changes to the residential housing market over the past 40 years are also significant. The proportion of people living in owner-occupied dwellings fell 15 per cent between 1986 and 2013, with 65 per cent of households owning their own home in 2013.⁴¹ Home ownership rates in Auckland have fallen relative to the rest of New Zealand, with only 61.5 per cent of Auckland households owning their own home in 2013, compared to 66.2 per cent of households outside Auckland.⁴² Declining home ownership has been attributed to a range of factors that have seen house prices rise at a rate that has outpaced rises in the average household income.⁴³ If the rate of home ownership continues to decrease, fewer couples will have a family home to divide on separation, which may make the automatic equal sharing of the family home more of an anomaly.
- 2.21 Increasing house prices also means that the financial consequences of the family use approach are more significant, as the PRA is requiring the division of an increasingly valuable asset. Family transfers, such as loans, gifts and inheritances from family members may become increasingly common as it becomes harder for first home buyers

⁴⁰ See *Martin v Martin* [1979] 1 NZLR 97 (CA) at 110–112.

⁴¹ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 49 citing Statistics New Zealand *Changes in home-ownership patterns 1986–2013: Focus on Māori and Pacific people* (June 2016) at 18; and Statistics New Zealand *2013 Census QuickStats about housing* (March 2014) at 12.

⁴² Rosemary Goodyear and Angela Fabian *Housing in Auckland: Trends in housing from the Census of Population and Dwellings 1991 to 2013* (Statistics New Zealand, December 2014) at 10.

⁴³ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 50 citing Families Commission *The kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, June 2008) at 87 and 97.

to enter the property market.⁴⁴ The extent to which a family home is funded by a family loan, gift or inheritance may also affect people's expectations of property sharing when relationships end.

- 2.22 Changes to the legal context since 1976 are also relevant. As noted at paragraph 2.13 above, the extension in 2001 of the general rule of equal sharing from the family home and chattels to all forms of relationship property may have reduced the need for the special treatment of the family home and chattels in order to guarantee property rights to the partner – typically the woman – performing a domestic role in the relationship.
- 2.23 The extension of the PRA to de facto relationships in 2001 is also significant. This increased the risk of unfair outcomes, because de facto couples are more likely than married couples or civil union partners to "drift" into a qualifying relationship without having considered or expected they would have to share property they owned prior to the relationship.⁴⁵ The Borrin Survey reports that while 68 per cent of respondents knew the PRA applies to de facto couples, only 48 per cent knew that it applies after three years of living together, and awareness did not vary between those who had lived with their partner for more than three years and those who had lived with their partner for less than three years.⁴⁶ This suggests that people may be reaching the qualifying period for a qualifying relationship under the PRA without appreciating the property consequences.
- 2.24 The extension of the PRA to de facto relationships also resulted in a consequential amendment to the start date for marriages, which reduced the application of the exception for short-term marriages in section 14. The start date of a marriage is now deemed to be the start date of any preceding de facto relationship between the spouses.⁴⁷ Because most marriages are preceded by a period of living in a de facto relationship,⁴⁸ the likelihood of the exception for short-term marriages applying has decreased significantly. Our review of cases since 2001 identified on average one case per year which resulted in unequal sharing under section 14.⁴⁹ This, combined with the limitations of the other exceptions to equal sharing discussed at paragraphs 2.17(b) and 2.17(c) above, means that the mitigating provisions in the PRA no longer present an effective response to the risk of unjust outcomes under the family use approach.
- 2.25 These factors point to a greater need than in 1976 (or in 2001) to provide for the growing group of people who will bring pre-relationship, gifted or inherited property into a relationship and who may be adversely affected by the family use approach if that relationship ends.

⁴⁴ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 52.

⁴⁵ See the discussion on the differences between early stage de facto relationships and marriages and civil unions in Chapter 4: Eligibility Criteria.

⁴⁶ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [112]–[113] and [119].

⁴⁷ Property (Relationships) Act 1976, ss 2B–2BAA.

⁴⁸ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 17.

⁴⁹ We identified only one case that was argued under s 14AA (civil unions of short duration), but that case did not result in unequal sharing: *Tupuae v Mawson* (2009) 28 FRNZ 431 (FC).

Results of the Borrin Survey

- 2.26 The changing social context will also have influenced public attitudes and values on sharing property when relationships end. This is evident from the results of the Borrin Survey. While there was a high level of support with the general rule of equal sharing (74 per cent of respondents agreeing with the current law), 88 per cent of respondents who supported the current law thought that it was appropriate to depart from equal sharing in certain situations.
- 2.27 One of these situations was where the family home was owned by one partner before the relationship began. Respondents were given a fact scenario and were asked whether a home that was one partner's pre-relationship property should be shared equally if the couple separates after six years. The majority (54 per cent of all respondents) thought that the home should not be shared equally, even if the non-owning partner had paid most of the couple's living expenses during the relationship. But 67 per cent of respondents were more favourable to equal sharing of only the increase in the value of the family home over the course of the relationship. This suggests that sharing pre-relationship property simply because it was used as the family home may no longer reflect many New Zealanders' sense of fairness.
- 2.28 Respondents were also asked about a scenario in which the partners purchased a home together, but using one partner's pre-relationship savings as a deposit. On separation four years later, 72 per cent of respondents thought that the partner who contributed the deposit should get it back, even though the couple had purchased the home together, and had shared expenses and mortgage payments. But only 26 per cent of respondents still thought that partner should get the deposit back if the other partner paid for most of the mortgage payments and living expenses. This shows that many respondents were willing to change their views on sharing pre-relationship property, depending on the different contributions the partners made during the relationship.

Results of consultation – concerns with the family use approach

- 2.29 Dissatisfaction with the family use approach was a strong theme from consultation, and was raised in just under one third of submissions (88 submissions from members of the public, eight submissions from individual practitioner and academic experts, one submission from a judge of the Family Court and five submissions from organisations). These submitters felt that the equal sharing of pre-relationship property after three years is unfair. Most submitters were concerned specifically with how the PRA results in automatic equal sharing of the family home.
- 2.30 The New Zealand Law Society (NZLS) said that while the PRA works well in circumstances where a couple comes to the relationship with few assets, "classification of relationship property on the basis of family use can produce an unfair outcome for a partner who enters a relationship with assets that are converted by use to relationship property". Robert Fisher QC submitted that the sharing of pre-relationship property was the "critical issue" with the PRA, and the issue that has caused endless trouble for New Zealand couples.
- 2.31 Many submitters pointed to the factors identified at paragraph 2.15 above, and the changing social context, as a reason why the PRA's "one size fits all" approach to classification is no longer appropriate for the wide variety of different relationships covered by the PRA. Second or subsequent relationships, relationships entered into later

in life, the presence of children from previous relationships, and early stage de facto relationships were all given as examples of where the current rules could result in unfair outcomes.

- 2.32 There was no apparent gender divide among submitters on this issue. Several members of the public commented that the family use approach no longer protected vulnerable women leaving relationships. The National Council of Women of New Zealand (NCWNZ) said:

While women with limited opportunities to accumulate property and further their careers were often seen as vulnerable when relationships ended, older women who had acquired equity in their homes were also seen as at risk of losing property vital to their quality of life in retirement.

- 2.33 The Wellington Women Lawyers' Association observed that there may be a gendered difference in the type of assets that men and women accumulate, and consequently differences in the way in which the law classifies them:

Many women prioritise having a home, and possibly a higher proportion of men have property divested into other legal entities such as companies and trusts, some of which would not be classified as relationship property, particularly a clearly separate business owned by a company.

- 2.34 A number of members of the public submitted that the current PRA rules are deterring them from forming a new relationship, for fear of losing their assets. Others were concerned that the PRA is incentivising unconscionable conduct, specifically maintaining a relationship for three years for pecuniary gain.
- 2.35 Several practitioners submitted that the single biggest reason for contracting out agreements and for the establishment of family trusts has been to protect pre-relationship property from division in the event of a new or future relationship ending. A clear theme, however, was that the ability to contract out or settle property on a trust are not adequate substitutes for fair rules. In respect of contracting out, submitters pointed to the cost of contracting out agreements and the need to engage lawyers, the awkwardness and discomfort of having a discussion about contracting out in the early stages of a relationship, the lack of protections should one partner refuse to enter into a contracting out agreement, and the risk of an agreement being overturned in the future. In relation to trusts, some submitters pointed to the need for expensive legal advice in order to establish a trust, while others pointed to the legal uncertainty surrounding claims against property held on trust.

Results of consultation – views on preferred reform were mixed

- 2.36 Submitters had mixed views on how the issues identified above should be resolved.
- 2.37 Most members of the public who commented on this issue thought that the PRA should enable partners to leave a relationship with the property with which they entered the relationship. They did not think the mere use of one partner's property by the couple during the relationship should result in its equal division when a relationship ends. Most members of the public were concerned specifically with the family home. This suggests support for a pure fruits of the relationship approach to classification. However some members of the public acknowledged that this might not be appropriate where there are dependent children of the relationship and the non-owning partner is the primary caregiver.

- 2.38 Several practitioner and academic experts also favoured moving away from a family use approach, including Robert Fisher, Professor Nicola Peart and Kate Wiseman. Kate Wiseman submitted that moving to a pure fruits of the relationship approach would eliminate the need for family trusts and contracting out in order to protect pre-relationship property, inheritances and gifts; different rules for short-term relationships; and much of the relationship property litigation which currently exists. But these submitters acknowledged that this would be a radical change to the current approach. Some considered there would need to be reinforcement of economic disparity compensation and the power to use property to meet family support obligations. One practitioner suggested a more limited change to the rules of classification, to exclude the net value of the family home at the date the relationship began when it is one partner's pre-relationship property, but otherwise retain the current family use approach.
- 2.39 Other submitters preferred retaining the family use approach to classification and addressing the problem in other ways. NZLS submitted that a fruits of the relationship approach would be too drastic of a change to the principles behind the PRA, which it considers are now reasonably well-known and supported by a body of case law. Instead, NZLS suggested an amendment to section 16, discussed at paragraph 2.17(b) above, so that it would apply when one partner's pre-relationship home becomes the family home, and the other partner has separate property of any kind that remains separate property. In that situation, the non-owning partner's interest in the family home "shall abate proportionately". NCWNZ considered that the family home should always be relationship property, regardless of the partners' direct financial contributions to the family home, although it supported the principle that other property that was previously owned, and inheritances and heirlooms, should be separate property. Jan McCartney QC also submitted in favour of retaining the family use approach, arguing that it provides a clear and simple bright line test, and "the fact that there is use tends to reflect the fact that there is contribution". Further, the assets used in the relationship are the assets required at the end of the relationship to provide support for any children of the relationship. Her preferred solution was to change the eligibility rules, and increase the qualifying period from three years to five years. ASCO Legal suggested a sliding scale of entitlements that would take into account the partners' age, the length of the relationship and the presence of children or grandchildren.
- 2.40 Many submitters suggested changing the eligibility rules, often alongside changes to the rules of classification. The most common submission was that the qualifying period should be increased from three years to five years, although some submitters thought an even longer period was more appropriate. Wellington Women Lawyers' Association proposed a change to the eligibility criteria targeted towards older New Zealanders. Their proposal was that, once both partners reach a certain arbitrary age, for example 40 or older, the qualifying period would be longer, such as five, seven or 10 years. Up until that period the short-term regime would apply to all relationships, which would provide for the division of relationship property on a contributions basis (provided the additional criteria for short-term de facto relationships are met).

Inconsistent approach to increases in the value of separate property attributable to the relationship

- 2.41 The PRA treats increases in the value of separate property (and any income or gains derived from separate property) that are attributable to the relationship as relationship property under sections 9A(1) and 9A(2). However, the rules of division vary depending on whether the increase in value was attributable to the application of relationship property (in which case the entire increase in value is divided equally),⁵⁰ or to actions of the non-owning partner (in which case the increase in value is divided on the basis of each partner's contribution to the increase in value).⁵¹
- 2.42 There are several problems with the current rules:
- (a) Having different rules of division in sections 9A(1) and 9A(2) is inconsistent with the principle in section 1N(b) that all forms of contribution to the relationship are treated as equal.⁵² It is also inconsistent with section 18(2), which states that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.⁵³ While monetary contributions (the application of relationship property) result in an equal entitlement under section 9A(1), non-monetary contributions (the actions of the non-owning partner) typically result in unequal entitlements under section 9A(2) that favour the owning partner.⁵⁴
 - (b) The rules of division that apply when an increase in value is attributable to the application of relationship property under section 9A(1) undermine the concept of separate property. This is because they enable the non-owning partner to share in increases in value that are not attributable to the relationship, such as market inflation.⁵⁵ The courts have in some cases sought to avoid unjust results by excluding contributions that have had minimal impact on the increase in value, thereby adopting an "all or nothing" approach to sharing increases in value.⁵⁶
 - (c) The rules of division that apply when an increase in value is attributable to the actions of the non-owning partner under section 9A(2) are unique. They require the court to determine each partner's entitlement in accordance with their contribution to the increase in value, rather than to the relationship, which is the formulation found elsewhere in the PRA, for example in section 13. Section 9A(2) provides little practical guidance, with the result that the evaluation of the partners' relative contributions is likely to be "a matter of general impression".⁵⁷
 - (d) Increases in value attributable to the actions of the owning partner are not directly captured by section 9A(2). This is inconsistent with the classification of other types of

⁵⁰ Property (Relationships) Act 1976, s 9A(1). See *Mead v Graham-Mead* [2015] NZHC 825.

⁵¹ Section 9A(2). See *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [26].

⁵² See discussion in Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 18.

⁵³ In *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [46] the Supreme Court observed that ss 1N(b) and 18(2) "have little or no application" under s 9A(2).

⁵⁴ For example in *Rose v Rose* the division was 60:40; in *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 the division was 75:25; and in *T v W FC Papakura* FAM-2009-055-432, 22 September 2011 the division was 80:20. In all cases the division was in favour of the owning partner.

⁵⁵ See for example *KRJ v RK* [2013] NZFC 823, [2014] NZFLR 127.

⁵⁶ See for example *V v V* [2007] NZFLR 350 (FC).

⁵⁷ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [46]; and *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 at [114].

wealth generated through the partners' joint and several efforts during the relationship as relationship property, such as income generated by the partners.⁵⁸ While section 15A may provide relief in this scenario, its application is significantly limited by the additional requirement to establish a disparity in income and living standards attributable to the effects of the division of functions. To date there have been no successful claims under section 15A.⁵⁹

Results of consultation

- 2.43 Few submitters commented on these issues. Through the PRA consultation website, 16 members of the public commented on when increases in the value of separate property should be shared, and most agreed with sharing increases in value in some cases. The most common response was that increases in value should be shared when they are caused by the actions of the non-owning partner (seven submitters).⁶⁰ Four submitters did not think increases in the value of separate property should ever be shared.
- 2.44 NZLS did not support substantial reform of section 9A, as it believed that sections 9A(1) and 9A(2) are working well enough, despite the issues discussed above. However it submitted that section 9A(1) should be extended to include the application of relationship property to meet mortgage payments on separate property. While NZLS acknowledged that section 15A is not often used, it did not support repeal, as it may provide a useful tool in certain circumstances.
- 2.45 Jan McCartney similarly did not favour reform of section 9A or repeal of section 15A. She did not consider the different rules in sections 9A(1) and 9A(2) created inconsistency. Rather, the different rules were justified on the basis that the partners can be assumed to have consented to, and have knowledge of, the application of relationship property to separate property. But for that application, the relationship property would have been available to the partners. However, contributions in the form of the non-owning partner's actions can take many forms, may not be consensual, and may result in little value to the property owner, particularly after they are required to account to the non-owning partner for part of the increase in value.

Special treatment of gifts and inheritances

- 2.46 Gifts and inheritances are treated as a special form of separate property under the PRA. Rather than including gifts and inheritances among the general types of separate property under section 9, section 10 deals with gifts and inheritances in isolation. While section 10(4) provides that any gifted or inherited property used as the family home and

⁵⁸ While s 9A(2) of the Property (Relationships) Act 1976 might apply where the non-owning partner's indirect contributions free up the owning partner to make improvements to their separate property (see *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [44]), this might not always be the case and/or capable of proof.

⁵⁹ Claims under s 15A have typically failed either because the applicant failed to show that the disparity in income and living standards between the partners was linked to the division of functions in the relationship (*de Malmarche v de Malmarche* [2002] 2 NZLR 838 (HC); *N v L* FC Gore FAM-2004-017-21, 18 August 2006; and *J v D* FC North Shore FAM-2008-044-833, 13 May 2011) or because the applicant failed to show any increase in the value of the other partner's separate property (*Beran v Beran* [2004] NZFLR 127 (FC); *A v F* FC Manukau FAM-2006-092-2394, 23 December 2009; and *J v D* FC North Shore FAM-2008-044-833, 13 May 2011).

⁶⁰ In addition, two submitters thought that increases in value should be shared "so long as the other partner has caused part of the increase in value", and three submitters thought increases in value should be shared "whenever a partner's separate property increases in value during the relationship".

chattels will be relationship property, in other respects gifts and inheritances are treated differently to other types of separate property, including pre-relationship property.

- 2.47 In particular, section 10(2) provides separate grounds for treating a gift or inheritance as relationship property. It focuses on whether the gift or inheritance has been intermingled with other relationship property to the extent that it is unreasonable or impracticable to continue to treat the gift or inheritance as separate property. The focus is therefore on the extent to which it is practical to trace the gift or inheritance into new forms of property, rather than whether the owning partner intended that the gift or inheritance be applied to relationship property (section 9A(3)), or to the acquisition of property for the common use or common benefit of both partners (section 8(1)(ee)).
- 2.48 It is also unclear whether gifts and inheritances are subject to other rules of classification. Specifically:
- (a) It is unclear whether section 10 is subject to sections 8(1)(c) (co-owned property) and 8(1)(d) (property acquired in contemplation of the relationship for common use or common benefit). The PRA does not specify which provision should take priority when the partners use a gift or inheritance to purchase property in their joint names or in contemplation of the relationship. The courts have considered this issue on a number of occasions, and are now tending to view section 10 as an "exclusive code", taking priority over section 8.⁶¹
 - (b) When a gift or inheritance increases in value, the PRA does not specify if sections 9A(1) or 9A(2) apply. If section 10 is intended to be an exclusive code, section 9A should not apply. The Supreme Court has, however, treated inherited property as being subject to section 9A.⁶²
- 2.49 In the Issues Paper we observed that whether gifts and inheritances should be treated as a special form of separate property is fundamentally a value judgement (Issues Paper at [10.61]). There is little discussion in the legislative material about why gifts and inheritances are treated differently to other separate property. The rationale alluded to in the case law is that property acquired from a third party has not been produced by the efforts of the partners and so should not be shared.⁶³ But the same can be equally said of pre-relationship property.

Results of consultation

- 2.50 22 members of the public commented on the treatment of gifts and inheritances. Almost all submitters thought that property received by one partner as a gift or inheritance should be treated as a special form of property, but views were mixed as to whether gifts and inheritances should be treated differently from other types of separate property. Several submitters thought pre-relationship property should be treated the same as gifts and inheritances.
- 2.51 Views were also mixed about whether gifts and inheritances should ever be treated as relationship property because of the way they were used. Some members of the public

⁶¹ See *S v W* [2006] 2 NZLR 669 (HC); *McDowell v McDowell* (2009) 28 FRNZ 379 (FC); *B v B* FC Christchurch FAM-2005-009-3163, 29 June 2009; and *Phair v Galland* FC Oamaru FAM-2008-045-113, 8 February 2010.

⁶² In *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1, one partner inherited land from his father and so it would have been separate property under s 10. The Supreme Court said that the increase in value of that land could be considered relationship property under s 9A. It did not, however, expressly discuss the relationship between ss 9A and 10.

⁶³ *S v W* [2006] 2 NZLR 669 (HC) at [52].

felt it was unfair to treat a gift or inheritance as separate property when both partners treat it as "theirs", and act in reliance on it. An example given was when the partners had anticipated receiving a significant inheritance for some time, had held the inheritance in a joint bank account and had then invested it and lived off its proceeds until they separated. Other submitters however told us that gifts and inheritances should never be shared, as it is not the intention of the donor that a future former partner should receive half its value. An example given was when parents gift money to their child for use as a deposit to purchase their first home.

- 2.52 NZLS submitted that there is no clear rationale for the distinction between gifts and inheritances and other forms of separate property. It suggested that some of the concerns about the inequities created in the PRA could be removed if the PRA was amended so that the same conversion rules applied to all forms of separate property. While not in favour of a pure fruits of the relationship approach to classification, NZLS did prefer adopting the intermingling rule in section 10(2) for all separate property, over any conversion test based on family use (such as section 8(1)(c)). NZLS noted that section 10(2) has been interpreted so that it is easier to show that gifts and inheritances have kept their classification as separate property than would otherwise be the case if the property had been acquired before the relationship began.
- 2.53 Submitters who favoured moving to a pure fruits of the relationship approach to classification, including Kate Wiseman, Robert Fisher and Nicola Peart, would treat gifts and inheritances no differently to other forms of separate property. Jan McCartney, who favoured the current family use approach, agreed special treatment should be given to gifts and inheritances, and that intermingling should not convert gifts and inheritances into relationship property. She considered that gifts and inheritances are always identifiable and traceable, and in any event it is always possible to estimate the respective proportions of relationship property and separate property. However she saw no reason why section 9A should not apply to gifts and inheritances in the same way as to other types of separate property.

Payments under the Accident Compensation Act and private insurance policies

- 2.54 The PRA does not make special provision for the classification of payments for personal injury made under either the Accident Compensation Act (ACC payments) or a private insurance policy.
- 2.55 In relation to ACC payments, the courts have held that a statutory entitlement under the Accident Compensation Act is property that is eligible for division under the PRA.⁶⁴ The different types of entitlements can be categorised as follows:⁶⁵
- (a) **lump sum compensation payments** for non-economic loss suffered as a result of permanent impairment;
 - (b) **weekly compensation payments** to compensate people incapacitated through injury for their lost earnings;

⁶⁴ *S v S* (1984) 3 NZFLR 88 (DC) at 91. See also *G v G* (1995) 13 FRNZ 427 (HC) at 433 involving the right of action the wife had in tort against the manufacturer of a defective contraceptive device that caused her injury.

⁶⁵ These categorisations are taken from the submission of the Accident Compensation Corporation and Ministry of Business, Innovation and Employment (ACC and MBIE); and Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15(1) Otago Law Review 169 at 176–181. They reflect ACC's operational approach rather than specific and identifiable statutory entitlements. For specific legal entitlements see Accident Compensation Act 2001.

- (c) **treatment and rehabilitation payments** to provide money and support to facilitate the injured person's rehabilitation; and
 - (d) **fatal injury entitlements**, including funeral grants paid to the deceased's estate, weekly compensation for surviving partners, and survivor grants (one-off lump sum payments to surviving payments to meet death-related expenses).
- 2.56 ACC payments will be classified under the PRA according to when the statutory entitlement to the payment accrued.⁶⁶ So if an entitlement accrued during the relationship, all ACC payments received in relation to that entitlement will be classified and divided as relationship property. Conversely, payments received during the relationship but derived from an entitlement that accrued before the relationship will be separate property.⁶⁷
- 2.57 The classification of private insurance payments is very similar to ACC payments under the Accident Compensation Act. The right to payments under an insurance policy is a contractual right that crystallises upon the injury or illness occurring. The courts have held that if the right crystallises during the relationship, the right is relationship property.⁶⁸ So too are all future payments a partner receives under the policy that are attributable to this underlying property right, even if the payments are received after the partners separate.⁶⁹
- 2.58 The current approach to personal injury payment raises several issues.
- 2.59 First, classifying personal injury payments as relationship property may deprive the injured partner of the funds they need for rehabilitation or compensation for personal impairment (Issues Paper at [11.11]). Some submitters agreed and emphasised that the classification and division of personal injury payments should depend on the purpose of the specific right or entitlement. These submitters said that treatment and rehabilitation payments were needed for the injured partner and therefore should not be shared. They also said that lump sum compensation payments should not be shared because permanent impairment is a purely personal loss that the injured partner will suffer for the rest of their life. Peart and Connell made the same points in their recent article, and recommend that such payments be classified as separate property.⁷⁰

⁶⁶ *S v S* (1984) 3 NZFLR 88 (DC) at 91–92 (concerning a lump sum compensation payment received after the relationship ended, in relation to an injury suffered during the relationship); *T v A* FC Auckland FP88/00, 20 November 2003 at [10] and [15] (concerning weekly compensation payments received during the relationship, in relation to an injury suffered before the relationship began); and *B v B* [2016] NZHC 1201, [2017] NZFLR 56 (concerning a lump sum compensation payment a partner received for suffering asbestosis). In that case there was an issue as to when the entitlement to payments accrued. Although the partner had contracted the condition some years before the relationship began, he was only diagnosed and received treatment during the relationship. The High Court said that, based on s 37 of the Accident Compensation Act 2001, the statutory right to payment accrues when the claimant first receives treatment for the injury, even if the injury itself was suffered and manifested some time earlier. There is limited case law addressing treatment and rehabilitation payments and fatal injury entitlements, but it is likely the courts would apply the same approach. See discussion in Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15(1) Otago Law Review 169 at 184–186.

⁶⁷ In *G v G* (1995) 13 FRNZ 427 (HC) at 434 the Court held that a payment received during the relationship but arising from a claim that accrued before the relationship was property acquired out of separate property under s 9(2) of the Property (Relationships) Act 1976.

⁶⁸ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004.

⁶⁹ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004; *G v G* (1995) 13 FRNZ 427 (HC) at 434.

⁷⁰ Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15(1) Otago Law Review 169. In their submission, the Accident Compensation Corporation and Ministry of Business, Innovation and Employment said they had been guided by the article and commended it to the Law Commission.

- 2.60 Second, the courts' approach of focusing on when the underlying entitlement or right to the payment accrued, rather than when the payment was received, means that payments received after a relationship ends can still be classified and divided as relationship property if the injury occurred during the relationship. In some cases, the courts have recognised the unfairness in requiring an injured partner to share payments that are intended as compensation for loss suffered after the relationship. In *P v P* for example, the Court observed that a lump sum compensation payment was "entirely personal" and intended to compensate the injured husband for losses he would suffer "for the remainder of his days".⁷¹ Submitters were unanimous that weekly compensation payments should not be shared after the relationship ends. Most explained that the payments represent income and it would be contrary to the principle that income received after the relationship is separate property and is not divided.
- 2.61 Third, the courts' approach also means that weekly compensation payments received during the relationship in relation to an earlier injury would be separate property, even though those payments are intended to replace lost earnings that would have otherwise been earned during the relationship. This is contrary to the principle that income received during the relationship should be classified and divided as relationship property.
- 2.62 Fourth, the current approach is not simple. The classification of entitlements under the Accident Compensation Act depends on when a partner's statutory entitlement arose. This can be a complex legal question, particularly where the injury is not diagnosed or treated for some time.⁷²

Classification of personal injury compensation in comparable jurisdictions

- 2.63 Compared to rules-based property sharing regimes in other jurisdictions, New Zealand law is unusual for allowing the division of personal injury compensation. The law in most Canadian provinces excludes damages, settlements and insurance proceeds for personal injury from the property eligible for division.⁷³ Some provinces, however, allow division if the insurance moneys represent lost wages.⁷⁴
- 2.64 The discretionary property sharing regimes in Australia, England and Wales do not exclude damages or compensation for personal injury from division.⁷⁵ However, an aim of these regimes is to divide the partners' property to reflect the needs of the partners and

⁷¹ *P v P* HC Nelson M8-83, 20 July 1983 at 9 per Hardie Boys J. See too *S v S* (1984) 3 NZFLR 88 (DC) at 92–93. In these cases, the courts applied the exception that extraordinary circumstances rendered equal sharing of the payments repugnant to justice. These cases were, however, decided prior to the 2001 amendments, when there was no general rule that property other than the family home and family chattels would be shared equally.

⁷² See as an example *B v B* [2016] NZHC 1201, [2017] NZFLR 56. In this case, one partner had suffered injury from exposure to asbestos well before the relationship began. However, the symptoms from the injury only revealed themselves during the relationship. Section 37 of the Accident Compensation Act 2001 provided that an injury is deemed to have been suffered under the Act when either (a) the injured person received treatment for the injury or (b) the injury results in the person's incapacity, whichever is the earlier. As the partner in this case had first received treatment during the relationship, the High Court held that the partner's statutory entitlements accrued during the relationship. Accordingly, the funds he received from the Accident Compensation Corporation were held to be relationship property.

⁷³ See Family Law Act RSNL 1990 c F-2, s 18(1)(c)(ii); Matrimonial Property Act RSA 2000 c M-8, s 7(2)(d); Family Law Act SBC 2011 c 25, s 85(1)(c); Family Property Act SS 1997 c F-6.3, s 23(3)(a); Family Property Act CCSM c F25, s 8(1); Ontario Family Law Act RSO 1990 c F-3, s 4(2)3; Family Law Act SNWT (Nu) 1997 c 18, s 35(2)(b); and Family Law Act RSPEI 1988 c F-2.1, s 4(1)(b)(iii)2.

⁷⁴ Family Law Act RSNL 1990 c F-2, s 18(1)(c)(ii); and Family Law Act SBC 2011 c 25, s 85(1)(c)(ii).

⁷⁵ See *W v W* (1985) 61 ALR 215 (HCA) at [3]; *Aleksovski v Aleksovski* (1996) 20 Fam LR 894 (Family Court of Australia) at [42] and [52]; *Wagstaff v Wagstaff* [1992] 1 WLR 320 (CA); and *M v M* [2011] EWCA Civ 1056, [2012] 1 FLR 117.

their children. Any personal need the injured partner has to entitlements relating to their injury will likely be recognised through the division.⁷⁶

- 2.65 It is also helpful to note the recommendations of the American Law Institute. It stated that insurance proceeds and personal injury recoveries should be classified as marital property to the extent that entitlement arises from the loss of a marital asset.⁷⁷ If the insurance proceeds replace lost income from the injury, they are marital property and divisible. If they are for pain and suffering, they are not marital property and not divisible.⁷⁸

Drafting issues with sections 8 to 10

- 2.66 A general issue we have identified with the classification rules relates to their construction. They are criticised as being "opaque and confusing", and "possibly the most complex in the world".⁷⁹
- 2.67 Rather than adopting a broad definition of relationship property and a narrow definition of separate property, which is the general approach taken in most comparable jurisdictions,⁸⁰ the PRA does the opposite. The definition of relationship property comprises a list of 12 different types of property, which in effect adds up to all property owned by either or both partners at the end of the relationship, except for property that was owned before the relationship, or was a third party gift or inheritance, unless it is converted into relationship property under the family use approach.
- 2.68 The broad definition of separate property as any property that is not relationship property in section 9(1) is not particularly helpful, because in effect it simply means pre-relationship property, and third party gifts and inheritances, which are, in any event, specifically identified as separate property in section 10(1).
- 2.69 The degree of specificity in the definition of relationship property means that many of its subsections are subject to a number of other provisions. For example, section 8(1)(e) (property acquired after the relationship began) is subject to sections 9(2) to (6), 9A and 10. Not only is this confusing to follow, it also leads to a range of interpretative issues, including those described at paragraphs 2.48(a) and (b) above. Another issue is the

⁷⁶ *Wagstaff v Wagstaff* [1992] 1 WLR 320 (CA) per Butler-Sloss LJ at 280:

There may be instances where the sum awarded was small and was specifically for pain and suffering in which case it would be unsuitable to order any of it to be paid to the other spouse. In some cases the needs of the disabled spouse may absorb all the available capital, such as the requirement of residential accommodation.

See also *M v M* [2011] EWCA Civ 1056, [2012] 1 FLR 117 at [22].

⁷⁷ American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark 2002) at § 4.08(2)(a) and (b).

⁷⁸ At 716.

⁷⁹ Bill Atkin "Classifying Relationship Property – A radical re-shaping?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 153 at 154.

⁸⁰ For example, in Scotland "matrimonial property" means all property owned by either or both partners acquired, other than by way of gift or succession from a third party, either "(a) before the marriage for use as the family home or as furniture or furnishings for such home; or (b) during the marriage but before the relevant date": Family Law (Scotland) Act 1985, s 10(4). In British Columbia, "family property" is defined to include, subject to the definition of excluded property, all real property and personal property that "on the date the spouses separate ... is owned by at least one spouse", or "a beneficial interest of at least one spouse in property": Family Law Act SBC 2011 c 25, ss 84–85. See also the definition of "net family property" in Ontario: Family Law Act RSO 1990 c F-3, s 4(1).

circularity between sections 8(1)(e) and 9A(3),⁸¹ giving rise to two possible interpretations, as the Court of Appeal observed in *Geddes v Geddes*.⁸²

- 2.70 A broader issue with the way the classification rules are currently drafted is that there is no guidance on who bears the burden of proof in establishing whether property is relationship property or separate property.⁸³ Rather than requiring the applicant in PRA proceedings to bear the burden of proof, the court adopts a semi-inquisitorial approach, which recognises that the applicant will often not be the legal owner of the property in dispute, and so evidence relevant to the applicant's claims is more likely to be in the possession of the responding partner. Atkin argues that the PRA should go further, and specify who has the burden of proof in relation to establishing whether property is relationship property or separate property, so as to promote clarity and certainty.⁸⁴ As the owning partner will inevitably be in the best position to provide evidence to the court, several jurisdictions place the burden of proof on the owning partner to establish that any property in dispute is separate property.⁸⁵

CLASSIFICATION IN COMPARABLE JURISDICTIONS

- 2.71 Before outlining our preferred approach to classification, it is helpful to review approaches to classification in comparable, rules-based relationship property regimes in other jurisdictions. These tend to fall on a spectrum. At one end, all property owned by either or both partners is shared under a "universal" model. At the other end of the spectrum, only the fruits of the relationship are shared.
- 2.72 While there is widespread acceptance that the fruits of the relationship should be shared when relationships end,⁸⁶ there are three important points to note:

⁸¹ This is because s 8(1)(e) of the Property (Relationships) Act 1976 provides that property acquired after the relationship began is relationship property, but this is subject to ss 9(2)–9(6), 9A and 10. Section 9(2) provides that property acquired out of separate property is separate property, but that is subject to s 9A(3). Section 9A(3) provides that property acquired out of separate property retains its separate character, unless it is used with the owner's consent for the acquisition or improvement of "property referred to in section 8(1)". There is therefore some circularity as s 8(1) includes property under s 8(1)(e), and "thus the circle returns to its starting point": RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.55].

⁸² *Geddes v Geddes* [1987] 1 NZLR 303 (CA) per Somers J at 307–308 and Casey J at 310. In that case the husband used separate property to acquire a farm during the relationship. On one interpretation, the farm fell within s 8(1)(e), because it was acquired during the relationship and, by operation of s 9(2) and what is now s 9A(3), was relationship property. However on this interpretation, all new property acquired out of separate property after the relationship begins is relationship property. The alternative interpretation was that the farm did not originate as set out in s 8(1)(e) – it originated under s 9(2), and must be regarded as excluded from s 8(1)(e) altogether. On that interpretation, new property acquired during the relationship out of separate property never becomes relationship property under s 8(1)(e). The Court of Appeal adopted the latter interpretation, noting the former would negate the effect of s 9(2), and that this "bizarre result" cannot have been Parliament's intention.

⁸³ In *M v B* [2006] 3 NZLR 660 (CA) the Court of Appeal said at [39] that a court needs only to be satisfied about a state of events which has existed, or which exists, and that "notions of onus of proof fit uncomfortably within this legislative regime".

⁸⁴ Bill Atkin "Classifying Relationship Property – A radical re-shaping?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 153 at 163.

⁸⁵ See for example Family Law Act RSO 1990 c F-3, s 4(3); Family Law Act SBC 2011 c 25, s 85(2); Family Property Act CCSM 2017 c F25, s 23; and Family Property Act SS 1997 c F-6.3, s 23(6). A burden of proof on the owning partner was also recommended by the American Law Institute: *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at 685.

⁸⁶ Joanna Miles and Jens M Scherpe "The legal consequences of dissolution: property and financial support between spouses" in John Eekelaar and Rob George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, Abingdon, 2014) 138 at 152.

- (a) First, few jurisdictions operate a "pure" fruits of the relationship model, and instead prefer to adopt elements from both ends of the spectrum. Many jurisdictions still rely to some extent on the use to which property is put.⁸⁷
- (b) Second, there are different ways a pure fruits of the relationship approach can be implemented.⁸⁸ Among jurisdictions that do adopt a model close to a pure fruits of the relationship approach, a range of different approaches are taken on issues such as sharing increases in the value of separate property, and the classification of new property that is purchased using a mixture of separate property and relationship property.
- (c) Third, it is important to bear in mind that each comparative regime sits within its own legal, social and societal context, which will differ from the New Zealand experience. For example, many property division regimes apply only to marriages and registered civil partnerships. Under these regimes, the task of identifying when a relationship begins, which is often necessary under a pure fruits of the relationship model, is less problematic than in New Zealand, where the PRA applies to de facto relationships as well as marriages and civil unions. Other societal factors, such as female labour market participation, how partners arrange their financial and property affairs, whether there is a functioning residential rental market, availability of State-supported child care and the general level of social welfare all impact on the practicalities of different models.⁸⁹ For example, in jurisdictions where the family home is not always shared, there will often be other provisions offering protection to the non-owning partner, such as rights of occupation.⁹⁰

2.73 In Canada, where relationship property division is governed by the relevant provincial or territorial law, a family use approach is still adopted in several provinces, including Ontario, Quebec, Saskatchewan and Nova Scotia (although this province is the subject of recent review, discussed below).⁹¹ In these jurisdictions, the family home is always shared, whenever acquired. Provinces with more recent relationship property legislation,

⁸⁷ For example, under Scottish law, the partners will divide the property they acquire during the relationship but the family home and property used as "furniture or furnishings" for the family home will be shared: Family Law (Scotland) Act 1985, s 10(4A).

⁸⁸ An equalisation approach is adopted in the Canadian jurisdictions of Ontario, Manitoba, Prince Edward Island, Nunavut and the Northwest Territories. Under an equalisation approach, the value of each partner's property at the time of separation is calculated, with deductions for liabilities, pre-relationship property, and gifts and inheritances. The net family property values of each partner are then equalised, and the partner with the lower net family property is entitled to one half of the difference between them. The alternative to an equalisation model is an asset-based model, where partners trace and exclude separate property, even if that property has changed form during the relationship. This is the model adopted in Alberta and British Columbia. It is also recommended by the American Law Institute. Under this model, where the partners do not agree on whether an asset was acquired out of separate property, its classification might require tracing the source of funds used to acquire it.

⁸⁹ Jens M Scherpe "Contracting Out of the Default Relationship Property Regime – Comparative Observations" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 357 at 360–361.

⁹⁰ Jens M Scherpe "Marital Agreements and Private Autonomy in Comparative Perspective" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, Oxford, 2012) 443 at 479.

⁹¹ The family home is always shared if it is owned by one or both partners in Ontario (Family Law Act RSO 1990 c F-3); Quebec (Quebec Civil Code Book Two c V); Saskatchewan (Family Property Act SS 1997 c F-6.3); Nova Scotia (Matrimonial Property Act RSNS 1989 c 275); New Brunswick (Marital Property Act RSNB 2012 c 107); Newfoundland and Labrador (Family Law Act RSNL 1990 c F-2); and Yukon (Family Property and Support Act RSY 2002 c 83). We note that the Ontario Law Reform Commission recommended repeal of the special rules for the family home in 1993, but that recommendation has not been adopted to date: Ontario Law Reform Commission *Report on Family Property Law* (November 1993).

including British Columbia, Alberta and Manitoba, have moved away from a family use approach, but to varying degrees.⁹² In British Columbia, reforms in 2011 replaced the previous family use approach with a model close to a pure fruits of the relationship approach. A White Paper accompanying the reforms stated:⁹³

The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship.

2.74 These jurisdictions do, however, share all increases in the value of separate property occurring during the relationship, regardless of whether that increase in value is attributable to the relationship, or whether the underlying separate property is used for a family purpose.⁹⁴

2.75 In September 2017 the Law Reform Commission of Nova Scotia also recommended excluding the value of pre-relationship property from division, regardless of the use to which that property is put during the relationship. It observed that:⁹⁵

This accords with the purpose of family property legislation to recognize contributions to the relationship and the acquisition of assets prior to the start of the relationship cannot be said to be a product of these contributions.

2.76 The Law Reform Commission of Nova Scotia also pointed to the changing social context, and considered that a fruits of the relationship approach should encourage settlement because it accords more with people's sense of fairness.⁹⁶ It rejected calls for giving the family home special status, observing that this leads to anomalies and can have adverse consequences especially in second or third relationships.⁹⁷ It also recommended that all increases in the value of pre-relationship property be shared, consistent with the British Columbia approach.⁹⁸ The Commission did not, however, recommend abolishing the family use approach entirely. It considered that third party gifts and inheritances should continue to be shared where they are used for the benefit of both partners or their children.⁹⁹ The Commission considered the logic of the family use approach in this context seemed to accord with people's sense of fairness and their expectations about what belongs to them as a family.¹⁰⁰ It was concerned that the alternative approach taken in British Columbia, to exclude the original value of gifts and inheritances but share all increases in value regardless of how the gift or inheritance was used, might be hard to rationalise in many cases, and could lead to more applications for unequal sharing.¹⁰¹

⁹² For example, in Manitoba pre-relationship property is excluded from division except where the property was acquired in specific contemplation of the relationship. Gifts and inheritances are also excluded from division, except where any income or appreciation in the value of a gift or inheritance is used to purchase a family asset: Family Property Act CCSM 2017 c F25, ss 4(2) and 7(5).

⁹³ Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislative Office *White Paper on Family Relations Act Reform; Proposals for a new Family Law Act* (July 2010) at 81. See also Law Reform Commission of British Columbia *Property rights on marriage breakdown* (Working Paper 63, 1989).

⁹⁴ Family Law Act SBC 2011 c 25, s 84(2)(g); Matrimonial Property Act RSA 2000 c M-8, s 7(3); and Family Property Act CCSM 2017 c F25, s 4(3) (pre-relationship property only).

⁹⁵ Law Reform Commission of Nova Scotia *Final Report – Division of Family Property* (September 2017) at 122.

⁹⁶ At 122–123.

⁹⁷ At 128–129.

⁹⁸ At 125.

⁹⁹ At 141–143.

¹⁰⁰ At 142.

¹⁰¹ At 142.

- 2.77 The American Law Institute recommends, as a starting point, an approach to classification that is close to a pure fruits of the relationship approach, commenting that this:¹⁰²
- ... reflects widespread consensus that marriage alone should not affect the ownership interest that each spouse has over property possessed prior to the marriage or received after the marriage by gift or inheritance. In contrast, the law of nearly every state reflects the view that marriage alone *is* sufficient to support a spousal claim of shared ownership at divorce to property earned by marital labor (labor performed during marriage by a spouse).
- 2.78 Significantly, however, the Institute also recommends that a portion of separate property should be reclassified as relationship property at the dissolution of a "long-term marriage".¹⁰³ The Institute explains the basis for this approach is that after a lengthy marriage spouses typically do not think of their separate property as separate. The longer the marriage, the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets in reliance on an expectation that their separate property will be shared.¹⁰⁴ The Institute does not specify a definition of "long-term marriage" or the formula for determining the portion of separate property to be reclassified as relationship property, instead leaving those matters to be specified at state level.¹⁰⁵
- 2.79 Outside North America, the jurisdictions usually more comparable to New Zealand – Australia, England and Wales, and Ireland – adopt discretionary relationship property regimes, which do not require a classification exercise. Rather, each partner's property remains their separate property, but the court has broad powers to adjust a person's property interests on separation if it considers it just to do so.¹⁰⁶
- 2.80 Scotland is more comparable to New Zealand as, while it is a discretionary regime, judicial discretion is limited by a set of statutory principles, one of which presumes the equal sharing of matrimonial property.¹⁰⁷ The definition of matrimonial property is limited to property acquired during the relationship otherwise than by way of gift or succession from a third party, and property acquired before the marriage "for use by them as a family home or as furniture of furnishings for such home".¹⁰⁸ Therefore pre-relationship property used as the family home or chattels will not normally be shared, unless it was acquired with that purpose in mind.¹⁰⁹
- 2.81 In Europe, there also appears to be a growing consensus that pre-relationship property, gifts and inheritances should not be shared, regardless of how they are used.¹¹⁰ The most common form of relationship property regime in Europe is a limited community of property, under which acquisitions during the relationship are shared, excluding gifts and inheritances.¹¹¹ No European country now follows a universal community of property, the

¹⁰² American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at 650.

¹⁰³ At 769–771.

¹⁰⁴ At 771.

¹⁰⁵ At 772–773.

¹⁰⁶ Family Law Act 1975 (Cth); Matrimonial Causes Act 1973 (UK); and Family Law (Divorce) Act 1996 (Ireland).

¹⁰⁷ Family Law (Scotland) Act 1985, ss 9(1) and 10(1).

¹⁰⁸ Section 10(4).

¹⁰⁹ See discussion in Kenneth McK Norrie "Scotland" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, Oxford, 2012) 289 at 297.

¹¹⁰ Jens M Scherpe "Marital Agreements and Private Autonomy in Comparative Perspective" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, Oxford, 2012) 443 at 478.

¹¹¹ At 449.

Netherlands being the last country to move to a limited community of property model in 2018.¹¹²

- 2.82 Our review of comparable jurisdictions indicates a shift in rules-based relationship property regimes since the 1970s, away from a universal model and towards the fruits of the relationship end of the spectrum, especially in relation to the treatment of pre-relationship property that is used by the partners as the family home. However it is also clear that many jurisdictions still place value on the partners' use of property as evidence of their property sharing intentions and expectations. Further, it can be seen that even a pure fruits of the relationship approach might not always achieve what partners would perceive as fair outcomes, if all increases in the value of separate property are treated as relationship property without the need to establish any connection to the relationship.

OPTIONS FOR REFORM

- 2.83 In the Issues Paper we identified two broad options for reform:
- (a) abolish the family use approach to classification and classify all property on the basis of a pure fruits of the relationship approach (Issues Paper at [9.35]–[9.37]); or
 - (b) adopt different approaches to classification depending on the length of the relationship (Issues Paper at [9.38]–[9.40]).
- 2.84 If New Zealand were to move to a pure fruits of the relationship approach to classification, we noted that there would be implications for the treatment of increases in the value of separate property, new property purchased using a mixture of relationship property and separate property funds, and gifts and inheritances (Issues Paper at [10.67]–[10.79]).
- 2.85 In addition to the options for reform discussed in the Issues Paper, we have also considered addressing concerns with the family use approach by amending the exception to equal sharing in section 16, introducing a new exception to equal sharing, or extending the qualifying period for all relationships. We do not, however, favour an option for reform that involves changes to the rules of division or eligibility criteria, rather than the rules of classification. While some submitters favoured these options, especially a longer qualifying period, we do not consider they directly address the central issue, namely the classification of property that was not acquired through the efforts of either partner during the relationship as relationship property. In addition, we do not favour an amendment to section 16 as proposed by NZLS (see paragraph 2.39), primarily because it fails to address the situation where one partner owns a home when the relationship begins, but the other partner has no assets.
- 2.86 We set out below our preferred approach to reform.

¹¹²

BE Reinhartz "New Matrimonial Property Law in the Netherlands" (paper presented to International Society of Family Law Conference, Amsterdam, 2017) at 2.

PREFERRED APPROACH

P5

Property owned by either or both partners should be classified as relationship property if it:

- a. was acquired before the relationship, for the partners' common use or common benefit;
- b. was acquired during the relationship, other than as a third party gift or inheritance; or
- c. is a family chattel.

P6

Property acquired by one partner before the relationship began, or from a third party as a gift or inheritance during the relationship, should be classified as separate property.

P7

Payments received under the Accident Compensation Act 2001 or under a private insurance policy for a personal injury should be classified as separate property, except to the extent the payment compensates for loss of income during the relationship.

P8

Any increase in the value of any separate property, or any income or gains derived from separate property, that is attributable to the application of relationship property or to the actions of either or both partners, should be classified as relationship property. Section 15A should be repealed.

P9

When the family home is separate property, any increase in the value of the family home occurring during the relationship should be classified as relationship property in every case.

P10

The burden of proof of establishing whether property is separate property should be on the owning partner.

2.87 We propose that, at the end of a relationship, partners share all property that is:

- (a) acquired by either partner for the partners' common use or common benefit;
- (b) acquired or produced by either partner during the relationship, excluding third party gifts and inheritances; or
- (c) used as a family chattel.

2.88 This proposal retains the current fruits of the relationship approach to classification, but adopts a more limited family use approach that focuses on the partners' intentions when property is acquired, rather than their subsequent use of that property. However we propose retaining the current approach to classifying family chattels, for the reasons discussed at paragraphs 2.104–2.105 below.

- 2.89 We have drafted proposed new sections 8-10 of the PRA with the assistance of Parliamentary Counsel Office. The new sections reflect our preferred approach to classification. They are included at the end of this chapter to facilitate consideration of our preferred approach.

A limited family use approach

- 2.90 Our view is that it is no longer appropriate to require partners to divide property simply because it is used by them during the relationship, regardless of the partners' intentions and expectations when that property was acquired. The current approach can lead to unfairness, particularly in respect of the family home, when it was owned by one partner before the relationship, or was received by one partner from a third party as a gift or inheritance during the relationship. In neither of these situations has the family home been acquired through the efforts of either partner during the relationship, nor for the purpose of being used by the partners as the family home. The decision to live in one partner's home might have been made for a range of reasons, and that decision alone should not entitle the non-owning partner to an equal share in the full value of that home if the relationship ends.
- 2.91 We therefore propose adopting a more limited family use approach that classifies property as relationship property when it is acquired for the partners' common use or common benefit. This adopts the language currently found in sections 8(1)(d) and (ee) of the PRA. We will refer to these as "family acquisitions". This should include property acquired in contemplation of the relationship, for example while the partners were dating, but would not include property acquired earlier. This is a common feature in other jurisdictions and minimises the risk of disputes over relationship start dates.
- 2.92 Whether property is owned jointly or in common in equal shares by the partners will be strong evidence that the property was acquired for the partners' common use or common benefit (or is otherwise relationship property under a fruits of the relationship approach to classification). However we do not propose classifying property purely on the basis of legal ownership, as is currently the case under section 8(1)(c). For example, separate property should not be treated as relationship property simply because it is held in a joint bank account.
- 2.93 The basis for classifying family acquisitions as relationship property is that they have been made with the relationship in mind, in order to benefit the family joint venture. When family acquisitions are funded from separate property, this can be regarded as a gift or form of monetary contribution to the relationship, and treating that monetary contribution as relationship property is consistent with the principle that all forms of contribution to the relationship are to be treated as equal.¹¹³
- 2.94 We do not propose moving to a pure fruits of the relationship approach for several reasons:
- (a) First, we consider that treating family acquisitions as relationship property broadly reflects most people's values and expectations about what property belongs to them as a family. It prioritises the partners' intentions to treat certain property as "theirs". In contrast, under a fruits of the relationship approach greater priority is placed on how the acquisition of property is funded. This means a partner who

¹¹³ Property (Relationships) Act 1976, ss 1M(b), 1N(b) and 18(2).

contributes separate property funds to the purchase of new property generally gets to retain the value of that contribution, regardless of any intention or expectation that the property is purchased for the family.

- (b) Second, we are concerned that some aspects of a pure fruits of the relationship approach would not accord with people's values and expectations. For example, in most Canadian provinces that adopt a model close to a pure fruits of the relationship approach, the partners share all increases in value of separate property occurring during the relationship.¹¹⁴ This might be seen as unfair when increases in value have no connection to the relationship. It might also lead to exaggerated claims on separate property, as submitted by Jan McCartney. Another aspect of the fruits of the relationship approach which might not accord with people's values and expectations relates to the treatment of debt. Broadly speaking, in a fruits of the relationship regime partners share all gains, as well as losses incurred during the relationship, regardless of whether debt was incurred for a family purpose.¹¹⁵ The risk of this approach is that debt incurred by one partner for personal reasons can have the effect of significantly diminishing the relationship property pool.
- (c) Third, a pure fruits of the relationship approach could be more difficult for partners to apply in practice, depending on how increases in value or any incomes or gains on separate property are treated, and how new property purchased using a mixture of relationship property and separate property funds should be shared. Specifically:
 - (i) If partners were to share all increases in the value of separate property, they would need to know the original value of all property they owned at the start of the relationship, plus any third party gifts or inheritances received during the relationship, in order to work out what the increase in value has been. This will mean the start date of the relationship will take on greater significance, and, given the PRA applies to de facto relationships as well as marriages and civil unions, may lead to more disputes over when the partners' de facto relationship began.
 - (ii) If partners were able to retain the value of any separate property contributions to the purchase of new property during the relationship, it would be necessary to determine what proportion of the new property is

¹¹⁴ In British Columbia, Alberta, Prince Edward Island, Nunavut and the Northwest Territories, all increases in the value of separate property are classified as relationship property: Family Law Act SBC 2011 c 25, s 84(2)(g); Matrimonial Property Act RSA 2000 c M-8, s 7(3); Family Law Act RSPEI 1988 c F-2.1, ss 4(1)(b) and 4(3); and Family Law Act SNWT (Nu) 1997 c 18, s 35(1). In Manitoba and Ontario (which still adopts a family use approach to the classification of the matrimonial home) increases in the value of pre-relationship property are classified as relationship property, but increases in the value of gifts and inheritances are excluded: Family Property Act CCSM 2017 c F25, ss 4(3) and 7; and Family Law Act RSO 1990 c F-3, s 4(1) definition of "net family property" and s 4(2). In 1993 the Ontario Law Reform Commission recommended that all increases in the value of gifts and inheritances should be classified as relationship property, and that the family use approach to the classification of the family home should be abolished: Ontario Law Reform Commission *Report of Family Property Law* (November 1993). However those recommendations have not been adopted to date. In 2017 the Law Reform Commission of Nova Scotia recommended abolishing the family use approach in relation to pre-relationship property and treating all increases in value of pre-relationship property as relationship property. However it recommended retaining a family use approach to gifts and inheritances: Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at 120–125 and 141–143. The American Law Institute proposes only sharing increases in value of separate property that are attributable to the relationship, but as it also recommends that, in longer relationships, a portion of each partner's separate property is shared, it cannot be regarded as a pure fruits of the relationship regime: American Law Institute: *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at 662–665 and 769–781.

¹¹⁵ For example, in British Columbia "family debt" is defined to include all financial obligations incurred by a spouse during the relationship: Family Law Act SBC 2011 c 25, s 86. See also Family Property Act CCSM 2017 c F25, s 11(1).

attributable to that separate property contribution, and how any subsequent increase in value of the new property is to be shared. The task of apportioning the correct value to the respective separate property and relationship components will be complex and is likely to be imprecise, particularly when there has been a series of purchases and sales over time.

- (iii) In the case of a long relationship, it may be impractical and unrealistic to expect partners to have kept clear records about the origins of all their property. Separate property may have become so intermingled with relationship property through subsequent dealings that it is impossible to discern what portion of the property that exists at the end of relationship is attributable to the application of separate property. Robert Fisher argues that a tracing exercise and robust estimations in place of precise calculation could be readily applied.¹¹⁶ But in any event, the partners will likely require expert assistance, which will increase costs and delay resolution of PRA matters.

2.95 We set out below what a limited family use approach means for different types of property.

The family home

- 2.96 The family home will be treated in the same way as any other item of property for classification purposes, except that any increases in the value of the family home during the relationship will always be relationship property, see paragraphs 2.109–2.110 below.
- 2.97 This means that when the family home was one partner's pre-relationship property, or was received as a third party gift or inheritance, the value of the home when the relationship began or when the gift or inherited property was received ("original value") will be classified as the owning partner's separate property. Any debt incurred before the relationship began to acquire, improve or maintain the family home would similarly be classified as the owning partner's personal debt. If this debt is reduced during the relationship through the application of relationship property (for example by using the partners' income to pay the mortgage), the owning partner will be obliged to compensate the non-owning partner for an amount equal to half the reduction in principal debt.¹¹⁷ Any debt incurred after the relationship began would be classified according to the existing rules in section 20 of the PRA.
- 2.98 This proposal addresses the risk of unjust outcomes under the PRA, as a property will no longer be shared simply because it is used as the family home. Ensuring that partners share only in the increase in value of the family home as relationship property also reduces the financial incentives to keep property separate (see paragraph 2.16), or to maintain a relationship for pecuniary gain (see paragraph 2.34).
- 2.99 This proposal will not affect the non-owning partner's ability to apply for an occupation order or any other ancillary orders in respect of the family home.

¹¹⁶ Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 329 at 341.

¹¹⁷ Compensation would not normally be available in respect of the payment of interest on the principal debt. Interest is a carrying charge which is incurred so that the property can be used before having fully paid for it and in this context it is treated as analogous to rent. This could be subject to a limited discretion if, for example, the owning partner incurred debt on imprudent terms with excessive rates of interest. See discussion in American Law Institute: *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at 690.

- 2.100 If a new family home is purchased during the relationship, it will be relationship property regardless of the source of funds used to purchase that home, because it has been purchased for the partners' common use or common benefit. If partners wish to retain the value of their separate property contributions to the purchase of the home, they would need to contract out of the PRA.
- 2.101 At a practical level, the purchase of a family home is an instance where the partners will have the opportunity to receive information and advice about the property conveyance, and will generally require legal assistance to conduct the conveyance. It is, therefore, a convenient opportunity for the partners to obtain information and legal advice on the PRA implications of the transaction.
- 2.102 The owning partner will have the burden of proving that the original net value of the family home should be treated as their separate property. This means that, when the family home was owned by one partner before the relationship began, they will need to determine the date the relationship began, obtain a valuation of the home as at that date, work out the net value of the home at that date, and calculate the extent to which a personal debt incurred to acquire, improve or maintain the home has been paid back from relationship property. While determining the start date of a relationship can be difficult, we note this is already becoming increasingly necessary in relationship property settlements in order to calculate KiwiSaver entitlements. Obtaining a valuation of the family home at the time the relationship began should be relatively straightforward in most cases, as will be calculating any reduction in personal debt associated with the home, although we note the need for people to be aware that they should keep bank records that will enable them to perform these calculations. We expect this task will be considerably easier in the case of family homes that are acquired by gift or inheritance, as the date of acquisition and net value at that date are likely to be more clearly documented. The additional complexity associated with our preferred approach is therefore considerably less than what might be required under a pure fruits of the relationship approach, as described at paragraph 2.94(c) above.
- 2.103 We propose an education campaign to inform the public about their entitlements and obligations under the PRA, including in particular the implications of purchasing new property for the partners' common use or common benefit, such as a family home. Information about the PRA should also be made available to people when they are buying and selling residential property. That material must raise awareness of the records that need to be retained in order to establish when the home was acquired and its original net value. Relevant records might include bank statements, loan statements, property valuations and sale and purchase records.

The family chattels

- 2.104 Family chattels will continue to be classified as relationship property whenever acquired. There is less call for reform of the family use approach as it applies to chattels, because they are usually of low value, are less likely than residential property to increase in value over time, and are more likely to be exchanged or replaced during the relationship. While some chattels can have significant value, such as art and antiques, the PRA already provides an exception for heirlooms. We are also considering whether there should be another exception for chattels of "special significance" (Issues Paper at [11.64]–[11.67]), and will address this in our final report. We expect this will largely address any perceived problems with the family use approach to classifying chattels. We also note that

contracting out of the PRA or reliance on the exception to equal sharing in section 13 may provide a suitable remedy in rare cases where valuable family chattels are brought into the relationship by one partner,¹¹⁸ or are received by one partner as a gift or inheritance during the relationship.

- 2.105 In the absence of any strong call for reform in respect of family chattels, we think the practical benefits of the family use approach outweigh the advantages of moving to a fruits of the relationship approach. Under a family use approach, chattels are classified simply by considering whether they fall within the definition of family chattels in section 2. It is not necessary to inquire into when the property was purchased, or how it was paid for. It provides a "bright line" test that does not require anything beyond a current valuation of the chattels. Treating all family chattels as relationship property to be shared equally deters arguments over what are generally assets of low value and will promote settlement of disputes.

Increases in the value of separate property

- 2.106 We propose replacing sections 9A(1) and 9A(2) with a single provision that treats any increase in the value of separate property, or any incomes or gains derived from separate property, that is attributable directly or indirectly to the relationship, as relationship property, to be divided equally between the partners.¹¹⁹ Increases in value will be attributable to the relationship if they are attributable to the application of relationship property, or to the actions of either or both partners. This ensures the equal treatment of monetary and non-monetary contributions to the relationship, consistent with sections 1N(b) and 18(2).
- 2.107 We propose including increases in value attributable to the actions of the owning partner, which is not explicitly captured in section 9A(2), on the basis that all types of wealth generated through the partners' joint and several efforts during the relationship should be shared. This will not substantially broaden the provision's application, because as the Supreme Court observed in *Rose v Rose*, where the owning partner works on separate property, it is likely that section 9A(2) would already apply on the basis that the non-owning partner's actions will have had some direct or indirect influence on any increase in value under section 9A(2).¹²⁰ A consequence of this approach is that section 15A becomes redundant, and we therefore recommend its repeal.

¹¹⁸ See for example *S v S* [2012] NZFC 2685.

¹¹⁹ In the Issues Paper we proposed two other options for reform: see Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [10.30]–[10.33] and [10.37]–[10.41]. One option involved changing the rules of division for both ss 9A(1) and 9A(2) to division based on the contribution of each partner to the relationship (consistent with the rules of division in ss 13–14A). This was based on a proposal in Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 19–20. We do not favour this option as we do not think it is appropriate for increases in value of separate property to be divided based on the contributions of the partners to the relationship. It could lead to unfairness where, for example, the increase in value is only partly attributable to the relationship. The second option proposed in the Issues Paper was to treat all increases in value as relationship property, essentially adopting a fruits of the relationship approach to classification. We do not favour this approach for the reasons given at paragraph 2.94 above.

¹²⁰ For example, when the non-owning partner's actions have enabled the owning partner to devote labour or expenditure to their separate property with consequent increase in value, or when the non-owning partner has provided financial support by paying for household expenditure and thereby enabling the owning partner to pay for work on their separate property which increases its value: *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [44].

- 2.108 The owning partner is not required to share increases in value which have no connection to the relationship. This means that increases in value attributable to market inflation will not normally be shared, unless the application of relationship property or the actions of either or both partners preserved the separate property so that future increases could be obtained.¹²¹

Increases in the value of the family home

- 2.109 We propose that any increase in the value of the family home is always treated as attributable to the relationship, and becomes relationship property. Partners would share both inflationary and non-inflationary increases in the value of the family home. This is for the following reasons:
- (a) A home brought into the relationship by one partner is different to other items of separate property. By living in and enjoying the home, the partners are more likely to treat the property as "theirs". The home is a key family asset that has financial, emotional and practical value to the partners. The home cannot, therefore, be considered separate to the relationship in the same way as other items of separate property.
 - (b) It is reasonable to assume that, during the relationship, both partners will directly or indirectly contribute to the preservation and improvement of the family home for the benefit of the family joint venture, regardless of its separate property source. For example, the non-owning partner might stay at home and care for children of the relationship, enabling the owning partner to earn the income needed to finance and maintain the home. This proposal will ensure the non-owning partner's contributions are recognised without having to prove the increase in value was attributable to the relationship, as will otherwise be necessary in order to share increases in the value of separate property.¹²²
- 2.110 As noted at paragraph 2.97, under this approach, any mortgage debt relating to the property that was incurred before the relationship would be the owning partner's personal debt. If the partners reduce the principal mortgage debt using relationship property, the non-owning partner would be entitled to compensation for half the reduction in principal debt.
- 2.111 In some cases dividing the increase in value and compensating for the reduction in debt could force the sale of the separate property family home in order to meet the non-owning partner's entitlement. This could lead to unfairness, for example, where the owning partner is the primary caregiver of children, and the sale of the home would result

¹²¹ This was the case in *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1, where, not only had most of the improvements on the separate property been funded by relationship debt, but had it not been for the non-owning partner's financial contributions to the relationship, it was likely that the separate property would not have been retained, so all or part of the increase in value may have been lost, as explained at [50].

¹²² Arguments have been made in other jurisdictions to exclude inflationary gains in the value of separate property, but this has always been in the context of a pure fruits of the relationship approach, where increases in value of all separate property are shared. In any event, we are not aware of any jurisdiction where such an approach has been adopted, although in Nova Scotia, whether the value of the relationship property substantially appreciated during the relationship is a relevant factor in determining whether equal division would be unfair or unconscionable: *Matrimonial Property Act* RSNS 1989 c 275, s 13(j). For further discussion on the merits of excluding inflationary increases in value see Manitoba Law Reform Commission *Report on Family Law: Part II Property Disposition* (Report 24, February 1976) at 70–71; Law Reform Commission of Saskatchewan *Proposals Relating to Matrimonial Property Legislation* (October 1985) at 10–12; and Law Reform Commission of British Columbia *Property rights on marriage breakdown* (Working Paper 63, 1989) at 82–83.

in their relocation away from their community. However, the potential unfairness could be addressed through occupation orders or orders postponing of vesting (discussed further in Chapter 7: Children's interests). It should also be noted that under the current law, the owning partner would be required to share the entire value of the property rather than just the gains made during the relationship.

Gifts and inheritances

- 2.112 We propose that the same rules should apply to all forms of separate property. The primary concerns with the family use approach as it relates to gifts and inheritances are addressed in our preferred approach. The family home will no longer be classified as relationship property if acquired as a gift or inheritance, and gifts and inheritances put into a joint account are less likely to lose their separate property status. We do not, therefore, see any justifiable basis for continuing to give gifts and inheritances special status over other forms of separate property.
- 2.113 We therefore favour abolishing the intermingling test that only applies to gifts and inheritances under section 10(2), and applying the same rules for when separate property can be converted into relationship property to all forms of separate property. This would mean that gifts and inheritances lose their separate property status if they are used to purchase property for the common use or common benefit of both partners, or are otherwise applied to already existing relationship property, for example improving a family home. Increases in the value of gifts and inheritances which are attributable to the relationship will also be shared as relationship property.

Payments under the Accident Compensation Act and private insurance policies

- 2.114 We propose that the classification of payments received under the Accident Compensation Act and under private insurance policies that insure against personal injury depend on the nature of the entitlements.
- 2.115 In respect of payments received under the Accident Compensation Act, we propose that:
- (a) Lump sum compensation payments should always be classified as separate property, as they are to compensate for the permanent, non-economic loss of bodily functions that the injured partner will suffer for the rest of their life. We acknowledge that the pain and suffering a partner experiences from an injury might also affect the non-injured partner.¹²³ For that reason, it might be argued that lump sum payments should be relationship property to the extent that both partners have been affected by the injury. On balance, however, we consider it is preferable to exclude lump sum compensation payments altogether, in order to avoid problematic assessments of the extent to which a lump sum compensates loss suffered by both partners.
 - (b) Treatment and rehabilitation payments should be classified as separate property, as the payments are personal to the rehabilitation of the individual and it is undesirable to potentially undermine rehabilitation by making the payment subject to division.¹²⁴

¹²³ For example, the non-injured partner will normally provide support and may also suffer as the couple's joint quality of life is diminished. See comments in American Law Institute *Principles of the Law of Family: Dissolution Analysis and Recommendations* (LexisNexis, Newark 2002) at 716.

¹²⁴ If however treatment and rehabilitation payments are used to modify relationship property, such as the family car, the payment may lose its separate property character. But there are other ways the injured partner may be able retain the benefit of modifications to an item of relationship property. For example, when implementing a division, a court could

- (c) Weekly compensation payments should be considered a substitute for income. On that basis, weekly compensation payments that replace the injured partner's income during the relationship should be relationship property, and weekly compensation payments that replace income after a relationship has ended should be the injured partner's separate property.
 - (d) Funeral grants and survivor grants should be classified as separate property. To divide a funeral grant could undermine the purpose for which it is given, while survivor grants are received after the relationship has ended and do not represent the fruits of the relationship. Weekly compensation payments paid to surviving partners should, like all weekly compensation payments, be considered a substitute for income. These will typically be the recipient's separate property, because the relationship will have ended upon the death of the deceased. However if the surviving partner has entered a new relationship, the survivor's weekly compensation should be classified as relationship property in the context of that relationship.¹²⁵
- 2.116 We also propose making a consequential amendment to section 123 of the Accident Compensation Act. That section provides that all entitlements under that Act are inalienable except in limited circumstances. There is no reference to the PRA.¹²⁶ Section 4A of the PRA provides that all other enactments must be read subject to the PRA unless the other enactment expressly provides to the contrary. This is sufficient for the PRA to apply over section 123 of the Accident Compensation Act. However, it would be preferable for that section to make this position explicit.¹²⁷
- 2.117 Entitlements under private injury policies that insure against personal injury should also be classified depending on the purpose of those entitlements. Similar to the treatment of entitlements under the Accident Compensation Act, entitlements that provide funds for rehabilitation, such as the payment of medical expenses, should be classified as separate property. Likewise, payments that are to provide compensation for bodily impairment should be separate property. Payments that are to compensate lost income that would otherwise have been earned during the relationship but for the injury should be relationship property. But payments to compensate for income that would have been earned after the relationship should be the injured partner's separate property.

Sections 8 to 10 to be modernised and simplified

- 2.118 We propose the redraft of the definitions of relationship property and separate property. This will not affect the basis for classification except to the extent we recommend reform of the current approach as set out above. It will, however, provide clearer guidance to partners that the starting point is that all property of either partner at the end of the relationship is to be shared, unless a partner can prove that certain items of property are their separate property. This is consistent with the approach taken in most comparable

order that the modified property vest in the injured partner. See discussion in Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15(1) Otago Law Review 169 at 192.

¹²⁵ We note, however, the opposing view in Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15(1) Otago Law Review 169 at 195.

¹²⁶ In contrast, see s 127 of the KiwiSaver Act 2006. Section 127(1) prohibits the assignment or passing of a member's KiwiSaver interest. Section 127(2) provides exceptions with specific reference to the Property (Relationships) Act 1976.

¹²⁷ Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15(1) Otago Law Review 169 at 191.

jurisdictions and, we think, clearly places the burden of proof on the partner that will have ready access to the information required to establish that property is separate property.

- 2.119 We recommend the use of examples in the definition of relationship property to draw attention to the specific items of property that must be considered, for example superannuation entitlements and the value of life insurance policies attributable to the relationship.
- 2.120 To facilitate consideration of our preferred approach to classification we include at the end of this chapter new draft sections 8–10.¹²⁸

Implications of our preferred approach on the relationship property pool

- 2.121 We appreciate that our preferred approach will, in some cases, have a significant impact on the size of the relationship property pool, namely when the family home was owned by one partner before the relationship, or was a third party gift or inheritance. However, the proposed changes to classification must be seen as one of several reforms we have proposed in this paper which together form a complete package. We have proposed that more relationships should be subject to equal sharing (in particular, marriages and civil unions of less than three years' duration). Our proposed reforms to section 15 in particular will require partners to share future income after a relationship ends if they have children, have been together for 10 years or more, or a partner has either sacrificed or enhanced their career because of the relationship. The combined effect of these reforms is that the pool of resources to be divided on separation will be smaller, or larger, depending on the circumstances of the relationship. It is likely that in shorter relationships and relationships entered later in life, there will be less relationship property because of our preferred approach to classification. In longer relationships, however, the partners are likely to have acquired more relationship property and meet the criteria for when they are required to share their future income. For those relationships, there is a greater amount of property to be divided among the partners when they separate.

¹²⁸

These provisions have been prepared by Parliamentary Counsel Office for this limited purpose.

Property (Relationships) Amendment Bill

cl 8

[Classification of property]

8 Meaning of relationship property

Property is **relationship property** of the partners to a relationship if the property—

- (a) is the property of either or both of the partners at the date on which their relationship ended; and
- (b) is not the separate property of a partner to the relationship.

9 Meaning of separate property

- (1) Property is the **separate property** of a partner to a relationship if the property is not a family chattel and the property—

- (a) was acquired by the partner before the relationship began;
- (b) was a gift to the partner from the other partner;
- (c) was acquired by the partner from a third person—
 - (i) by succession; or
 - (ii) by survivorship; or
 - (iii) by gift; or
 - (iv) because the partner is a beneficiary under a trust settled by the third person;
- (d) was received by the partner under the Accident Compensation Act 2001 as an entitlement for a personal injury, not being an entitlement that is weekly compensation for loss of earnings during the relationship;
- (e) was received by the partner under an insurance policy as a payment for a personal injury, not being a payment for loss of income during the relationship.

- (2) An increase in the value of any property of a partner described in **subsection (1)**, and income or gains derived from any property of a partner described in **subsection (1)**, are the separate property of the partner.

Example 1

Before Aiden enters into a relationship with Bella, he has \$50,000 invested in a bank account. During his 4-year relationship with Bella, Aiden retains this bank account in his own name and does not deposit any funds into the account or withdraw any funds from the account. The bank account is Aiden's separate property. The interest of \$5,000 earned on the \$50,000 over the 4 years is also Aiden's separate property.

Example 2

Before Clare enters into a relationship with Dom, she owns a horse. Clare keeps her horse during her relationship with Dom and uses her savings from before the relationship to pay all related expenses. The horse subsequently gives birth to a foal. Both the horse and the foal are Clare's separate property.

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-
- (3) Property is also the separate property of a partner to a relationship if the property is not a family chattel and the property was acquired by the partner out of—
- (a) any of the partner's separate property described in **subsection (1) or (2)**; or
 - (b) any sale proceeds of any of the partner's separate property described in **subsection (1) or (2)**.
- (4) This section is subject to **section 10**.

10 When property no longer separate property

The following is not the separate property of a partner to a relationship, but is relationship property:

- (a) property acquired before the relationship began using separate property of a partner, if the property—
 - (i) was acquired in contemplation of the relationship; and
 - (ii) was intended for the common use or common benefit of the partners:

Example 1

Atamai and Bree are dating, but are not in a relationship. Atamai buys a house using his own savings so that he and Bree can move in and live together. Atamai and Bree subsequently enter into a relationship and live together in the house. The house is relationship property.

- (b) property acquired during the relationship using the separate property of a partner, if the property was intended for the common use or common benefit of the partners:

Example 2

During Corey's relationship with Daphne, he inherits \$500,000. Corey uses this money to buy a beach house for him and Daphne to use as their summer holiday home. The beach house is relationship property.

Example 3

Before Elaine meets Felicity, Elaine owns her own apartment. After she enters into a relationship with Felicity, Elaine sells her apartment and uses the sale proceeds of \$600,000 to pay the deposit on a property that she and Felicity buy together. The property that Elaine and Felicity buy together is relationship property. The \$600,000 is no longer Elaine's separate property.

- (c) any increase in the value of separate property that is being used as the family home:

Example 4

Before Giles enters into a relationship with Hau, Giles owns a house valued at \$800,000. During their relationship Giles keeps the house as his separate

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property but it is used by Giles and Hau as the family home. At the end of their relationship, the house is valued at \$1,200,000 as a result of rising real estate prices. The house remains Giles' separate property, but the increase in its value of \$400,000 is relationship property.

- (d) any increase in the value of separate property of a partner, or any income or gains derived from separate property of a partner, attributable to—
- (i) the application of relationship property; or
 - (ii) the actions of either or both of the partners:

Example 5

Ihaka owns a classic car that is his separate property. He uses funds from a joint bank account that he has with his partner, Jenny, to pay for restoration work undertaken on his car. The restoration work increases the value of his car by \$40,000. The car remains Ihaka's separate property, but the increase in its value of \$40,000 is relationship property. Any subsequent increase in the value of the car that is due to market inflation is Ihaka's separate property.

Example 6

Before Ken enters into a relationship with Lulu, Ken is a member of a Kiwi-Saver Scheme and has an account that is his separate property. During his 5-year relationship with Lulu, Ken pays the contributions to the scheme from his salary. The increase in the value of the KiwiSaver Scheme account attributable to the contributions Ken makes during the relationship is relationship property.

- (e) any separate property of a partner used with the express or implied consent of the partner for—
- (i) acquiring, improving, or increasing the value of any relationship property; or
 - (ii) increasing the amount of any interest of the partners in any relationship property:

Example 7

Melissa has separate property of \$80,000 in a bank account. She uses \$60,000 of her funds to have a new kitchen and bathroom installed in the house that she and her partner own. The \$60,000 is no longer Melissa's separate property.

Example 8

While in a relationship, Nico has a climbing accident and sustains spinal injuries that result in him subsequently needing to use a wheelchair. Nico receives from ACC a lump sum of \$100,000 as compensation for his permanent impairment. He spends the money modifying the house that he and his partner, Oscar, own. The modifications increase the value of the home, which is relationship property. When Nico's relationship with Oscar ends, he

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does not receive reimbursement of the \$100,000, because the money has been used to increase the value of relationship property.

11 Burden of proving that property is separate property

A partner to a relationship who contends that property is the partner's separate property has the burden of proof in relation to the matter.

CHAPTER 3

Division

IN THIS CHAPTER, WE CONSIDER:

how relationship property should be divided, including:

- the general rule of equal sharing;
- the exception to equal sharing for extraordinary circumstances in section 13; and
- the role of misconduct in the division of relationship property.

THE GENERAL RULE OF EQUAL SHARING

Current law

- 3.1 Section 11 provides that on the division of relationship property under the PRA, each partner is entitled to share equally in the family home, the family chattels and any other relationship property. We call this the general rule of equal sharing. It is a cornerstone of the PRA.¹²⁹
- 3.2 The PRA provides limited exceptions to the general rule of equal sharing.¹³⁰ A court can depart from equal sharing if there are extraordinary circumstances that make equal sharing repugnant to justice (section 13), and it can adjust each partner's share of relationship property in order to compensate one partner in certain situations, including:
- (a) when each partner owned a home at the date the relationship began, but only one partner's home (or its sale proceeds) is included in the relationship property pool when the relationship ends (section 16);
 - (b) when one partner's separate property has been sustained by the application of relationship property or the actions of the other partner (section 17);

¹²⁹ As Woodhouse J observed in *Martin v Martin* [1979] 1 NZLR 97 (CA) at 99:

The primary purpose [of the PRA] is to substitute for abstract and individual notions of justice a settled statutory concept which must be taken from the Act itself. That fact will need to be remembered should the temptation arise to bend its language to conform with personal estimates of what some class of case may deserve. The next purpose is associated with the first. It is to substitute, for assessments arrived at by evaluating material contributions to property, a strong statutory bias in favour of the equal entitlement of spouses to matrimonial property of every kind.

¹³⁰ In addition to the exceptions discussed in this chapter, a court can also depart from equal sharing in relationships of less than three years' duration under ss 14–14A (discussed in Chapter 4: Eligibility Criteria), and in order to redress economic disparities under ss 15–15A (discussed in Chapter 5: Section 15).

- (c) when one partner's separate property has been materially diminished in value by the deliberate action or inaction of the other partner (section 17A);
- (d) when, after separation but before relationship property is divided,¹³¹ one partner has done anything that would have been a contribution to the relationship had the relationship not ended (section 18B); or
- (e) when, after separation but before relationship property is divided,¹³² the relationship property has been materially diminished in value by the deliberate action or inaction of one partner (section 18C).

Issues

- 3.3 In the Issues Paper our preliminary view was that equal sharing remains appropriate in contemporary New Zealand, because it reflects the values we should attribute to relationships, is familiar to the public, is easy to understand and is simple to apply (Issues Paper at [12.6]).
- 3.4 But equal sharing may not always be seen as achieving a fair outcome in individual cases. This is because there is little scope to take into account case-specific factors, such as the contributions each partner made to the relationship or how long the relationship lasted. While we did not canvas alternatives to equal sharing in the Issues Paper, these would include division on the basis of each partner's contribution to the relationship (currently provided for under sections 13–14A), or division at the court's discretion, which would enable a court to inquire into the individual circumstances of each case and divide relationship property in a way it considers just (currently the approach in Australia and England and Wales, discussed at paragraph 3.14).

Results of consultation

- 3.5 Most submitters who commented on equal sharing were concerned that the equal sharing of pre-relationship property after three years is unfair.¹³³ This was a strong theme from consultation, and is explored in Chapter 2: Classification. Under our preferred approach to classification, partners will no longer be required to share property that was acquired before the relationship was contemplated, other than increases in value that occurred during the relationship and were attributable to the relationship, including increases in the value of the family home.¹³⁴
- 3.6 Some submitters felt that equal sharing was unfair in situations when the partners' contributions to the relationship (both financial and non-financial) were unequal. This

¹³¹ In proceedings commenced after the death of one of the partners, s 18B is modified by s 86: Property (Relationships) Act 1976, s 18B(3).

¹³² In proceedings commenced after the death of one of the partners, s 18C is modified by s 86: Property (Relationships) Act 1976, s 18C(3).

¹³³ This was evident in submitter responses on the consultation website. We asked whether the law should continue to provide that each partner has a right to share equally in relationship property unless an exception applies. 13 submitters responded no, but eight of these submitters were concerned about equal sharing of pre-relationship property. They felt that partners should retain what they each brought into the relationship. Five submitters thought that the law should give greater recognition to the actual contributions made during the relationship (financial and non-financial), rather than presuming an equal share will be fair. The remaining two submitters supported equal sharing, with 1 submitter noting it recognises the important non-financial contributions made by each partner to the relationship, and is a simple and fair concept to understand and apply.

¹³⁴ Family chattels will however continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 2: Classification.

issue was raised in 24 submissions, including 19 submissions from members of the public, three submissions from individual practitioner and academic experts, and in submissions from law firm ASCO Legal and the Wellington Women Lawyers' Association. Members of the public pointed to situations where one partner was the primary income earner as well as primary caregiver of the couple's children, or where one partner independently saved for a house deposit and met all financial expenses associated with the home, because the other partner had no interest in buying a house. Negative contributions and misconduct, such as family violence and dissipation of property, were also raised. We discuss these issues below.

- 3.7 These submitters favoured division on the basis of the partners' contributions to the relationship. Wellington Women Lawyers' Association and several practitioners favoured extending contributions-based sharing to more couples under the PRA, either by extending the rules for short-term relationships (discussed in Chapter 4: Qualifying relationships), or applying contributions-based sharing to all couples without children, older couples, and second and subsequent relationships. ASCO Legal and a few other submitters favoured more staggered rules of division, with a partner's entitlement increasing over time and depending on their age and the presence of children.
- 3.8 Other submitters thought the equal sharing rule was too inflexible in failing to take into account the often unequal situation of the partners after separation, when one partner has been the primary caregiver of the partners' children during the relationship and, due to ongoing childcare commitments, finds it hard to re-enter the workforce after separation. We address this issue in greater detail in Chapter 5: Section 15.
- 3.9 The New Zealand Law Society (NZLS) did not specifically comment on the general rule of equal sharing (it was not a specific question in the Issues Paper), but its broad submission was that the framework of the PRA is sound and in general terms achieves a fair and just division of property when partners separate.

Results of the Borrin Survey

- 3.10 Results of the Borrin Survey provide statistically representative data on New Zealanders' public attitudes and values about equal sharing. It found that awareness of equal sharing was high among New Zealanders, with 79 per cent of all respondents stating that they were aware of equal sharing (and a further four per cent answering "maybe/think so").¹³⁵ The Borrin Survey also identified a high level of support for equal sharing. 74 per cent of all respondents either agreed (43 per cent) or strongly agreed (32 per cent) with equal sharing.¹³⁶
- 3.11 Respondents who had experienced a previous separation where relationship property was divided were less likely to agree with equal sharing (68 per cent, compared to 74 per cent of all respondents), and were also more likely to hold strong views on equal sharing.

¹³⁵ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [109]. Respondents were read out the following description of equal sharing (at [108]):

The law says that the family home, household items (such as furniture or the car), money, debt or property the couple get during the relationship are considered to be relationship property and should be shared equally if the couple separate. This is sometimes known as a 50/50 split or the equal sharing law.

¹³⁶ Six per cent strongly disagreed, 10 per cent disagreed, seven per cent neither agreed nor disagreed and two per cent didn't know: I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at 31 (Figure Four). Note that the figures in individual categories may not add up to the net figure due to rounding.

37 per cent strongly agreed with equal sharing (compared to 32 per cent of all respondents) and 10 per cent strongly disagreed with equal sharing (compared to six per cent of all respondents).¹³⁷

- 3.12 Respondents were given specific scenarios that tested their views on equal sharing in different situations, namely where one partner brings property to the relationship, and where one partner finds their post-separation earning potential is impaired because they stopped working to care for children during the relationship. Responses to these scenarios revealed that 88 per cent of those who agreed with equal sharing in principle did not always support equal sharing in practice in these situations.¹³⁸ In other parts of this paper we address what this means for considering what property is shared (Chapter 2: Classification), and how to respond to economic disparities following separation (Chapter 5: Section 15). It also raises a more general point about the need for the law to recognise that, in some situations, equal sharing should be departed from.

Rules of division in comparable jurisdictions

- 3.13 Comparable jurisdictions that adopt a rules-based property sharing regime all adopt a general rule of equal sharing, but reserve some discretion to the court for departing from equal sharing in limited circumstances. We address these circumstances at paragraphs 3.33–3.35 below. This is the case in the Canadian provinces and in Scotland.¹³⁹
- 3.14 Australia, England and Wales and Ireland adopt a discretionary approach to property division.¹⁴⁰ In these jurisdictions there is no distinction between "relationship property" and "separate property". A court may instead re-allocate property between the partners if it considers it just to do so. The advantage of a discretionary approach is that it provides an individualised form of justice, tailored to the specific circumstances of each case. A court can take into account factors that are generally not relevant under a rules-based regime, including the partners' future needs and post-separation childcare arrangements.¹⁴¹ The disadvantage of such an approach is that the law is less predictable, which can hinder efficient resolution of property disputes and lead to protracted and expensive litigation. We note there have been recent calls in Australia and in England and Wales for a shift towards an equal sharing presumption.¹⁴²

¹³⁷ At [149].

¹³⁸ At [257].

¹³⁹ See for example the law in British Columbia where "family property" is generally shared equally, but a court has power to order unequal division where equal division would be "significantly unfair": Family Law Act SBC 2011 c 25, s 95. Scottish law relies on the principle that matrimonial property is "taken to be shared fairly ... when it is shared equally": Family Law (Scotland) Act 1985, s 10(1). However, a court has the power to order unequal sharing where there are "special circumstances": s 10(1) and s 10(6).

¹⁴⁰ See Family Law Act 1975 (Cth); Matrimonial Causes Act 1973 (UK); and Family Law (Divorce) Act 1996 (Ireland).

¹⁴¹ The Australian Law Reform Commission, when reviewing Australia's discretionary property sharing regime in 1987, explained in their report *Matrimonial Property* (Report No 39, 1987) at xxvii that:

... the major question is not whether the law of property allocation on divorce should be formally based on judicial discretion or on legislatively prescribed entitlements. It is whether the post-separation circumstances of the spouses and their children should be taken into account in the allocation of property, or whether these circumstances are primarily matters for the law of spousal and child maintenance and social security.

The Commission concluded that the post-separation circumstances of the parties and their children must continue to be a factor in the re-allocation of property. Introduction of a rule of equal sharing without regard to the spouses' post-separation circumstances would, the Commission considered, primarily work to the disadvantage of custodial parents and women whose earning capacity had been impaired by their marriage: at xxvii.

¹⁴² In England, the Divorce (Financial Provision) HL Bill (2017-19) 26, a private member's bill, was introduced by Baroness Deech with the object of introducing principles-based division, similar to Scotland, including a presumption of equal

Preferred approach

P11

The PRA should continue to provide that each partner is entitled to share equally in all relationship property, subject to limited exceptions.

- 3.15 Our preferred approach is to retain equal sharing, subject only to the limited exceptions discussed below.
- 3.16 We appreciate that equal sharing may not always be seen as achieving a fair outcome in individual cases. This is evident from some of the submissions we received. We are satisfied, however, that the risk of unfair outcomes in individual cases does not warrant reform to the general rule of equal sharing, for the following reasons:
- (a) Equal sharing is consistent with public attitudes and values. Results of the Borrin Survey indicate a strong level of support for equal sharing, with just under three quarters of all respondents agreeing or strongly agreeing with the current law. We consider this reflects broad public acceptance that partners can contribute to the relationship or family joint venture in different ways, but that all forms of contribution, financial and non-financial, should be treated as equal. Equal sharing also promotes gender equality, as women historically tended to make non-financial contributions, and while gender roles are changing, the evidence suggests women continue to make more non-financial contributions than men.¹⁴³
 - (b) Equal sharing is a well understood rule. Results of the Borrin Survey revealed that just under 80 per cent of all respondents were aware of equal sharing. Because the PRA is social legislation and affects so many people, there is a great deal of value in public awareness of the law.
 - (c) Equal sharing is easy to understand and simple to apply, which in turn makes the law more predictable. It provides a "bright-line" test for determining each partner's share of the relationship property. This helps partners to understand their rights and empowers them to resolve property matters out of court, which is central to the principle that disputes should be resolved as inexpensively, simply and speedily as is consistent with justice.
 - (d) While some submitters did favour contributions-based sharing, overall this was not a strong theme of consultation (24 submissions raised this as an issue out of a total of 313 submissions received on the Issues Paper).

sharing: cl 4(2). A second reading took place in the House of Lords on 11 May 2018. The date of the Committee stage is yet to be scheduled. In Australia, the Australian Law Reform Commission is reviewing the family law system, including the property division rules. A 2014 review by the Australian Productivity Commission recommended that the Australian Government review whether presumptions should be introduced, as currently applies in New Zealand, in order to promote greater use of informal dispute resolution mechanisms: see Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 2, 5 September 2014) at 874. In its recent review, the Australian Law Reform Commission, following consultation, concluded that the case has not been made out for a shift from a discretionary system to a prescriptive system before further research is undertaken about property adjustment on relationship breakdown. However, it outlined a number of amendments that can be made to improve the clarity of the law: see Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at 59–61.

¹⁴³ See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at ch 6.

(e) Repeal of equal sharing would be a radical shift in policy. The alternatives to equal sharing involve a greater degree of discretion, and would therefore undermine the important benefits of certainty and clarity in the existing regime.¹⁴⁴ This would hinder the simple, speedy and inexpensive resolution of PRA matters.

- 3.17 Our proposals must be seen as a package of reforms. The key issues identified with equal sharing are addressed by our preferred approach in Chapter 2: Classification and Chapter 5: Section 15. In light of those proposals, we consider that the benefits of a simple, well understood and certain rule outweigh the benefits of adopting a more individualised and discretionary approach to division.

EXCEPTION TO EQUAL SHARING FOR EXTRAORDINARY CIRCUMSTANCES

Current law

- 3.18 Section 13 provides that, "if the court considers that there are extraordinary circumstances that make equal sharing ... repugnant to justice", the share of each partner in the relationship property is to be determined in accordance with the contribution of each partner to the relationship.

- 3.19 The operation of section 13 was settled by a string of Court of Appeal cases decided shortly after the Matrimonial Property Act 1976 was enacted.¹⁴⁵ In 2016, the High Court described the approach to be taken under section 13 as "uncontroversial and beyond doubt".¹⁴⁶

- 3.20 Section 13 sets a high threshold for departing from equal sharing. In *Martin v Martin* the Court of Appeal said:¹⁴⁷

It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare.

- 3.21 Section 13 is not, however, an impossible threshold.¹⁴⁸ In determining whether the section 13 threshold is met, all the circumstances of the case must be considered.¹⁴⁹ This requires a comparison of the relevant relationship against the whole range of different qualifying relationships, rather than against some kind of relationship "norm".¹⁵⁰

¹⁴⁴ Another alternative might be another bright line rule, for example an entitlement of 60 per cent of the relationship property pool to the primary caregiver if there are children. ASCO Legal submitted that the Property (Relationships) Act 1976 should provide a sliding scale of entitlements that would take into account the partners' age, the length of the relationship and the presence of children or grandchildren. We are not satisfied, however, that either option would be workable in practice, or would reduce unfair outcomes.

¹⁴⁵ See *Martin v Martin* [1979] 1 NZLR 97 (CA); *Dalton v Dalton* [1979] 1 NZLR 113 (CA); *Williams v Williams* [1979] 1 NZLR 122 (CA); and *P v P* [1980] 2 NZLR 278 (CA). These early cases remain authority despite the 2001 amendments to what is now the Property (Relationships) Act 1976: *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC).

¹⁴⁶ *B v B* [2016] NZHC 1201, [2017] NZFLR 56 at [26].

¹⁴⁷ *Martin v Martin* [1979] 1 NZLR 97 (CA) at 102.

¹⁴⁸ *Jones v Ballantine* (1984) 1 FRNZ 140 (HC) at 141.

¹⁴⁹ *Simon v Wright* [2013] NZHC 1809 at [68] affirming *J v J* (1993) 10 FRNZ 302 (CA).

¹⁵⁰ *J v Jn* (1993) 10 FRNZ 302 (CA) at 307.

- 3.22 The fact that one partner brought the family home to the relationship,¹⁵¹ earned significantly more than the other partner,¹⁵² is significantly younger or older than the other partner,¹⁵³ or is nearing retirement on separation¹⁵⁴ would not in itself constitute an extraordinary circumstance, as it not so unusual or outside the whole range of "ordinary" qualifying relationships. However these factors, taken in combination with other circumstances, may amount to extraordinary circumstances.¹⁵⁵
- 3.23 There are two broad categories of cases where section 13 applies:¹⁵⁶
- (a) Where the technical criteria for equal sharing are only marginally satisfied. This might include where a relationship only just reaches the three year qualifying period, where the family home or family chattels have been used as such for a very short period of time,¹⁵⁷ or where an inheritance was applied to the family home or family chattels shortly before the parties separated.¹⁵⁸
 - (b) Where there is a gross disparity in contributions to the relationship.¹⁵⁹ This might apply where one partner contributed significantly more to the relationship, in terms of monetary and non-monetary contributions, or where one partner made negative contributions to the relationship, due to misconduct.¹⁶⁰

Issues

- 3.24 In the Issues Paper we expressed the view that a court must be able to depart from equal sharing in appropriate cases (Issues Paper at [12.16]). We also considered that there should be a high threshold for departing from equal sharing, in order to preserve the principles of the PRA (Issues Paper [12.17]).
- 3.25 However we noted the need to revisit the section 13 test in light of our proposals to reform other key rules in the PRA, and to consider whether the section 13 test and its focus on "extraordinary circumstances" remains appropriate in light of the increasing diversity of relationships (Issues Paper at [12.18]–[12.19]).

¹⁵¹ See *Martin v Martin* [1979] 1 NZLR 97 (CA) at 110; *Dalton v Dalton* [1979] 1 NZLR 113 (CA) at 118; and *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 698.

¹⁵² See *Simon v Wright* [2013] NZHC 1809 at [78].

¹⁵³ *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [134].

¹⁵⁴ At [134].

¹⁵⁵ For example see *B v S* [2016] NZFC 7132. In that case there was a finding of extraordinary circumstances where Ms Starke brought the assets available for division to the relationship, the marriage was of only three years and six months duration, there were no children, both parties were mature when they met and married, Ms Starke was 22 years older than Mr Brown and, realistically, her opportunities to re-establish herself following on from the breakdown of the marriage were limited as she was aged 74 years and in receipt of a benefit.

¹⁵⁶ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.28]–[12.30].

¹⁵⁷ At [12.29] citing *Finny v Finny* [1979] NZ Recent Law 211 (SC); *Beuker v Beuker* (1977) 1 MPC 20 (SC); *Jerome v Jerome* (1977) 1 MPC 113 (SC); *Castle v Castle* [1977] 2 NZLR 97 (SC); and *Castle v Castle* [1980] 1 NZLR 14 (CA).

¹⁵⁸ See *A v C* (1997) 16 FRNZ 29 (HC).

¹⁵⁹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.30] citing *Castle v Castle* [1977] 2 NZLR 97 (SC); *Castle v Castle* [1980] 1 NZLR 14 (CA); *J v J* (1979) 2 MPC 100 (SC); *Martin v Martin* [1979] 1 NZLR (CA); *Dalton v Dalton* [1979] 1 NZLR 113 (CA); *O'Keefe v O'Keefe* (1980) 3 MPC 128 (HC); *P v P* [1980] 2 NZLR 278 (CA); *SJB v IRM* [2011] NZCA 435, [2011] NZFLR 1087.

¹⁶⁰ *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 per Gendall J at [28]. However s 13 calls for a broader approach to contributions than the detailed consideration under s 18: *J v J* (1993) 10 FRNZ 302 (CA) at 309 per McKay J and at 306 per Richardson J.

3.26 We noted two options for reform (Issues Paper at [12.20]):

- (a) **Option 1:** Prescribing in greater detail the matters a court should take into account when deciding whether section 13 should apply; and
- (b) **Option 2:** Setting out examples in the PRA of how the exception is intended to operate, or replacing the current section 13 test with a new formula.

Results of consultation

- 3.27 Seven submitters commented on section 13 specifically. Submitters generally agreed that there remains a need for a provision that permits a court to depart from equal sharing in appropriate cases. NZLS commented that section 13 prevents partners falling prey to strict equal sharing within a narrow probationary period.
- 3.28 There were differing views as to whether the wording of section 13 is satisfactory. NZLS said that it was unaware of any general discontent with the working of section 13, that it was now well-understood, and that it was operating fairly. It submitted that section 13 should be retained in its present form. While there is the occasional hard case, NZLS felt that this was a necessary trade-off for a simple, universal rule.
- 3.29 Jan McCartney QC submitted that section 13 has real limitations, because even if the high threshold is satisfied, the court must then direct sharing in accordance with the partners' contributions to the relationship. She supported an amendment that allowed a court to "make an order that reflects the justice of the particular case, rather than the contributions to the relationship".
- 3.30 Professor Nicola Peart questioned whether cultural diversity ought to play a role in section 13.
- 3.31 Two members of the public commented that the section 13 test was set too high. Other submitters commented generally that equal sharing was unfair in situations when the partners' contributions to the relationship (both financial and non-financial) were unequal (see paragraph 3.6). These submitters may well consider that the section 13 test, which generally requires a gross disparity in contributions (see paragraph 3.23(b)), sets the threshold too high.
- 3.32 Practitioners and Family Court judges we talked to during consultation meetings also raised the concern that, while the operation of section 13 might be uncontroversial and beyond doubt in the courts, it is inaccessible and easily misunderstood by the public. Unrepresented litigants in particular may find it difficult to understand how section 13 operates, and apply it to their own circumstances.

Exceptions to equal sharing in comparable jurisdictions

- 3.33 As noted at paragraph 3.13 above, comparable rules-based jurisdictions adopt a general rule of equal sharing but reserve some discretion to the court for departing from equal sharing in limited circumstances.¹⁶¹ There is however no consistency in the test for departing from equal sharing.

¹⁶¹ Jurisdictions that adopt a discretionary approach to property division do not have a general rule of equal sharing nor exceptions to equal sharing. See paragraph 3.14 above.

- 3.34 In Canada, the provinces adopt different tests for departing from equal sharing, including where equal sharing would be "unconscionable",¹⁶² "inequitable",¹⁶³ "significantly unfair",¹⁶⁴ "grossly unfair or unconscionable",¹⁶⁵ "unfair or unconscionable",¹⁶⁶ or "unfair and inequitable".¹⁶⁷ A court is often required to apply the test having regard to a range of statutory considerations. These considerations vary across provinces, but often include the duration of the relationship, whether the parties had an agreement about the division of property, whether one partner dissipated property during the relationship, and the circumstances related to the acquisition, disposition or preservation of property.¹⁶⁸
- 3.35 In Scotland, matrimonial property is shared equally, "or in such other proportions as are justified by special circumstances".¹⁶⁹ Special circumstances may include the terms of any agreement between the partners, the source of funds used to acquire matrimonial property, dissipation of property by one partner and the nature and use of matrimonial property.¹⁷⁰ The lower threshold of "special circumstances", and the provision of additional principles of division,¹⁷¹ means that, overall, the threshold for departing from equal sharing in Scotland is much lower than in New Zealand or the Canadian jurisdictions.¹⁷²

Preferred approach

- 3.36 We propose no change to section 13. We are satisfied that the section 13 test continues to set the appropriate threshold for departing from equal sharing in light of our other proposals for reform outlined in this paper, and is flexible enough to respond to the many different variations in relationships today and into the future.
- 3.37 We do, however, recognise the need for greater information to be available to the public on how the section 13 test operates in practice. In Chapter 10: Resolution we recommend the publication of an information guide for separating partners, and that guide should include information about when a court might apply the section 13 test and depart from

¹⁶² In Ontario, see Family Law Act RSO 1990 c F-3, s5(6); and Prince Edward Island, see Family Law Act RSPEI 1988 c F-2.1, s 6(5).

¹⁶³ In New Brunswick, see Marital Property Act RSNB 2012 c 107, s 7.

¹⁶⁴ In British Columbia, see Family Law Act SBC 2011 c 25, s 95.

¹⁶⁵ In Manitoba, see Family Property Act CCSM 2017 c F25, s 14. In Newfoundland and Labrador a similar formulation is used, where equal sharing "would be grossly unjust or unconscionable": Family Law Act RSNL 1990 c F-2, s 22.

¹⁶⁶ In Nova Scotia, see Matrimonial Property Act RSNS 1989 c 275, s 13.

¹⁶⁷ In Saskatchewan, see Family Property Act SS 1997 c F-6.3, s 21(2). In Alberta a similar formulation is used, where equal sharing "would not be just and equitable": Matrimonial Property Act RSA 2000 c M-8, s 7.

¹⁶⁸ Family Law Act RSO 1990 c F-3, s 5(6); Family Law Act SBC 2011 c 25, s 95; Matrimonial Property Act RSA 2000 c M-8, s 8; Family Property Act SS 1997 c F-6.3, s 21(4); Matrimonial Property Act RSNS 1989 c 275, s 13; Family Law Act RSN 1990 c F-2, s 22; Family Law Act RSPEI 1988 c F-2.1, s 6(5); Family Law Act SNWT (Nu) 1997 c 18, s 18(6); Marital Property Act RSNB 2012 c 107, s 7; and Family Property and Support Act RSY 2002 c 83, s 13.

¹⁶⁹ Family Law (Scotland) Act 1985, s 10(1).

¹⁷⁰ Section 10(6).

¹⁷¹ Four other principles of division in s 9 can affect property division in Scotland. These principles cover economic advantage or disadvantage suffered by either party, childcare responsibilities on separation, rehabilitation of an economically dependent former spouse, and the possibility of creating financial hardship.

¹⁷² This is evident in the results of a recent review of 200 cases decided under the Scottish regime, which found that a departure from equal sharing was sought in about 40 per cent of all cases, and was granted in just over 20 per cent of all cases: Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2016) at 50.

equal sharing, and what it means to divide relationship property on the basis of each partner's contributions to the relationship.

The relationship between section 13 and our other proposals for reform

- 3.38 In Chapter 2: Classification we propose that partners should only share property that was acquired during the relationship, or before the relationship began if it was acquired for the partners' common use and common benefit.¹⁷³ In Chapter 4: Qualifying relationships we propose abolishing the separate regimes for short-term relationships. In Chapter 5: Section 15 we propose that partners should share future income in some situations, in order to ensure the economic advantages and disadvantages arising from a relationship or its end are shared.
- 3.39 The combined effect of these proposals will be that more relationships will be subject to equal sharing (in particular, marriages and civil unions of less than three years' duration). But the pool of resources to be divided on separation will be smaller, or larger, depending on the circumstances of the relationship. In particular, in shorter relationships, and relationships entered into later in life, the relationship property pool for division may be smaller, because property acquired before the relationship was contemplated will no longer be shared. In longer relationships, and other relationships where the partners have arranged their lives in such a way that one partner is economically advantaged or disadvantaged on separation, the pool of resources may extend to include future income for a limited period. In effect, our proposals intend to move away from a "one size fits all" approach, and provide a more tailored response to the increasing diversity of relationships in contemporary New Zealand.
- 3.40 In light of these proposals, we consider that the proper role of section 13 remains to address truly exceptional cases that cannot be envisaged by the legislation, and that would make equal sharing, in the broader context of the PRA framework (as amended under our proposed reforms) repugnant to justice.

The section 13 test does not require reform

- 3.41 We do not propose amending the section 13 test, for the following reasons:
- (a) We are satisfied that the section 13 test is flexible enough to respond to the many different variations in relationships today and into the future. While relationships are more diverse, our review of the cases has not identified a concern that the current formulation of section 13 is preventing the courts from considering the diverse circumstances of any given case and reaching an appropriate view on all of the evidence.
 - (b) We consider that the result of a successful section 13 claim, the division of relationship property on the basis of each partner's contribution to the relationship, is appropriate. It permits a court to consider all the relevant circumstances of the relationship and arrive at an individualised result, without compromising the principles

¹⁷³ Family chattels will however continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 2: Classification.

of the PRA, for example by permitting a court to focus only on monetary contributions to the relationship.¹⁷⁴

- (c) Any amendment to the section 13 test, either to modernise the wording used or to adopt a lower threshold, has significant disadvantages. It would change what is a well-established test, and would likely result in significant uncertainty, at least in the short-to-medium term.¹⁷⁵ A lower threshold would also likely result in more applications and awards for unequal sharing. Given our proposals in other parts of this paper, discussed above, we do not think a lower threshold is justified in the New Zealand context.

3.42 We have also considered, but do not prefer, including a list of relevant factors for the purposes of the section 13 test. This is for several reasons:

- (a) First, we do not consider that the operation of section 13 is amenable to a simple list of relevant considerations. In determining whether the section 13 threshold is met, all the circumstances of the case must be considered. Circumstances taken individually, such as one partner owning the family home before the relationship began, may not amount to an extraordinary circumstance in and of itself. Attempts to come up with a list of relevant considerations may misrepresent the current approach, and create uncertainty, particularly for unrepresented litigants.
- (b) Second, relationships are of infinite variety, and extraordinary circumstances "can involve an infinite variety of situations".¹⁷⁶ Section 13, as currently worded, imposes no limits on the range of circumstances the courts can take into account.¹⁷⁷ Coming up with a list of relevant considerations would be difficult.
- (c) Third, the absence of a list of relevant factors in section 13 provides the courts with greater flexibility to respond to a changing social context. The Court of Appeal in *J v J* confirmed that section 13 involves a consideration of whether "in the New Zealand society of the times the circumstances advanced can truly be characterised as extraordinary".¹⁷⁸ Priestley J in a subsequent decision said this "constituted a permission to adapt the law to changing social norms".¹⁷⁹ We are concerned that attempts to further define what may amount to extraordinary circumstances would risk unduly limiting the circumstances that can be taken into account, now and in the future.

¹⁷⁴ We note that contributions-based sharing can result in awards close to 100 per cent of the relationship property pool in extreme cases: for example see *Miramontes v Brennan* [2017] NZFC 4298, [2017] NZFLR 623 where the court ordered a 90:10 division on the basis of the partners' respective contributions to the relationship.

¹⁷⁵ We note that when s 13 was first introduced, a series of Court of Appeal decisions leading into the 1980s were necessary to clarify the operation of the provision (see paragraph 3.19 above).

¹⁷⁶ *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 at [28].

¹⁷⁷ *J v J* (1993) 10 FRNZ 302 (CA) at 304.

¹⁷⁸ At 307.

¹⁷⁹ *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [129].

THE ROLE OF MISCONDUCT IN THE DIVISION OF RELATIONSHIP PROPERTY

Current law

- 3.43 Section 18A addresses the relevance of misconduct in PRA matters. It provides that a court may not take misconduct into account in proceedings under the PRA, except when determining:
- (a) the contribution of a partner to the relationship; or
 - (b) what order it should make under sections 26, 26A, 27, 28, 28B, 28C and 33.¹⁸⁰
- 3.44 In order for misconduct to be taken into account, it "must have been gross and palpable and must have significantly affected the extent or value of the relationship property" (section 18A(3)). For convenience we refer to this as "gross and palpable misconduct".
- 3.45 The effect of section 18A is that the partners' conduct during the relationship is generally irrelevant to the division of relationship property. This reflects the implicit "no-fault" principle underpinning the PRA.

The relationship between sections 13 and 18A

- 3.46 The relationship between sections 13 and 18A is unclear. Section 18A does not expressly permit gross and palpable misconduct to be taken into account in determining whether there are extraordinary circumstances that justify a departure from equal sharing under section 13. But section 18A does allow a court to take into account gross and palpable misconduct when determining the contribution of a partner to the relationship. This is relevant to how property is divided under section 13, if a court is satisfied that extraordinary circumstances exist.
- 3.47 This lack of clarity has resulted in differing interpretations on the question of whether gross and palpable misconduct can justify a departure from equal sharing under section 13.¹⁸¹
- 3.48 It is also unclear whether the *effect* of misconduct falling short of the gross and palpable threshold is relevant under section 13. In *J v J*, the Court of Appeal held that while the fact of misconduct that was not gross and palpable had to be disregarded for the purposes of section 13, a court could take into account the disparity of contribution between the partners which resulted from that misconduct.¹⁸² But in a later case, the Court of Appeal took a more restrictive approach, observing that "misconduct is

¹⁸⁰ In this chapter we are concerned primarily with the impact of misconduct on the division of relationship property. Further consideration is required in relation to the impact of misconduct on the exercise of the court's discretion on other relationship property matters, including under these sections (listed in s 18A(2)(b)).

¹⁸¹ Authors of Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR13.06] say that the current law:

... is that conduct is not a basis for a finding of extraordinary circumstances rendering equal sharing repugnant. However, if subs 18A(2) and (3) are satisfied, conduct can be a factor in determining contributions.

By contrast, the authors of RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.34] say:

The comparison of contributions central to the discretion under s 13(1) clearly imports misconduct, which in terms of s 18A(3) has been "gross and palpable and has significantly affected the extent or value of the relationship property.

Compare, for example, the decision in *J v J* (2005) 25 FRNZ 1 (CA) at [11] with the decisions in *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 at [28]; and *Simon v Wright* [2013] NZHC 1809 at [79].

¹⁸² *J v J* (1993) 10 FRNZ 302 (CA) at 311–312 per McKay J. See also the decisions of Cooke P at 305 and Richardson J at 306. This case was decided under previous s 18(3) of the Matrimonial Property Act 1976.

irrelevant except to the extent provided for by s 18A(2) and (3)".¹⁸³ Subsequent cases have taken different approaches, some favouring the earlier approach in *J v J*,¹⁸⁴ others favouring the later approach.¹⁸⁵

The role of family violence

- 3.49 It is rare for family violence to have any impact on the division of property under the PRA. This is for two reasons.
- 3.50 First, it is often difficult for family violence to satisfy the threshold of gross and palpable misconduct. In *W v G* the District Court considered that, in order for family violence to be "gross and palpable" it "must be readily perceived or evident".¹⁸⁶ Family violence must also have "significantly affected the extent or value of the relationship property" in order to satisfy the section 18A(3) threshold. This requirement "has caused Judges difficulty in recognising in any real way the economic consequences of domestic violence".¹⁸⁷
- 3.51 Second, family violence may not be considered an extraordinary circumstance justifying a departure from equal sharing under section 13. In *S v S* the District Court noted that it was "an unfortunate indictment on our society that the occasional assault during a marriage is not so uncommon as to be extraordinary".¹⁸⁸ In *H v D* violence occurred throughout the relationship, exposing the children to physical, emotional and psychological abuse.¹⁸⁹ However the High Court agreed with the Family Court that the circumstances of this relationship were "ordinary rather than extra-ordinary – they are typical of many current de facto or marriage relationships".¹⁹⁰ Further, if a partner was violent but contributed in other ways, the circumstances are unlikely to be extraordinary.¹⁹¹

¹⁸³ *J v J* (2005) 25 FRNZ 1 (CA) at [11]. In that case the Court was asked, in an application for leave to appeal, whether the husband's misconduct (deceit about his affair), which fell short of gross and palpable misconduct, was "of at least contextual significance" for the purposes of determining whether there were extraordinary circumstances under s 13 (at [10]).

¹⁸⁴ In *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 Gendall J said at [36]:

It is clear that even if misconduct does not meet the s 18A test it does not follow that it has a reverse influence by requiring the Court to ignore the resulting imbalance of contributions: [*J v J*] (supra) per McKay J (at 312).

See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.40]; *Maxfield v Maxfield* HC Hamilton AP 106/02, 22 June 2004; and *E v W* (2006) 26 FRNZ 38 (FC) at [10]–[11].

¹⁸⁵ In *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 Faire J, after referring to *J v J* (2005) 25 FRNZ 1 (CA), held at [55]:

[Conduct] will only be relevant if it is gross and palpable and in other respects complies with s 18A. The words "or otherwise" in s 18A(1) make it clear that not only is conduct not able to be taken into account to diminish one partner's contributions, it is not able to be used in any other way.

However in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 Glazebrook J said at [61]:

The fundamental point to be made regarding conduct is that it cannot be used to affect one party's share in relationship property unless the conditions in s 18A are met. This is not to say that the consideration of conduct is not allowed where it is otherwise relevant. For example, in a decision relating to vesting, conduct could be relevant to assessing the parties' relative attachment to a property.

¹⁸⁶ *W v G* DC Wellington FP558/92, 16 August 1995 at 12.

¹⁸⁷ *Watson v Watson (No 2)* (1999) 19 FRNZ 24 (DC) at 25 citing *W v G* DC Wellington FP558/92, 16 August 1995.

¹⁸⁸ *S v S* DC Whangarei FP 888/218/82, 22 April 1991 at 10.

¹⁸⁹ *H v D* HC Wellington CIV-2008-485-950, 3 August 2008 at [29].

¹⁹⁰ At [31].

¹⁹¹ See for example *S v S* DC Whangarei FP 888/218/82, 22 April 1991, where Judge Robinson found the husband's assaults on the wife were serious, but having regard to the number of assaults (4), the time elapsing since the last assaults, and the fact that "in all other respects the husband has been a good provider, a hard worker and a good father" he was "satisfied that such evidence does not create a situation where there are extraordinary circumstances" (at 10).

- 3.52 We are only aware of one case where family violence was found to be gross and palpable, to have significantly reduced the value of relationship property and, along with the husband's other negative financial contributions, justified a departure from equal sharing.¹⁹²

Issues

- 3.53 In the Issues Paper we observed that there have been calls for a partner's misconduct to have a greater bearing on the division of relationship property, particularly in cases of family violence (Issues Paper at [12.28]). A further issue is the current uncertainty around the relationship between sections 13 and 18A, discussed above.

Results of consultation

- 3.54 We received 32 submissions that commented whether misconduct should have a greater bearing on the division of property under the PRA. Most submitters focused on family violence, although a few members of the public submitted that other forms of misconduct, in particular adultery, should be considered when dividing property under the PRA.
- 3.55 Submitters were divided on the relevance of family violence to property division. Among members of the public, 13 submitters thought that family violence should be an exception to equal sharing. These submitters pointed to the significant toll family violence has on its victims, the negative economic impacts on the partner who was the victim of family violence and their likely greater future needs, as well as physical damage to relationship property resulting from family violence. They felt that in failing to address family violence in the division of relationship property, the PRA is in effect rewarding violent partners for their behaviour throughout the relationship. They advocated for the PRA to play a greater role in condemning family violence by reducing the perpetrator's relationship property entitlement. Eight submitters did not support family violence as an exception to equal sharing. These submitters gave reasons including that restitution for family violence should be addressed under other areas of family and criminal law, that an exception for family violence might increase the risk of further abuse for victims who seek to rely on it, and that as family violence is often hidden, it will be difficult to prove the nature and extent of past family violence.
- 3.56 The Ministry for Women, the National Council of Women of New Zealand and The Backbone Collective were all in favour of giving greater weight to family violence when dividing relationship property. The Ministry for Women considered that a larger share of relationship property might be appropriate where a victim of family violence has suffered a serious physical injury inflicted by their partner, or psychological harm from the abuse, preventing them from working or decreasing their earning capacity.
- 3.57 The Family Violence Death Review Committee (FVDRC), however, considered it best not to have a specific exception to equal sharing for family violence. Its concern was that any specific exception will likely be used equally (or more so) by predominant aggressors, particularly if they have financial means. FVDRC cautioned against enabling the legal

¹⁹² *B v H* (1998) 17 FRNZ 667 (FC) at 675–676. In that case the wife provided the family home and made most of the financial contributions, the husband worked occasionally and used those earnings for his own purposes, and physical violence and control of the wife by the husband featured throughout the relationship, resulting in the parties' separation.

system to be used by perpetrators to continue their abuse tactics post-separation. It therefore "reluctantly recommend[s] no change to the current misconduct exception".

- 3.58 NZLS was also opposed to reintroducing fault as a factor in property division beyond the current ambit of section 18A. It suggested that a wider exception could have the unintended consequence of encouraging fractious affidavits and incentivising meritless applications in relation to family violence. Remedies for family violence, it said, should be addressed elsewhere. Jan McCartney made a similar submission, commenting that "family violence is a topic for serious examination all on its own", and that if there are to be amendments, they should follow "a full and proper examination of the causes of family violence in New Zealand, consultation, a discussion paper and across-the-board solutions", rather than "one-offs in largely unrelated legislation".

The role of misconduct in comparable jurisdictions

- 3.59 Property division regimes in comparable jurisdictions are all underpinned by a no-fault philosophy. Misconduct is typically of limited relevance to property matters, unless it has a direct financial impact on the partners or their property.¹⁹³
- 3.60 In Australia, the relevance of misconduct to property division is currently under review. While Australian legislation is silent on the issue, case law has established that misconduct, and in particular family violence, is relevant to property division if it has a "significant adverse impact upon [the other] party's contributions to the marriage".¹⁹⁴ In practice, however, family violence is rarely relied on, which has raised concerns about access to justice for victims of family violence.¹⁹⁵ Several problems have been identified with the Australian approach, including the difficulty in proving family violence and its impact on the victim's contributions to the relationship, and the difficulty in quantifying the impact of family violence.¹⁹⁶
- 3.61 There have been calls for reform in Australia, but commentators disagree on what form change should take. Some argue that family violence should be dealt with purely through a financial needs adjustment, which is a feature of Australia's discretionary property

¹⁹³ In Canada, misconduct is typically irrelevant unless it amounts to dissipation or has some other direct financial impact: see for example Family Property Act CCSM 2017 c F25, s 14(3); Family Property Act SS 1997 c F-6.3, s 25; and Family Law Act RSN 1990 c F-2, s 23. In Scotland, a court is not able to take account of the conduct of either party, unless it has adversely affected the partners' relevant financial resources, or if it would be "manifestly inequitable" to leave the conduct out of account when considering the need to rehabilitate an economically dependent former spouse, or the possibility of creating financial hardship: Family Law (Scotland) Act 1985, s 11(7). In England and Wales the court shall, when making property adjustment orders, have regard to the conduct of each of the parties, "if that conduct is such that it would in the opinion of the court be inequitable to disregard it": Matrimonial Causes Act 1973 (UK), s 25(2)(g). The courts have interpreted this as setting a very high standard before conduct can be considered relevant to property orders: see *Wachtel v Wachtel* [1973] 2 WLR 366 (CA); *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618; and *AAZ v BBZ* [2016] EWHC 3234 (Fam), [2018] 1 FLR 153.

¹⁹⁴ *In the Marriage of Kennon* (1997) 22 Fam LR 1 (FC) at 3.

¹⁹⁵ See Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at [3.113] citing Patricia Easteal, Catherine Warden and Lisa Young "The Kennon 'Factor': Issues of Indeterminacy and Floodgates" (2014) 28 AJFL 1 at 9–12.

¹⁹⁶ See Sarah Middleton "The verdict on *Kennon*: failings of a contribution-based approach to domestic violence in Family Court property proceedings" (2005) 30 Alt LJ 237; Angela Lauman "Factoring in the Cost of Violence: the Relevance of Family Violence in Determining Property Settlements under the Family Law Act" (Honours Thesis, Australian National University, 2014); and Quijun Jia "Can domestic violence affect property settlement?" *The Bulletin* 39(4) (South Australia, May 2017) at 40.

regime.¹⁹⁷ Others suggest that family violence should be considered a negative contribution to the relationship property,¹⁹⁸ or that a separate statutory compensation regime should be introduced, which would enable the court to award compensation for pain and suffering and economic loss as a result of a history of family violence during the relationship.¹⁹⁹

- 3.62 In October 2018 the Australian Law Reform Commission (ALRC) released a discussion paper on its review of the family law system.²⁰⁰ It proposes legislative amendments to require a court to take into account the effect of family violence on a party's contributions to the relationship, and in determining the future needs of the parties.²⁰¹ The ALRC considers its proposals will clarify the relevance of family violence to property settlements, particularly for unrepresented litigants.²⁰²

Preferred approach

P12

The PRA should be amended to clarify that a court can take into account a partner's misconduct that satisfies the threshold in section 18A(3) when deciding whether there are extraordinary circumstances which make equal sharing repugnant to justice under section 13.

P13

The Government should consider the division of property at the end of a relationship under the PRA, in the context of its wider response to family violence.

- 3.63 To date Parliament has resisted calls to give misconduct greater weight in the division of property.²⁰³ While we recognise the risk of an unjust outcome in cases where one partner's misconduct does not meet the high threshold in section 18A(3), or does not amount to extraordinary circumstances under section 13, we are not persuaded that it is appropriate or desirable that general misconduct should play a greater role in property division under the PRA.
- 3.64 In our view, providing for greater recognition of misconduct would incentivise partners to focus on fault and lay blame, which would in turn "impose an impossible burden on the courts to require them to apportion blame for the breakdown of the [relationship] in each individual case".²⁰⁴ It would also introduce an undesirable level of discretion into what is a

¹⁹⁷ Sarah Middleton "The verdict on *Kennon*: failings of a contribution-based approach to domestic violence in Family Court property proceedings" (2005) 30 Alt LJ 237 at 241.

¹⁹⁸ Quijun Jia "Can domestic violence affect property settlement?" *The Bulletin* 39(4) (South Australia, May 2017) at 41.

¹⁹⁹ Patrick Parkinson "Reforming the Law of Family Property" (1999) 13(2) AJFL 117.

²⁰⁰ Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018).

²⁰¹ At 56 (Proposal 3–11).

²⁰² At [3.116]–[3.122].

²⁰³ In 2001 the Select Committee considering the amendments to the then Matrimonial Property Act 1976 considered that it would be undesirable to introduce fault or misconduct as a basis for property division, and would represent a significant departure from the current scheme: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

²⁰⁴ Law Commission of England and Wales *Family Law – The Financial Consequences of Divorce* (LAW COM No 112, 1981) at [36].

rules-based regime, making the law less certain and predictable, thereby undermining the principle of inexpensive, simple and speedy resolution of PRA matters.²⁰⁵

- 3.65 We are, however, concerned about the current uncertainty around the relationship between sections 13 and 18A, and make proposals to clarify the law below.

Clarifying the relationship between sections 13 and 18A

- 3.66 We propose that the PRA should be amended to clarify the relationship between sections 13 and 18A. We do not think Parliament could have intended a restrictive interpretation that requires a court to ignore gross and palpable misconduct for the purposes of determining whether extraordinary circumstances exist, but then take it into account for the purposes of determining how the relationship property should be divided, if the extraordinary circumstances threshold is met for other reasons.²⁰⁶ Nevertheless the current uncertainty in the law is undesirable. We propose that the PRA should be amended to clarify that gross and palpable misconduct is relevant to a court's consideration of whether there are extraordinary circumstances that make equal sharing repugnant to justice. We propose that section 18A(2) should be amended to specifically refer to determinations under section 13.
- 3.67 We are also considering whether further clarification is required to ensure that, consistent with the decision in *J v J* (see paragraph 3.48 above), a court can take into account the effect of one partner's misconduct on the other partner's contributions to the relationship. We agree that a partner guilty of misconduct should not be able to obtain a double benefit from characterising their behaviour as misconduct, thereby preventing a court from taking into account any effect of that misconduct on the disparity in contributions of the partners.²⁰⁷ This might be achieved by removing the words "or otherwise" from section 18A(1). However this would have wider consequences, as it may affect the relevance of misconduct to PRA matters other than the division of relationship property. We will therefore consider this issue further in the final report.

Should there be a specific exception for family violence?

- 3.68 We recognise the concern that sections 13 and 18A, even with the amendment proposed above, are an inadequate response to family violence, for the reasons discussed at paragraphs 3.50–3.51. We do not, however, propose introducing a specific exception to equal sharing for family violence. We find force in Jan McCartney's submission that any amendments to the PRA that respond to family violence should follow a full and proper

²⁰⁵ Similar concerns were identified by the Australian Law Reform Commission in its consideration of whether to require a court to have regard to family violence in property division matters. It concluded, however, that these concerns were outweighed by the need for a clear statement in the law of the relevance of family violence to property settlement outcomes. This, it considered, may encourage settlement and better outcomes for people affected by family violence. See Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at [3.120].

²⁰⁶ Section 18A was inserted on 1 February 2002 by s 17 of the Property (Relationships) Amendment Act 2001, replacing what was s 18(3) of the Matrimonial Property Act 1976. The introduction of s 18A did not appear to have the intention of altering the effect of that provision. The explanatory note to Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (SOP) stated at 76 that the SOP repeats the rules of division "in a more modern drafting style", and that "[t]his SOP does not seek to alter the effect of those provisions". The Select Committee report on the SOP also states that "[p]roposed new section 18A retains current section 18(3)": Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 14.

²⁰⁷ *J v J* (1993) 10 FRNZ 302 (CA) at 311–312. See also the comments of William Young J in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [402].

examination of the causes of family violence in New Zealand and "across-the-board solutions rather than one-offs in largely unrelated legislation". We therefore propose that any reform to the PRA that has the effect of penalising perpetrators of family violence should be considered within the context of the Government's broader efforts to address the impacts of family violence in the community, and alongside wider issues including access to justice and appropriate support for victims of family violence.

3.69 Any future consideration of this issue should take into account the strong arguments for giving family violence greater weight in property division. Specifically:

- (a) The PRA is built on the theory that a qualifying relationship is a family joint venture, to which partners are presumed to contribute in different but equal ways. Family violence disrupts that presumption. By not penalising violence in property division the law "effectively transmits the message that the behaviour has no impact on the contributions to the marriage partnership of either spouse".²⁰⁸
- (b) The PRA is social legislation and it should reflect the increasing awareness of the damaging effects of family violence, and be consistent with other Government initiatives to curtail violent behaviour.²⁰⁹ As former Principal Family Court Judge Boshier wrote in 1998, "[f]rom a policy point of view, it is anomalous that matrimonial property law protects men from the consequences of conduct that is prohibited in other areas of law".²¹⁰
- (c) It is inconsistent for the PRA to take into account the consequences of some criminal behaviour, such as fraud, but not violence.²¹¹ While property-based crimes have been considered as rightly coming within the ambit of the PRA because they are directly related to the property of the couple, there is growing awareness that family violence also has ongoing economic consequences for the victim of family violence.²¹² By not penalising violence in property division the law "ignores the economic effect of the violence on the property of the parties".²¹³

3.70 It is also important that any future consideration of this issue take into account the arguments against giving family violence greater weight in property division (see also our general concerns at paragraph 3.64). In particular:

²⁰⁸ Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

²⁰⁹ At 153. Current action and innovations being undertaken by Government includes the Integrated Safety Response/ Whangaia Ngā Pa Harakeke/ E Tu Whānau/ and Pasefika Proud, and the Family and Whānau Violence Legislation Bill (247-2) which seeks to enable a collaborative government response to people experiencing family violence by increasing access to risk and needs assessments and services, more accurately recording family violence offending in the criminal justice system, enabling the introduction of codes of practice and improving information sharing. In addition, in September 2018 the Government announced a joint venture to address family violence to be formally launched by the end of 2018. The objective of the joint venture is to ensure an effective whole-of-government response to family violence and sexual violence. Its role is to lead, integrate, and provide support for agencies and the at least 10 government departments currently working in this area. See Andrew Little, Carmel Sepuloni and Jan Logie "Doing things differently to end family and sexual violence" (press release, 28 September 2018).

²¹⁰ Peter Boshier "Developments in Matrimonial Property" (paper presented to the New Zealand Law Society Family Law Conference, August–September 1998) at 53. See also the comments of Judge Inglis QC in *G v G* (1998) 17 FRNZ 166 at 171–172.

²¹¹ See Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 153; and Peter Boshier "Developments in Matrimonial Property" (paper presented to the New Zealand Law Society Family Law Conference, August–September 1998) at 53.

²¹² Geraldine Callister "Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration" (LLB (Hons) Dissertation, University of Waikato, 2003) at 19.

²¹³ Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

- (a) A specific exception for family violence raises safety concerns, as it would encourage partners to focus on fault and misconduct at a time that may be of particular danger for victims of family violence.²¹⁴
- (b) A specific exception carries with it a serious risk of abuse by the predominant aggressor, as identified by the FVDRC.
- (c) There are practical issues with how such an exception would operate. The Australian experience detailed above demonstrates the evidential difficulties in attempting to recognise and respond to family violence within the narrow context of property division.
- (d) Imposing a financial penalty for family violence in the form of a reduced property entitlement cannot provide a comprehensive response to the problem of family violence. It would be ineffective where there is little or no property to be divided, where the threat of further violence prevents a victim from pursuing their legal rights, or where affordable legal advice is unavailable.²¹⁵

²¹⁴ The Law Commission noted evidence that women are most likely to be killed by an abusive partner in the context of an attempted separation: Law Commission *Understanding Family Violence: reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 31 citing Walter S DeKeseredy, McKenzie Rogness and Martin D Schwartz "Separation/divorce sexual assault: The current state of social scientific knowledge" (2004) 9 *Aggression and Violent Behaviour* 675 at 677.

²¹⁵ Angela Lauman "Factoring in the Cost of Violence: the Relevance of Family Violence in Determining Property Settlements under the Family Law Act" (Honours Thesis, Australian National University, 2014) at 46–47. These problems might indicate that a more effective response would be a compensatory regime, as has been suggested in Australia: see Patrick Parkinson "Reforming the Law of Family Property" (1999) 13(2) *AJFL* 117. However, that goes beyond the scope of the Property (Relationships) Act 1976 and our review.

CHAPTER 4

Qualifying relationships

IN THIS CHAPTER, WE CONSIDER:

the eligibility criteria that relationships must satisfy in order to qualify for property sharing under the PRA, and in particular:

- whether the eligibility criteria for de facto relationships require reform; and
- what rules should apply to short-term relationships.

INTRODUCTION

- 4.1 The PRA applies to marriages, civil unions and de facto relationships. But the rules are different depending on the length of the relationship, and, if the relationship is less than three years' duration, whether the relationship is a marriage, civil union or de facto relationship (section 1C).
- 4.2 In this chapter we focus on specific aspects of the eligibility criteria that are causing concern.²¹⁶ As this review is the first comprehensive evaluation of the PRA since de facto relationships were included in 2001,²¹⁷ it is unsurprising that most of the concerns raised through consultation focused on the PRA's application to de facto relationships.
- 4.3 In any property sharing regime, the eligibility criteria must be considered alongside what property is subject to sharing, and how that property is to be shared. The proposals in this chapter have been developed alongside our preferred approach to classification (Chapter 2) and division (Chapter 3), in order to provide a coherent package of reforms.

²¹⁶ We do not consider specific relationship types in this chapter, namely Māori customary marriage, relationships between young people, contemporaneous relationships, relationships between members of the LGBTQI+ community, multi-partner relationships and domestic relationships. Specific relationship types were considered in the Issues Paper and will be addressed in our final report. See Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 7.

²¹⁷ For a discussion on the history of the inclusion of de facto relationships in the Property (Relationships) Act 1976, see Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [5.11]–[5.16].

DE FACTO RELATIONSHIPS

Current law

- 4.4 There are two requirements that must be satisfied in order for a de facto relationship to qualify for equal sharing under the PRA:
- (a) the relationship must meet the definition of de facto relationship in section 2D; and
 - (b) the partners must have lived together as de facto partners for three years or longer (sections 1C(2)(b), 2E(1)(b) and 14A).
- 4.5 Once a de facto relationship qualifies for equal sharing, the PRA applies retrospectively from the date the de facto relationship began, rather than from the date the de facto relationship satisfies the three year qualifying period. De facto relationships that do not satisfy the qualifying period are discussed below, in the section on short-term relationships.

Defining a de facto relationship

- 4.6 A de facto relationship is defined as a relationship between two people, both aged 18 or older, who "live together as a couple", and who are not married to, or in a civil union with each other (section 2D(1)).
- 4.7 In determining whether two people live together as a couple, all the circumstances of the relationship are to be considered, including the following matters, when relevant (section 2D(2)):
- (a) the duration of the relationship;
 - (b) the nature and extent of common residence;
 - (c) whether or not a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
 - (e) the ownership, use and acquisition of property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) the care and support of children;
 - (h) the performance of household duties;
 - (i) the reputation and public aspects of the relationship.
- 4.8 It is not necessary for a court to make a finding in respect of any of these matters when determining whether two people live together as a couple (section 2D(3)(a)). However a court is entitled to have regard to such matters, and to attach such weight to any matter, as it thinks appropriate in the circumstances (section 2D(3)(b)).
- 4.9 The definition of de facto relationship is therefore broad and flexible. It gives a court a high level of discretion that focuses on how a couple's relationship operates in practice, rather than its form. There are no prerequisites for the central concept of two people who "live together as a couple". It is not necessary, for example, for the partners to live in the same household, to share finances or to have a sexual relationship, although all these factors will be relevant to the court's exercise of discretion. The definition of de facto relationship is discussed in further detail in Chapter 6 of the Issues Paper.

The three year qualifying period

- 4.10 The three year qualifying period for de facto relationships was adopted as it was considered "an appropriate length of time for the duration of de facto relationships before the property-sharing regime takes effect".²¹⁸ A qualifying period is generally regarded as necessary for de facto relationships, because of their informal nature compared to marriages and civil unions.²¹⁹ As Atkin explains:²²⁰

Marriage is a public event, recorded in a public registry, with the participants more or less knowing what they are committing themselves to. While for many, marriage is a social and ceremonial occasion, people are also aware that there are legal ramifications. They go into marriage with their eyes open ... Marriage involves a lifelong, or at least long-term, commitment to the other person. The same is true of those who have entered a civil union ...

De facto relationships are very different. There is no public registry ... There is no ceremony. The legal consequences of a de facto relationship are probably obscure to most people. Some may drift into an association not being aware that the law would deem it a "de facto relationship" ... The majority probably begin to live together without thinking too hard about the consequences.

- 4.11 The qualifying period for de facto relationships has two objectives:²²¹
- (a) First, it uses relationship duration as a measure of commitment. In the absence of a deliberate decision by the partners to formalise their relationship by getting married or entering a civil union, the passage of time is used to indicate when a relationship has reached a sufficient level of commitment that justifies the imposition of property sharing obligations.
 - (b) Second, it acts as a safeguard against the retrospective imposition of property sharing obligations on unsuspecting partners.²²² It gives partners an opportunity to live together as a couple, and to recognise that their relationship is changing, before they have to decide whether to accept the property sharing obligations the PRA imposes on them or to opt out of the PRA by way of a contracting out agreement. It also provides a safeguard against strategic or exploitative behaviour by one partner,

²¹⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9–10.

²¹⁹ See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [15.4]–[15.14]. As discussed at paragraph 4.26 below, a qualifying period features in almost all comparable jurisdictions we have reviewed which extend, or recommend the extension of, a property sharing regime to de facto relationships.

²²⁰ Bill Atkin "Family property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Wellington, LexisNexis, 2013) 209 at 216.

²²¹ For further discussion see Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018); and Margaret Briggs "Which Relationships Should be Included in a Property Sharing Scheme?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 37 at 54. For discussion on the qualifying period in comparable jurisdictions see Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.33]–[3.45]; Law Reform Commission of Ireland *Report: Rights and Duties of Cohabitants* (LRC 82, 2006) at [2.13]; Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at 113; and Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [197]–[199] and [246]–[249].

²²² In *M v P* [2012] NZHC 503, [2012] NZFLR 385 Miller J observed at [23] that the effect of the Property (Relationships) Act 1976 is that "the law may impose the legal status of a de facto relationship retrospectively upon parties whose relationship gradually and without conscious election assumed that character".

such as entering into a relationship with the aim of acquiring a share of the other partner's property.²²³

Issues

- 4.12 In the Issues Paper we sought feedback on three questions:
- (a) Is it appropriate that the PRA applies to de facto relationships on an opt-out basis (Issues Paper at [5.22]–[5.25])?
 - (b) Do the eligibility criteria for de facto relationships capture relationships that are not substantively the same as marriages and civil unions? This might be because the definition of de facto relationship is too broad (Issues Paper at [6.29]–[6.47]), or because the qualifying period is too short (Issues Paper at [15.25]–[15.36]).
 - (c) Do the eligibility criteria for de facto relationships strike the right balance between flexibility and certainty (Issues Paper at [6.48]–[6.51])?
- 4.13 We identified several possible options for reform in the event that these questions required legislative amendment (Issues Paper at [6.52]–[6.62] and [15.37]–[15.47]). We have given particular consideration to whether the PRA should give greater priority to some of the section 2D(2) factors when deciding whether a de facto relationship exists, and to increasing the qualifying period to five years.

Results of consultation

- 4.14 We received 96 submissions that commented on various aspects of the eligibility criteria, including 83 submissions from members of the public, seven submissions from individual practitioner and academic experts, and six submissions from organisations. The vast majority of these submissions were concerned with how the PRA applies to de facto relationships.
- 4.15 Submissions reflected a diverse range of views. Some submitters, including the Human Rights Commission (HRC), the National Council of Women of New Zealand (NCWMZ) and the New Zealand Law Society (NZLS), thought that the PRA should apply in the same way to all relationships that are substantively the same. HRC said that the different treatment of relationships that are substantively the same would be discriminatory under human rights law.
- 4.16 A common theme of submissions, however, was that the PRA should not apply to de facto relationships in the same way as marriages and civil unions. These submitters emphasised that de facto relationships were different to marriages and civil unions because de facto partners have not made a formal, legally binding commitment to each other. They thought that if partners do not choose to formalise their relationship, and that relationship ends, they should not be subject to the same legal consequences as married and civil union partners.
- 4.17 Other submitters pointed to the practical difficulties in imposing property consequences on de facto relationships. Professor Nicola Peart observed that a major problem with the way the PRA applies to de facto relationships is that some people will not realise they are in a qualifying de facto relationship, or from what date the PRA applies to them, until after the relationship ends. NZLS agreed that the eligibility criteria are causing issues for

²²³ Bill Atkin "Property division: Lessons from New Zealand" in Panagiotis I Kanellopoulos, Elini Nina-Pazarzi and Cornelia Delouka-Inglessi (eds) *Essays in Honor of Penelope Agallopoulou* (Ant N Sakkoulas, Athens, 2011) 129 at 138.

some de facto relationships. It suggested that the commencement date may be the main reason. That is, the definition in section 2D can leave partners unsure as to when their relationship became a de facto relationship under the PRA. NZLS also pointed to a concern that contracting out agreements may be too readily set aside. A similar concern was also raised by Jan McCartney QC. We discuss contracting out in Chapter 8: Contracting out and settlement agreements.

- 4.18 Submitters' views on the preferred option for reform were mixed. Some submitters thought that the PRA should only apply to de facto relationships when partners deliberately opt-in to the regime. Others thought that the eligibility criteria should be more restrictive.
- 4.19 Some submitters thought that the definition of de facto relationship should make certain factors more important or even mandatory, although there was no consensus among submitters as to which factors should be prioritised. Submitters variously prioritised living together in the same household, having children together, mutual commitment to a shared life, sharing finances or making other substantial contributions to the relationship.
- 4.20 NZLS thought there was merit in giving priority to whether the partners shared a common residence.²²⁴ It noted that most people can easily relate to the concept of a de facto relationship when two people live together in the same household. People often judge it a major step in their relationship to "move in" together. But other submitters, including Nicola Peart and Community Law Wellington and Hutt Valley, noted that prioritising common residence would risk excluding some relationships that ought to be captured, and including other relationships that should not be captured (such as where two older people decide to move in together to save costs and share expenses). NZLS also thought that there may be merit in expanding the section 2D(2) factors to include consideration of whether the relationship is a second qualifying relationship, and in limiting the reference to care and support of children to biological or adopted children of both partners.
- 4.21 Some submitters, including NZLS, HRC and NCWNZ, favoured the existing qualifying period. But a longer qualifying period, of five or even 10 years, was a common submission from members of the public,²²⁵ as well as from some individual practitioner and academic experts. Many submitters felt that three years was too short, especially for second and subsequent relationships later in life, when partners are more likely to have accumulated assets before entering into a new relationship and to keep their finances separate during the relationship. But often the underlying concern was about what property was shared after three years. We discussed this concern in Chapter 2: Classification.
- 4.22 A small number of submitters raised concerns that touched on the objectives of the qualifying period (see paragraph 4.11). Some submitters thought that it can take longer than three years to build a genuine and committed relationship. NCWNZ noted that some

²²⁴ NZLS noted, however, that there were diverging views within the profession as to whether common residence should give rise to a rebuttable presumption that the partners are in a de facto relationship.

²²⁵ Submissions received through the consultation website indicated a preference for a five year qualifying period. We asked: "How long do you think a de facto relationship should last before the partners must share their relationship property equally if they separate?". Five people selected three years or less, 12 people selected five years and 9 people thought it should be more than five years. Some submissions received by email and post also preferred a longer qualifying period, although it was not always clear whether this was in relation to de facto relationships only or all relationship types.

of its members also thought that people might enter into de facto relationships for three to five years and never intend to make a longer term commitment. The Wellington Women Lawyers' Association suggested a longer qualifying period for partners over a certain age, on the basis that three years "does not fit the situation of many older adults". Other submitters thought that three years was not long enough to provide a robust safeguard. Some said three years does not give people enough time to realise that the PRA could apply to their relationship and to contract out, while others said that people could maintain a relationship for three years for pecuniary gain.

- 4.23 A clear theme from consultation was that aspects of the eligibility criteria for de facto relationships are not well understood by some members of the public. NZLS observed that many people are unaware that common residence is not a requirement for a de facto relationship under the PRA, and that people are often surprised to discover that their relationship may have started sooner than they thought. NZLS said "there appears to be an information lacuna in respect of rights under the PRA relating to de facto relationships". Submissions from members of the public also highlighted concerns that the definition of de facto relationship was broad enough to capture couples dating but not living together, or flatmates and boarders. NZLS noted the need for significant education to better inform the public about the PRA, which it said should assist in creating more certainty for the public about when the PRA applies.

Results of the Borrin Survey

- 4.24 The Borrin Survey made several key findings:

- (a) **Just under half of all respondents (48 per cent) knew that equal sharing applies to couples who have lived together for three years or longer.**²²⁶ Respondents who lived with a partner tended to have higher awareness than those who did not have a partner (55 per cent),²²⁷ but awareness did not vary between those who had lived with their partner for more than three years and those who had lived with their partner for less than three years.²²⁸ A higher proportion of respondents (68 per cent) knew that equal sharing applies to married and unmarried couples in the same way.²²⁹
- (b) **A range of factors are considered important in deciding whether equal sharing should apply to a couple.** Around nine in 10 respondents said that having children together, living together as a couple, buying a house together and sharing finances were all important factors in deciding if equal sharing should apply to a couple.²³⁰ On average, respondents thought that of eight factors described to them, six were important.²³¹

²²⁶ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [112].

²²⁷ At [115].

²²⁸ At [119]. However the small sample size of respondents who had lived with their partner for less than three years (44 respondents) means this finding should be treated with caution.

²²⁹ At [113].

²³⁰ At [124].

²³¹ At [124]. The factors respondents were asked about were whether a couple have bought a house or property together, have children together, live together as a couple, share finances, are strongly committed to each other or love each other, are married, are in a civil union, or have a sexual/intimate relationship.

- (c) **There was no consensus as to what was the single most important factor in deciding whether equal sharing should apply.** The most common responses were whether the couple had children together (22 per cent), whether they were married (11 per cent), whether they lived together as a couple (eight per cent) or had been together for a certain period of time (eight per cent).²³²
- (d) **There was no consensus as to how long couples should live together before equal sharing should apply, but most were happy with three years.** When asked how long they thought couples should have to live together, 32 per cent of respondents favoured a length of time less than three years, 38 per cent said it should be three years, and 29 per cent favoured a length of time greater than three years.²³³ The average length of time preferred was three years and three months.²³⁴ When respondents were prompted with what the law actually says, six in 10 agreed with the current law.²³⁵ Among those respondents who did not agree that the law should apply after three years, some thought the length of time should be shorter and some thought it should be longer, with five years being the most common preference (30 per cent of respondents who did not agree with the current law).²³⁶
- (e) **Many respondents viewed marriage differently to other relationship types.** 70 per cent of all respondents thought that whether a couple was married was an important factor in deciding if equal sharing should apply.²³⁷ These respondents tended to think that the law should apply to married couples much sooner, with 47 per cent saying that equal sharing should apply as soon as a couple get married.²³⁸ These respondents often drew a clear distinction between marriage and living together, with over half saying that unmarried couples should live together for a period of time (typically three years) before equal sharing applies.²³⁹

De facto relationships in comparable jurisdictions

- 4.25 There is considerable variation in how de facto couples are accommodated in property sharing regimes in other jurisdictions. In England and Wales, the property sharing regime applies to married couples only.²⁴⁰ Scotland²⁴¹ and Ireland²⁴² have introduced separate property sharing regimes for de facto couples, which provide more limited property rights compared to married couples. In contrast, de facto partners have the same

²³² At [125].

²³³ At 29 (Figure Three).

²³⁴ At [135].

²³⁵ At [146].

²³⁶ At 32 (Figure Five).

²³⁷ At 26 (Figure One).

²³⁸ At [140]–[141].

²³⁹ At [141].

²⁴⁰ A separate property sharing regime for cohabitants was recommended by the Law Commission of England and Wales in 2007, but this has not yet resulted in reform: Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007).

²⁴¹ In Scotland cohabitants have property rights in relation to household goods and money allocated to household expenses, and a court may make orders for financial provision for economic advantages and disadvantages resulting from the relationship: Family Law (Scotland) Act 2006, ss 25–28.

²⁴² In Ireland cohabitants can apply for a property adjustment order or compensatory maintenance order if they are financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), ss 173–175.

property entitlements as married partners in Australia and in some Canadian provinces.²⁴³ Other Canadian provinces do not accommodate de facto couples in their property sharing regimes,²⁴⁴ or only accommodate de facto couples on an opt-in basis.²⁴⁵ However experience in Canada has shown that opt-in regimes are ineffective in reducing the number of people who must rely on the law of equity,²⁴⁶ and two recent Canadian reviews have recommended that de facto partners be granted the same property entitlements as married partners.²⁴⁷

- 4.26 Most jurisdictions that include de facto relationships in a property sharing regime impose eligibility criteria in the form of a statutory definition that must be met, as well as a qualifying period.²⁴⁸ The statutory definitions in Australia and Ireland are similar to the PRA definition of de facto relationship, as they focus on a central concept of two people who live together as a couple, and include a statutory list of relevant factors.²⁴⁹ Scotland and several Canadian provinces adopt definitions that focus on a marriage analogy, applying to "marriage-like" or conjugal relationships.²⁵⁰ Most recently the Alberta Law Reform Institute recommended adopting a broader definition of "adult interdependent partners", capturing two people that live in a relationship of interdependence, defined as a relationship outside marriage in which any two persons share one another's lives, are emotionally committed to one another and function as an economic and domestic unit.²⁵¹
- 4.27 The qualifying period for de facto relationships tends to be either two or three years, although Ireland adopts a qualifying period of five years.²⁵²

²⁴³ British Columbia, Manitoba, Saskatchewan, Nunavut and the Northwest Territories.

²⁴⁴ Ontario, Quebec, Alberta and New Brunswick.

²⁴⁵ Nova Scotia, Newfoundland and Labrador, Prince Edward Island and Yukon.

²⁴⁶ See Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [148]–[168]. The Institute observes that Nova Scotia and Manitoba allow common law partners to opt-in to the property sharing regime by registering their relationship with a government agency. But although registration regimes have been in place for over 10 years, both provinces have experienced very low rates of registration. In Manitoba, only 416 couples registered in the first 10 years, out of an estimated 45,100 common law couples living in that province, according to the 2016 census. There were 68 registrations in Nova Scotia in 2013, 51 in 2012 and 76 in 2011.

²⁴⁷ Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018); and Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at 14. See also Ontario Law Reform Commission *Report on The Rights and Responsibilities of Cohabitants under the Family Law Act* (1993).

²⁴⁸ We are aware of only one jurisdiction – Scotland – where there is no qualifying period for de facto relationships: Family Law (Scotland) Act 2006, s 25. However the property entitlements of cohabitants are limited in Scotland.

²⁴⁹ Family Law Act 1975 (Cth), s 4AA; Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), s 172. The Law Commission of England and Wales also recommended a definition based on the concept of "living as a couple in a joint household": Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.13].

²⁵⁰ Family Law Act (Scotland) 2006, s 25; Family Law Act SBC 2011 c 25, s 3; Family Property Act CCSM c F25, s 1(1); The Family Property Act SS 1997 c F-6.3, s 2(1); and Family Law Act SNWT (Nu) 1997 c 18, s 1(1). See also Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at 115.

²⁵¹ Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [233]–[245]. See also the definition of "adult interdependent partners" in the Adult Interdependent Relationships Act SA 2002 c A-4.5, s 1.

²⁵² The qualifying period is 2 years in Australia and the Canadian provinces of British Columbia, Saskatchewan, Nunavut and the Northwest Territories. In 2017 a 2 year qualifying period was also recommended by the Nova Scotia Law Reform Commission: Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at [4.5.2]. Manitoba has a qualifying period of 3 years. A 3 year qualifying period has also been recommended by the Ontario Law Reform Commission and the Alberta Law Reform Institute: Ontario Law Reform Commission *Report on The Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, 1993) at 63; and Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at

Preferred approach

P14

The PRA should apply in the same way to all marriages, civil unions and qualifying de facto relationships.

P15

The eligibility criteria for de facto relationships should retain the existing definition of de facto relationship and the existing three year qualifying period.

- 4.28 We propose no change to the way the PRA applies to de facto relationships that qualify for equal sharing (qualifying de facto relationships), or to the existing eligibility criteria for de facto relationships.
- 4.29 We acknowledge that many submitters felt that property sharing obligations should be a matter of choice, and in the absence of a deliberate decision to formalise a relationship by getting married or entering a civil union, should only be imposed on de facto relationships if they opt-in to the regime. However, we do not prefer an opt-in approach, for the following reasons:
- (a) The role of the eligibility criteria for de facto relationships is to ensure that only those de facto relationships that are *substantively the same* as marriages and civil unions are captured. Having different rules for relationships that are substantively the same risks being discriminatory on the basis of marital status under human rights law.²⁵³ It is also out of step with social trends, such as the increasing prevalence of de facto relationships and changing attitudes on issues such as living together before marriage, or not marrying at all.²⁵⁴
 - (b) Applying the same rules to marriages, civil unions and de facto relationships is consistent with public attitudes and values. The Borrin Survey identified that six in 10 agreed with the current law (that equal sharing should apply to *all* couples who live together for three years).²⁵⁵ While 70 per cent of respondents thought whether a couple were married was an important factor, a higher proportion of respondents (around nine in 10) said that living together was an important factor.²⁵⁶ Only 11 per cent of respondents thought that whether a couple were married was the most important factor.²⁵⁷
 - (c) Experience in jurisdictions that do have opt-in regimes for de facto relationships demonstrates that opt-in rules fail to reduce the number of people who must rely on

[246]–[249]. The Law Commission of England and Wales recommended a qualifying period of between two and five years, rather than a specific qualifying period: Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.45].

²⁵³ Section 19(1) of the New Zealand Bill of Rights Act 1990 and s 21 of the Human Rights Act 1993 together affirm the right to be free from discrimination on the grounds of marital status, including being married, in a civil union or in a de facto relationship.

²⁵⁴ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at ch 1.

²⁵⁵ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [146].

²⁵⁶ At 26 (Figure One).

²⁵⁷ At [125].

the law of equity (see paragraph 4.25). In New Zealand, de facto relationships were brought into the PRA partly in order to avoid the need for de facto partners to rely on the law of constructive trust.²⁵⁸ In our view it would be a backwards step to return to that unsatisfactory state of affairs. Imposing the same property sharing obligations on all qualifying relationships, with the ability to contract out, ensures more people, especially vulnerable people, are subject to the protections under the PRA (Issues Paper at [5.25]).

- (d) De facto partners have been included in the PRA on an opt-out basis since 2001. Introducing such a significant change would likely lead to public confusion and uncertainty.

4.30 In our view, concerns with the eligibility criteria for de facto relationships are best addressed through a public education campaign that raises awareness about when and how the property sharing regime applies to de facto relationships. This will better equip people to understand their legal rights and obligations. Greater education would also address awareness of key aspects of the eligibility criteria, such as the three year qualifying period.

4.31 We do not propose changing the definition of de facto relationship for the following reasons:

- (a) A flexible definition of de facto relationship is appropriate given the diverse nature of de facto relationships²⁵⁹ and the range of public attitudes and values about what are important factors in determining whether a de facto relationship exists. This was affirmed through consultation and the results of the Borrin Survey, which identified no clear consensus on what should be the determining factor(s). While a more rigid definition that prioritises certain factors would provide greater certainty, it would also unduly risk excluding relationships that ought to be covered, and including relationships that ought not to be covered.
- (b) A review of the case law does not reveal widespread problems with the way the definition of de facto relationship is interpreted and applied by the courts.²⁶⁰ In our view, the real issue is around the lack of guidance these individual cases can provide to the general public. We consider that these concerns are best addressed through greater public education and the publication of an information guide for members of the public that will address when the regime might or not might not apply to them (proposed in Chapter 10: Resolution).

²⁵⁸ For a discussion of the law applying to de facto relationships prior to the 2001 amendments see Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 22–23.

²⁵⁹ See discussion in Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the TwentyFirst Century* (Oxford University Press, Canada, 2014) at 8–11. See also Patrick Parkinson "Reconsidering Family Property Law in the Post-Marital Age" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 15 at 32.

²⁶⁰ A study of reported cases under the Property (Relationships) Act from 2002 to 2009 found that in 43 per cent of cases involving de facto relationships the partners disputed the length of the de facto relationship, but only 12 per cent involved a dispute about whether the relationship satisfied the s 2D definition of de facto relationship. See Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [6.50]; and Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012).

- (c) The degree of flexibility in the definition of de facto relationship is consistent with comparable jurisdictions, including in particular Australia and those Canadian provinces that extend property regimes to de facto relationships.

4.32 Nor do we propose increasing the qualifying period. The diverse nature of de facto relationships means that choosing a qualifying period is a difficult, arbitrary exercise.²⁶¹ But we are satisfied that three years is appropriate, for the following reasons:

- (a) Results of the Borrin Survey identify that three years is broadly consistent with public attitudes and values as to when a de facto relationship reaches a point of commitment that justifies the imposition of property sharing obligations.²⁶²
- (b) While many submitters were concerned that three years is too short, often the underlying concern was about what property is shared after three years. This concern will be addressed by our proposals in Chapter 2: Classification to limit equal sharing to property acquired during the relationship, or for the partners' common use or common benefit (see paragraph 4.39). This will reduce the risk of unfair outcomes for de facto relationships that only just satisfy the qualifying period.
- (c) The risk of unfair outcomes in de facto relationships that only just satisfy the three year qualifying period is further mitigated in two respects. First, the relationship must satisfy the definition of de facto relationship. Second, the continued availability of section 13 (discussed in Chapter 3: Division), provides an exception to equal sharing if a court considers that there are extraordinary circumstances that make equal sharing repugnant to justice.²⁶³
- (d) A three year qualifying period is now a well settled feature of the PRA. It has been in place since 2001, and results of the Borrin Survey indicate that many people are aware of it, although there is still a need for greater public education, as discussed in Chapter 1. Preserving the status quo has the important benefit of minimising the risk of public confusion that might arise if the qualifying period is changed.
- (e) Extending the qualifying period would be out of step with trends in comparable jurisdictions, which generally adopt a qualifying period of two or three years.

²⁶¹ The diversity of de facto relationships means it is difficult to make generalisations about when de facto relationships reach a level of commitment that justifies the imposition of property sharing obligations. In the Issues Paper we explored the available evidence about the nature and duration of de facto relationships, which suggests most de facto relationships end (either as a result of the partners marrying each other or separating) within five years, but that de facto relationships may now be more enduring than in the past: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [15.27]–[15.33]. However this evidence is of limited assistance in determining the appropriate qualifying period, as it does not tell us when partners consider themselves to be in a de facto relationship that should have property sharing consequences.

²⁶² A similar public values survey was undertaken in Alberta in 2016 as part of a review of the property entitlements of common law partners by the Alberta Law Reform Institute. Results of that survey suggested that most people who had lived in a common law relationship considered it to be a common law relationship by the end of the first year: Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report* 112 (June 2018) at [219].

²⁶³ Brevity of relationship coupled with a gross disparity in contributions is a recognised ground for departing from equal sharing under s 13 of the Property (Relationships) Act 1976. Often a party will argue s 13 in the alternative, should a claim under s 14 fail. See for example *B v B* [2016] NZHC 1201, [2017] NZFLR 56; *Brown v Starke* [2016] NZFC 7132; *S v S* [2012] NZFC 2685; *RSQ v BQ* [2012] NZFC 7272; *BRL v NAR* FC Christchurch FAM-2008-009-1355, 17 November 2011; and *VK v FK* FC Porirua FAM-2009-091-717, 1 February 2011.

SHORT-TERM RELATIONSHIPS

Current law

- 4.33 If a marriage, civil union or de facto relationship lasts for less than three years, it is a short-term relationship and special property sharing rules apply.²⁶⁴ These rules differ significantly depending on the type of relationship.
- 4.34 Short-term marriages and civil unions are subject to the PRA's ordinary rules of division from the date of marriage or civil union, but a limited exception to equal sharing is available if one of the special situations outlined in sections 14 or 14AA applies (Issues Paper at [16.3]–[16.8]). Specifically:
- (a) Where one partner's contribution to the relationship "has clearly been disproportionately greater" than the contribution of the other partner, all relationship property is divided on the basis of the contribution of each partner to the relationship.
 - (b) Where the family home or family chattels were owned by one partner before the relationship, or were received by one partner by way of gift or inheritance from a third party, those items of property are divided based on the contributions of each partner to the relationship.
 - (c) Where one partner's contribution to the relationship "has been clearly greater" than that of the other partner, relationship property other than the family home and family chattels are divided based on the contributions of each partner to the relationship.
- 4.35 These rules recognise that applying the PRA's ordinary rules of division to short-term marriages and civil unions may lead to unfair outcomes in some situations (for example, where the family home was owned by one partner before the relationship began), and may encourage strategic or exploitative behaviour by one partner. The objective of the rules is therefore to prevent one partner obtaining a windfall gain if the marriage or civil union ends after a short period of time.
- 4.36 The rules for short-term de facto relationships fulfil a different objective. A short-term de facto relationship normally falls outside the PRA, unless it meets the additional eligibility criteria specified in section 14A(2), namely:
- (a) there is a child of the de facto relationship,²⁶⁵ and the court is satisfied that failure to make an order dividing relationship property would result in serious injustice; or
 - (b) the applicant has made a substantial contribution to the de facto relationship, and the court is satisfied that failure to make an order dividing relationship property would result in serious injustice.
- 4.37 The objective of section 14A is therefore to recognise that excluding all short-term de facto relationships from the PRA may lead to unfair outcomes in some situations. If the additional eligibility criteria are satisfied, each partner's share in the relationship property is to be determined on a contributions basis (section 14A(3)).

²⁶⁴ A court can also treat a relationship of longer than three years as a short-term relationship if it considers it just, but there is no corresponding discretion to treat a short-term relationship as a relationship longer than three years' duration: Property (Relationships) Act 1976, s 2E.

²⁶⁵ See Chapter 7: Children's Interests for a discussion on the definition of child of the relationship.

Issues

- 4.38 In the Issues Paper we highlighted a number of issues with the way the rules for short-term relationships operate in practice. In particular:
- (a) The rules for short-term marriages and civil unions are unclear and incomplete, and may not always achieve a just division of property (Issues Paper at [16.9]–[16.16]).
 - (b) The PRA treats short-term de facto relationships differently to short-term marriages and civil unions, which may be inconsistent with the implicit principle of the PRA that the law should apply equally to all relationships that are substantively the same, and may be discriminatory under human rights law (Issues Paper at [17.10]–[17.19]).
 - (c) The additional eligibility criteria for short-term de facto relationships in section 14A(2) are unclear, and set a high bar for relationships with children (Issues Paper at [17.20]–[17.27]).
- 4.39 In light of our preferred approach to classification outlined in Chapter 2, a more fundamental issue is whether it is necessary to retain the special rules for short-term relationships. Under our classification proposals, partners will no longer be required to share property that was acquired before the relationship was contemplated. Although increases in value that occurred during the relationship and were attributable to the relationship, including increases in the value of the family home, would continue to be shared.²⁶⁶ This reflects a significant change in policy, and directly addresses the risk of windfall gains in short relationships, which is the objective of the rules for short-term marriages and civil unions.
- 4.40 If the rules for short-term marriages and civil unions are no longer necessary and should be removed, the effect would be that the PRA's ordinary rules of division would apply to all marriages and civil unions regardless of length. A separate question then arises as to how the PRA should treat short-term de facto relationships. Simply removing the rules for short-term de facto relationships would exclude all de facto relationships that do not satisfy the three year qualifying period (which would have the opposite effect of removing the rules for short-term marriages and civil unions).

Results of consultation

- 4.41 We received few submissions that commented specifically on the rules that should apply to short-term relationships.²⁶⁷ Submitters who did comment on short-term relationships had mixed views.
- 4.42 Submissions from members of the public tended to focus on short-term de facto relationships. Some submitters strongly felt that the PRA should not apply to short-term de facto relationships under any circumstances. Often these submitters were also in favour of increasing the qualifying period for de facto relationships. However, other submitters thought that the PRA should capture short-term de facto relationships in some circumstances. A common submission was that de facto couples who have children together should be captured, or that a shorter qualifying period should apply to these

²⁶⁶ Family chattels will however continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 2.

²⁶⁷ Submitters were asked for their views on the operational issues with the special rules for short-term relationships, but were not asked directly about whether the rules should remain, as this issue has arisen only through the development of our preferred approach to classification.

couples.²⁶⁸ One member of the public submitted that a rigid qualifying period with no flexibility was unfair, as it allows a person to walk out of a relationship just before the qualifying period is satisfied and avoid any consequences under the PRA.

- 4.43 Organisations, including NZLS, the Wellington Women Lawyers' Association, HRC and the New Zealand Federation of Business and Professional Women (BPWNZ) supported the PRA applying to all short-term relationships in some situations, as did some practitioner and academic experts. BPWNZ noted that excluding short-term relationships could lead to unfairness in situations where one partner was the primary earner and the other an unpaid caregiver. The caregiver partner has lost the opportunity for income during that time and, in the absence of any property sharing entitlement on separation, may be left far worse off than when they entered the relationship.
- 4.44 Views were mixed as to whether all short-term relationships should be treated the same. Some submitters, including HRC, thought that the PRA should apply equally to all short-term marriages, civil unions and de facto relationships, and that there should not be additional eligibility criteria for short-term de facto relationships. It argued that amending the PRA to apply equally to all short-term relationships would bring the law into greater consistency with New Zealand's international human rights obligations. Nicola Peart agreed that the different treatment of different short-term relationships may not be justified under human rights law. NZLS said that there was a divergence of views among lawyers as to whether the different treatment remains sustainable. NZLS observed that partners who marry or enter into a civil union have "effectively 'opted in' and expressed their commitment by virtue of an official ceremony". But with de facto relationships there is no such evidential basis. Other submitters expressed a similar view. NZLS said that whether the PRA should treat all short-term relationships the same is a question of policy, on which it expressed no view. It did not, however, support removing the additional eligibility criteria for short-term de facto relationships, or applying the same rules of division to all short-term relationships.
- 4.45 NZLS also submitted that the additional eligibility criteria for short-term de facto relationships should be further restricted to where a child of the relationship is the biological or adoptive child of both partners (currently a child of the relationship can include children from a previous relationship, as discussed in Chapter 7: Children's interests). Lawyers reported to NZLS that while partners understand and accept that a biological or adoptive child of the relationship should give rise to entitlement under the PRA, most express surprise or even indignation that a child of a prior relationship can be the gateway to entitlement for the other partner under the PRA.
- 4.46 Few submitters commented on the rules of division that ought to apply to short-term relationships.²⁶⁹ Some submitters were happy to retain the existing rules of division for short-term marriages and civil unions (equal sharing with exceptions), although Wellington Women Lawyers' Association noted the need, when the exceptions applied,

²⁶⁸ Submitters on the consultation website were asked whether a different qualifying period should apply when a de facto couple have children together. 16 submitters said the presence of children should make a difference, while 11 submitters thought it should not make a difference.

²⁶⁹ In the Issues Paper we proposed three options for reform for the rules of division for marriages and civil unions, namely retaining the existing exceptions to equal sharing in special situations with some minor tweaks, applying contributions-based sharing to all short-term marriages and civil unions, or adopting a fruits of the relationship approach to classification for all short-term marriages and civil unions: Law Commission *Dividing Relationship Property – Time for Change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [16.15]–[16.21]. We also proposed similar options for short-term de facto relationships at [17.40]–[17.42].

to limit the weight to be given to financial contributions over non-financial contributions. HRC favoured extending the rules for short-term marriages and civil unions to de facto relationships. NZLS favoured a fruits of the relationship approach to classification for short-term marriages and civil unions, agreeing that the rationale for special treatment of the family home and chattels may be weaker in a short-term relationship. NZLS submitted:

We believe that most people would understand and accept, particularly in the case of short-term relationships, that the product of the partners' joint contributions during the relationship should be divided equally between them, with the ability to obtain compensation for improvements they had undertaken on each other's separate property, as opposed to changing the status of the underlying nature of the separate property itself.

- 4.47 NZLS did not, however, favour applying the same rules of division to short-term de facto relationships, for the reasons discussed at paragraph 4.44. Nicola Peart favoured a fruits of the relationship approach for all relationships (regardless of length), but also noted that if this were adopted, there may be less reason to depart from equal sharing in short-term relationships.

Short-term relationships in comparable jurisdictions

- 4.48 We have not identified any comparable jurisdictions that have special rules for short-term relationships. Rather, the same rules of classification and division apply to all qualifying relationships regardless of their length, but relationship duration can be a relevant consideration in determining whether an exception to equal sharing should apply (similar to section 13 of the PRA).²⁷⁰
- 4.49 As noted at paragraphs 4.26–4.27, most comparable jurisdictions that include de facto relationships in a property sharing regime impose a qualifying period, with the exception of Scotland.²⁷¹ Several jurisdictions also provide different avenues into the property sharing regime for de facto relationships that do not satisfy the qualifying period. In Australia, the property sharing regime applies if the two year qualifying period is met, *or* there is a child of the de facto relationship, *or* one party has made substantial contributions to the relationship and a failure to make a property division order would result in serious injustice.²⁷² Similarly, the Alberta Law Reform Institute recently recommended that the property sharing regime should apply if the partners live together for three years, *or* live together and have a child together, *or* otherwise enter an

²⁷⁰ For example, in Ontario the court has the power to vary the equal sharing rule if it would be "unconscionable", having regard to the fact that the amount a spouse would receive would be "disproportionately large in relation to a period of cohabitation that is less than five years": Family Law Act RSO 1999 c F-3, s 4(6). Similarly in Saskatchewan the court may order unequal sharing if it would be "unfair and inequitable" to make an equal distribution of family property, having regard to the length of time that the spouses cohabited: The Family Property Act SS 1997 c F-6.3, s 21(2).

²⁷¹ However the length of time the couple have lived together is relevant to whether a qualifying de facto relationship exists: Family Law (Scotland) Act 2006, s 25.

²⁷² Family Law Act 1975 (Cth), s 90SB. A similar recommendation regarding the presence of children was made by the Law Commission of England and Wales in Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.31].

agreement to become interdependent partners.²⁷³ In Ireland, the qualifying period is only two years if the partners are parents of a dependent child.²⁷⁴

Preferred approach

P16

The provisions for short-term relationships should be repealed and the ordinary rules of division should apply to all marriages, civil unions and qualifying de facto relationships.

P17

A "qualifying de facto relationship" should include a de facto relationship that does not satisfy the three year qualifying period if it meets the following additional eligibility criteria:

- a. there is a child of the relationship, and a court considers it just to make an order for division; or
- b. the applicant has made substantial contributions to the relationship, and a court considers it just to make an order for division.

4.50 Our preferred approach is to repeal the special rules for short-term relationships in light of our preferred approach to classification, outlined in Chapter 2 and summarised at paragraph 4.39. Our classification proposals overtake the objective of the special rules for short-term marriages and civil unions, as they minimise the risk of windfall gains and strategic or exploitative behaviour.

4.51 Other reasons for repealing the special rules for short-term marriages and civil unions are as follows:

- (a) The special rules for short-term marriages and civil unions rarely apply in practice.²⁷⁵ This is due to the low number of marriages and civil unions that end within three years (Issues Paper at [15.22]). It is also due to amendments to the PRA in 2001, which mean that any time spent in a de facto relationship immediately preceding a marriage or civil union is counted when calculating the length of the marriage or civil union (sections 2B and 2BAA). Given the increasing tendency for partners to live together before marriage, short-term marriages are therefore less likely today than in 1976.²⁷⁶
- (b) Repealing the special rules for short-term marriages and civil unions is consistent with public attitudes and values as evidenced by the findings from the Borrin Survey. For 70 per cent of respondents, marriage was an important factor in deciding whether

²⁷³ Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [229]–[259]. In Nunavut and the Northwest Territories the property sharing regime also applies to de facto relationships of 2 years' duration or relationships of "some permanence" where the partners are natural or adoptive parents of a child: Family Law Act SNWT (Nu) 1997 c 18, s 1(1).

²⁷⁴ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), s 172(5).

²⁷⁵ This is borne out in our review of cases available on Westlaw and LexisNexis, which identified approximately one case per year resulting in unequal sharing under s 14 since 2001, and no successful cases under s 14AA.

²⁷⁶ Superu *Families and Whānau Status Report 2014* (June 2014) at 164. See also Law Commission *Relationships and Families in Contemporary New Zealand – he hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 17–18.

equal sharing should apply to a couple,²⁷⁷ and these respondents tended to think that the law should apply to married couples much sooner than three years, with 47 per cent saying the equal sharing law should apply as soon as a couple gets married.²⁷⁸

- (c) The risk of unfair outcomes in applying the ordinary rules of division to short-term marriages and civil unions is mitigated by the availability of an exception to equal sharing in extraordinary circumstances (see paragraph 4.32(c)).
- (d) Repealing the special rules for short-term marriages and civil unions would be consistent with the accepted approach in comparable jurisdictions.

4.52 We also propose repealing the special rules for short-term de facto relationships, and extending the ordinary rules of division to short-term de facto relationships that meet the additional eligibility criteria proposed below. In our view this is an appropriate response given our classification proposals, which will have the effect of reducing the pool of relationship property in situations where the family home was owned by one partner before the relationship began. If we were to retain contributions-based sharing for eligible short-term de facto relationships, this would likely result in situations where the non-owning partner receives significantly less than what they would have been entitled to under the current rules. We think this would be an unfair outcome for the small number of short-term de facto relationships that do satisfy the additional eligibility criteria.²⁷⁹

4.53 Our proposals to repeal the special rules for all short-term relationships and extend the ordinary rules of division to some short-term de facto relationships also have the following advantages:

- (a) The eligibility criteria will be simplified, making the PRA easier to apply. One set of property division rules will apply to all marriages, civil unions and qualifying de facto relationships. Partners who are married or in a civil union will not need to determine when their relationship began (including any immediately preceding de facto relationship) or ended in order to determine what rules apply. Equal sharing is also more certain and easier to apply than contributions-based sharing. We consider that these proposals will best achieve the principle of simple, speedy and inexpensive resolution of relationship property disputes, as is consistent with justice.
- (b) Less emphasis will be placed on a relationship passing an arbitrary three year milestone. For marriages and civil unions, greater weight is placed on the partners' deliberate decision to formalise their relationship, consistent with public attitudes and values (see paragraph 4.50(b)). For de facto relationships, the additional eligibility criteria recognises the necessarily arbitrary nature of the qualifying period and gives equal weight to other measures of commitment.
- (c) Removing the rules for short-term marriages, civil unions and de facto relationships minimises the different treatment of different relationship types, consistent with human rights law (see paragraph 4.56).

²⁷⁷ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at 26 (Figure One).

²⁷⁸ At [140]–[141].

²⁷⁹ Our review of cases available on the legal databases Westlaw and LexisNexis identified that the additional eligibility criteria for short-term de facto relationships in s 14A(2) have been satisfied in 21 cases since 2001, an average of less than 1.5 cases per year.

Additional eligibility criteria for de facto relationships

- 4.54 De facto relationships that do not satisfy the qualifying period should be subject to the PRA if they satisfy additional eligibility criteria. These criteria provide different ways to measure commitment that should be given equal weight to the deliberate decision to formalise a relationship by getting married or entering a civil union, or satisfying the qualifying period.
- 4.55 The additional eligibility criteria proposed below are broadly consistent with the existing criteria under section 14A(2), with the important distinction that the threshold of "serious injustice" is lowered to "justice". We consider that this will achieve fairer outcomes through greater access to the court's discretion.
- 4.56 We propose that the PRA should apply to short-term de facto relationships in two situations:
- (a) **When there is a child of the relationship and the court considers it just to make an order dividing relationship property.** Partners who have children together can be presumed to be in a family joint venture, to which the partners contribute equally, although in different ways.²⁸⁰ Results from consultation and the Borrin Survey affirm that the presence of children make a difference to people's attitudes about whether equal sharing should apply. Some respondents to the Borrin Survey regarded having children together as being a more important factor than how long the partners have been together (see paragraph 4.24(c)). We acknowledge the concern raised by NZLS that the presence of a child of the relationship that is not the biological or adopted child of both partners might not provide an appropriate measure of commitment. We are concerned, however, that a more limited definition of child of the relationship for this purpose would be inconsistent with social trends towards more diverse family structures and may fail to properly accommodate whāngai and stepchildren. In our view this concern is best addressed by reserving some discretion to the court, so that it must still be satisfied that making an order for division would be just in all the circumstances.
 - (b) **When one partner has made substantial contributions to the relationship and the court considers it just to make an order dividing relationship property.** A short-term de facto relationship to which one partner has made substantial contributions should also qualify for equal sharing. This gives a court broad discretion to recognise situations in which the substantial contributions made by one partner to the relationship demonstrate a significant commitment to the relationship. It also

²⁸⁰

We agree with the recent conclusion of the Alberta Law Reform Institute in Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [250]:

It is reasonable to presume that partners raising a child or children are in an economic partnership, even if the relationship lasts less than three years. Usually, both partners contribute to meeting the needs of the family. The contributions may include money, caregiving, or other domestic work.

This is supported by some research that suggests de facto partners raising children together have made a personal commitment to each other, and have a degree of financial interdependence. See for example Jan Pryor and Josie Roberts "What is Commitment? How married and cohabiting parents talk about their relationships" (2005) 71 *Family Matters* 24 at 31; Simon Duncan, Anne Barlow and Grace James "Why don't they marry? Cohabitation, commitment and DIY marriage" (2005) 17(3) *CFLQ* 383; L Jamieson and others "Cohabitation and commitment: partnership plans of young men and women" (2002) 52(3) *The Sociological Review* 354; C Lewis, A Papacosta and J Warin *Cohabitation, Separation and Fatherhood* (Joseph Rowntree Foundation, York, 2002); and J Lewis *The End of Marriage? Individualism and Intimate Relationships* (Edward Elgar, Cheltenham, 2001).

provides an avenue into the PRA for child-free couples, and avoids discriminating on the basis of family status under human rights law.²⁸¹

- 4.57 Under our proposals short-term de facto relationships will continue to be treated differently to marriages and civil unions of the same length, as they will only be eligible for equal sharing if they satisfy the additional eligibility criteria proposed above. We are satisfied that this different treatment is not discriminatory under human rights law, given that early stage de facto relationships are different in nature to marriages or civil unions of the same length.²⁸² In a de facto relationship the partners have not made a deliberate decision to formalise their relationship, and cannot be presumed to have accepted the legal consequences that entering into marriage or a civil union entails. Requiring the satisfaction of additional eligibility criteria for short-term de facto relationships ensures the PRA treats different relationship types that are substantively the same in the same way, and avoids imposing property sharing obligations on de facto relationships that are not substantively the same as marriages or civil unions.

²⁸¹ Section 19(1) of the New Zealand Bill of Rights Act 1990 together with s 21 of the Human Rights Act 1993 affirm the right to be free from discrimination on the grounds of family status (which includes having the responsibility for the part-time or full-time care of children or other dependents).

²⁸² Differential treatment of people or groups on a prohibited ground of discrimination is potentially discriminatory under human rights law, but only if it treats people in comparable situations differently: *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109]; approved in *Child Poverty Action Group (CPAG) v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43].

CHAPTER 5

Section 15

IN THIS CHAPTER:

We propose repealing section 15 of the PRA and the maintenance regime in Part 6 of the Family Proceedings Act 1980, and replacing both with a new way to share the economic advantages and disadvantages arising from a relationship or its end.

CURRENT LAW

- 5.1 Section 15 of the PRA was introduced in 2001 to address the economic disadvantage experienced by some partners on separation, because of the effects of the division of functions within the relationship.²⁸³ The principles in section 1N of the PRA were introduced at the same time to guide the achievement of the purpose of the PRA. They included the principle that a just division of relationship property "has regard to the economic advantages or disadvantages" to the partners arising from the relationship or its end (section 1N(d)).²⁸⁴

Section 15

- 5.2 Section 15 provides that a court may award compensation to a partner from the other partner's share of relationship property if three requirements are met.²⁸⁵ These requirements were discussed in detail in the Issues Paper (Issues Paper at [18.31]–[18.80]), and are summarised below:
- (a) First, there must be a significant disparity in both the income and living standards of the partners. This involves a prospective assessment of what each partner's income and living standard is likely to be.²⁸⁶

²⁸³ Matrimonial Property Amendment and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

²⁸⁴ Other principles introduced to the Property (Relationships) Act 1976 in 2001 included the principle that men and women have equal status, and their equality should be maintained and enhanced (s 1N(a)), and the principle that all forms of contribution to the relationship are treated as equal (s 1N(b)).

²⁸⁵ In *M v B* [2006] 3 NZLR 660 (CA) at [125] the Court of Appeal described these as "hurdles" that "must be overcome" in order to succeed in a claim under s 15.

²⁸⁶ "Significant" being "a more than trivial disparity" relative between the partners: *X v X* [Economic Disparity] [2009] NZCA 399, [2010] 1 NZLR 601 at [77]. It was described as "noteworthy" or "important" in *P v P* [2003] NZFLR 925 (FC) at [172]; and "somewhere between 'clearly greater' and 'disproportionately greater'" in *N v N* [2003] NZFLR 150 (FC) at [120].

(b) Second, the disparity must be caused by the division of functions within the relationship. This involves a retrospective assessment of what happened during the relationship. The division of functions does not have to be the sole cause of economic disparity,²⁸⁷ and it is presumed that the division of functions was agreed to by the partners.²⁸⁸

(c) Third, compensation must be just in the circumstances.²⁸⁹

- 5.3 If these requirements are met, a court must then assess the amount of compensation to be awarded (Issues Paper at [18.81]–[18.103]). The only guidance in the PRA on quantifying a section 15 award is that it should "compensate" the applicant partner. As a result, different quantum methodologies have developed in the case law. One approach, adopted by the Court of Appeal in *X v X*, is to identify the "income shortfall" by focusing on the applicant partner's lost opportunity to develop a career.²⁹⁰ Another approach focuses on the enhancement of the respondent partner's earning ability.²⁹¹ A third approach is less formulaic and looks more broadly at all the relevant circumstances, taking a "broad brush approach".²⁹²
- 5.4 Since publication of the Issues Paper, the Supreme Court has released its decision in *Scott v Williams*, marking the first time the Court had considered section 15.²⁹³ The appeal focused on the methodology used to determine the amount of a section 15 award. The Family Court had awarded \$850,000 to Ms Scott, which was reduced to \$280,000 in the High Court and then increased to \$470,000 in the Court of Appeal. In the Supreme Court, all five Judges issued separate judgments providing a diverse range of views on many matters, although a majority (Glazebrook, Arnold and O'Regan JJ) ordered an increased award of \$520,000.²⁹⁴ Atkin notes that the "disparate results on economic disparity at different levels of the judicial hierarchy are testament to the unfortunate fluidity of the concept".²⁹⁵

²⁸⁷ *M v B* [2006] 3 NZLR 660 (CA) at [201] per William Young P.

²⁸⁸ *X v X [Economic Disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [105].

²⁸⁹ The Court of Appeal explained at [171]:

The s 15(3) discretionary assessment is not amenable to a prescribed formula, and the justice of an award in any particular case will depend on a comprehensive assessment of the parties' respective financial positions, their earning prospects going forward, their current obligations in respect of any children of the partnership, and other matters that go to the overall fairness of an award.

²⁹⁰ At [171].

²⁹¹ *M v B* [2006] 3 NZLR 660 (CA) at [199]; *P v P* [2005] NZFLR 689 (HC) at [56]; and *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [164].

²⁹² See for example *J v J* [2014] NZHC 1495.

²⁹³ *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 Mr Williams was a partner in a law firm and Ms Scott was a qualified accountant and lawyer. From the birth of the couple's first child Ms Scott had reduced her work hours. She then stopped working after the birth of the couple's second child, who required significant medical care for the first eight years of his life. Ms Scott helped do the accounts for Mr Williams' firm on a part-time basis. For a discussion of the Supreme Court judgments see Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 121–127; and Nikki Chamberlain *The Future of Economic Disparity Redress in New Zealand* (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) at 107.

²⁹⁴ *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [271]. Elias CJ at [358] held that quantification of the s 15 award should be remitted back to the Family Court for reconsideration, while William Young J at [477] held that the award should be reduced to \$188,000.

²⁹⁵ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 121.

Maintenance

- 5.5 Maintenance is available under Part 6 of the Family Proceedings Act 1980 to meet a partner's reasonable financial needs at the end of a relationship in certain circumstances. This includes where a partner is unable to meet their needs because of the division of functions within the relationship and their likely earning capacity.²⁹⁶ The applicant partner must, however, assume responsibility for meeting their own financial needs within a reasonable time.²⁹⁷ Maintenance is, therefore, typically temporary in nature.²⁹⁸
- 5.6 Given their similar subject matter, maintenance and section 15 are often used interchangeably in practice (Issues Paper at [19.60]).²⁹⁹ This is because they both primarily focus on the future financial consequences arising from the division of functions during the relationship. The benefits of one regime often offset the disadvantages of another. For example, maintenance allows periodic payments and more immediate access to funds, while an award under section 15 is likely to be larger and more reflective of the economic disadvantage due to the division of functions in the relationship. Maintenance might also be a more appropriate response than section 15 in circumstances where one partner has a high income but there is little relationship property.³⁰⁰

ISSUES

Failure to share the economic advantages and disadvantages of the relationship

- 5.7 As explained in Chapter 1: Introduction, a qualifying relationship is a family joint venture to which each partner contributes equally, but in different ways. Partners contribute to the family joint venture with the expectation that they will continue to share in the fruits of that joint venture – the product of their combined contributions – into the future.
- 5.8 Often, partners will structure their family joint venture in a way that reduces one partner's individual earning capacity, and sustains or enhances the other partner's individual

²⁹⁶ Family Proceedings Act 1980, ss 63 and 64. Other circumstances in which maintenance may be available is where one partner cannot meet their reasonable needs because of ongoing childcare responsibilities, the standard of living of the partners when they were together, or any undertaking of training by a partner to eliminate the need for maintenance of that partner. Maintenance during a marriage or civil union is also available when the need arises due to physical or mental disability or inability to obtain adequate and reasonable work: Family Proceedings Act 1980, s 63(2)(d)–(e).

²⁹⁷ Section 64A.

²⁹⁸ The Court of Appeal in *C v G* [2010] NZCA 128, [2010] NZFLR 497 observed at [31] that:

Where one party is liable to maintain the other, the legislative policy is that the liability should ordinarily be temporary in nature while the maintained party consciously moves towards self-sufficiency.

Caldwell also notes that the requirement of reasonableness within s 64A of the Family Proceedings Act 1980 is taken to necessitate a maintenance period that is defined and limited in time, and while the extent of a "reasonable" period of time is left unspecified, "some judges seem to adhere to the view that the expected length of time would ordinarily be in the realm of 3 to 4 years following separation": John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 400.

²⁹⁹ Atkin observes that, since the first decision under s 15 in *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC), "maintenance has been seen as a genuine alternative to an economic disparity award": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 172. We understand from our discussions with practitioners before and during public consultation that it is not uncommon for maintenance to be offered by a respondent partner in exchange for an applicant partner withdrawing a s 15 application.

³⁰⁰ This was the case in *McQueen v Penn* [2016] NZHC 699, [2016] NZFLR 795, where lump-sum maintenance in the vicinity of \$380,000 was awarded to the wife. The husband was a surgeon and the wife was a nurse but she had stopped work to care for the couple's children. The couple had a high standard of living during the marriage as a result of the husband's high income, but they had very little, if any, relationship property (at [39]–[42]).

earning capacity. A common example is where one partner (Partner A) forgoes their own full participation in the workforce in order to care for the partners' children.³⁰¹ This reduces Partner A's individual earning capacity and frees up Partner B to improve or sustain their own individual earning capacity. Both partners benefit from such an arrangement as long as the family joint venture continues. But if the partners separate, the economic advantages arising from the relationship are concentrated in Partner B, while Partner A is at an economic disadvantage. This is illustrated in the examples below.

EXAMPLE: JOAN AND FRANK

Joan and Frank were married for 20 years. When they married, Frank and Joan both worked as sales assistants for an electronics company. Joan stopped work 18 years ago to raise the couple's three children and take responsibility for the household. Frank became the sole breadwinner, and he focused on improving his income earning potential, including working late nights. As a result, Frank's career has advanced and he is now the manager earning \$90,000. After separation Joan finds work as a sales assistant in a rival electronics company earning \$28,000.

EXAMPLE: ASHLEY AND FRANCIS

Ashley and Francis were in a de facto relationship for 12 years. When they met Ashley was starting a medical degree and Francis was a secondary school teacher earning \$45,000, which increased during their relationship to \$65,000. Throughout the first 10 years of their relationship Francis supported Ashley financially as Ashley studied. Two years before they separated Ashley started work as a cosmetic surgeon earning \$145,000.

EXAMPLE: ALEX AND ROBIN

Alex and Robin were married for 35 years. They met when they were both 20 years old and working as teachers on a starter salary of \$18,000 each. They did not have any children. Throughout the relationship both partners worked in a variety of jobs and supported each other through periods of unemployment due to illness, redundancy and the pursuit of interests such as extra study and an art hobby. When the partners separate Alex is earning \$90,000 as an education adviser and Robin is earning \$60,000 as an art teacher.

- 5.9 In some cases, the end of the relationship does not put an end to the arrangements that resulted in an unequal distribution of economic advantages and disadvantages. For example, a partner who stopped work in order to care for the partners' children is likely to continue to be the primary caregiver after separation,³⁰² further impacting on their earning capacity. This is illustrated in the following example:

EXAMPLE: DIANE AND EDDIE

Diane and Eddie were married for 15 years. When they met, Eddie worked on the family farm and Diane worked in a local real estate agency. Diane left work early in their relationship to

³⁰¹ In Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) (Issues Paper) at [19.2] we observed that, in 2016, 33 per cent of couples with children were characterised by one partner working full-time and one partner not in paid employment. While financial and non-financial functions might be shared more evenly in more relationships, there remains a strong correlation between having children and reduced workforce participation for women. See Issues Paper at ch 6 citing Bryan Perry *Household incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2016* (Ministry of Social Development, July 2017) at 147.

³⁰² In the Study Paper we identified that, among couples with children, women have a lower workforce participation rate than men, and that motherhood is a significant factor in how women participate in paid work: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at 40–41. We also identified that the division of paid and unpaid work during the relationship can result in different rates of economic recovery after separation, with the ongoing care of children having a significant effect on women's workforce participation (at 60–61). See also Christopher Turnbull "Family Law Property Settlements: Principled Law Reform for Separated Families" (PhD Thesis, Queensland University of Technology, 2017) at 44.

raise their three children, the youngest of whom is disabled. As the children became more autonomous Diane did the accounting work for the farm. When the relationship ends, Diane has primary care of the children. Eddie continues to receive a salary from the farm of \$80,000 and lives in a house on the farm. Diane rents a small house in town but can only take on a part-time role in the local supermarket (earning \$22,000) in order to be available for the children and, in particular, for the youngest child's therapy sessions.

- 5.10 In these situations, the PRA fails to divide the fruits of the family joint venture as it does not share the economic advantages one partner leaves the relationship with. Nor does it address the economic disadvantages the other partner suffers, unless that partner can successfully claim under section 15 (we discuss problems with section 15 below). The PRA therefore fails to implement its principle that a just division of relationship property has regard to the economic advantages and disadvantages arising from the relationship.
- 5.11 Failing to share economic advantages and disadvantages arising from relationships can have significant consequences for the economically disadvantaged partner. They effectively suffer a "double loss", as not only has their own earning capacity reduced, they also no longer get to share in their partner's sustained or enhanced income.³⁰³ They may also be unable to meet their future needs, which can become a societal problem, as State resources are used to provide for them in the future if maintenance is not available. If the economically disadvantaged partner is the primary caregiver of the partners' children, the financial consequences of separation are exacerbated by the inadequacy of the child support regime, discussed in Chapter 7: Children's interests.

A longstanding problem

- 5.12 How to share economic advantages and disadvantages arising from a relationship has long presented a challenge for policy makers, legislators and the courts, both in New Zealand and elsewhere (see paragraphs 5.28–5.32 for a discussion of comparable jurisdictions).³⁰⁴ Past efforts to address the problem in New Zealand have included unsuccessful arguments to classify and divide enhanced earning capacity as relationship property,³⁰⁵ improvements to the maintenance regime to achieve better sharing of future income,³⁰⁶ and legislative provision for compensation from the relationship property pool, in the form of section 15.
- 5.13 Despite these attempts, sharing the economic advantages and disadvantages arising from a relationship or its end remains unavailable for most New Zealanders.³⁰⁷

³⁰³ *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [13] per Lord Nicholls of Birkenhead.

³⁰⁴ For example, this problem was identified back in 1988, by the Royal Commission on Social Policy. See Report of the Royal Commission on Social Policy/*Te Kōmihana A Te Karauna Mō Ngā Āhutatanga-Ā-iwi* (Government Printer, April 1988) vol 4 at 217–227; and Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4.

³⁰⁵ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280.

³⁰⁶ In 1999 a majority of the Government Administration Select Committee, when considering the Matrimonial Property Amendment Bill, concluded that sharing future income was best dealt with by the law of maintenance, rather than by treating enhanced earning capacity as matrimonial property: Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at 14. In 2001 Parliament made significant amendments to the maintenance regime in pt 6 of the Family Proceedings Act 1980 that sought to give a court greater flexibility to consider a wider range of circumstances in determining maintenance, including the division of functions during the relationship and the partners' earning capacity: see Matrimonial Property Amendment Bill 1998 and Matrimonial Property Amendment and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 20.

³⁰⁷ As Atkin observes, "the problem of genuine equality of outcome on relationships breakdown remains a real issue": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 102.

Section 15 has failed to provide an effective response

- 5.14 There are a range of legal and practical problems with section 15 that include:
- (a) The time and cost involved in making a section 15 claim puts it beyond the reach of many New Zealanders (Issues Paper at [18.104]–[18.108]).
 - (b) The inconsistent approach to section 15 awards makes it an uncertain and unpredictable remedy. The lack of consensus between all five Judges in *Scott v Williams* highlighted the complexity of the issues while doing little to clarify the law.
 - (c) Section 15 fails to provide immediate relief on separation. It applies on the division of relationship property, which may occur months if not years after separation.
 - (d) The court may only make compensatory awards under section 15 from the other partner's share of relationship property. This makes section 15 an ineffective remedy when the pool of relationship property is small.
- 5.15 A clear theme in *Scott v Williams* was that section 15 requires reform. Elias CJ stated that section 15 "cannot be accounted to have been successful in meeting its purpose,"³⁰⁸ while Arnold J observed the "widespread view amongst family law commentators" is that section 15 "has not lived up to expectations".³⁰⁹ O'Regan J agreed there were problems and noted that:³¹⁰

Given the difficulties that have been encountered with s 15 so far, it would seem that the best solution to these problems is to learn from them and for Parliament to settle on clear objectives and legislate for a regime that offers more likelihood of resolution of claims without the difficulties and expense that have occasioned s 15 claims up until now.

Maintenance is an inadequate response to sharing economic advantages and disadvantages

- 5.16 Amendments in 2001 to the maintenance regime were designed to sit alongside the amendments to the PRA. But the resulting overlap between section 15 and maintenance has been described as "baffling", raising "perhaps the greatest question of uncertainty and confusion" since the 2001 package of reforms were introduced.³¹¹
- 5.17 While maintenance might provide access to future income, its objective is not to share economic advantages and disadvantages arising from the relationship. It remains focused primarily on meeting needs.
- 5.18 There is also a broader question as to the role of maintenance in 2018, especially in light of section 15. Caldwell explains:³¹²

The heart of the maintenance problem is that the fundamental moral question of exactly *why* one party would be liable to provide income support to an ex-partner has never been

³⁰⁸ *Scott v Williams* [2017] NZSC 185. [2018] 1 NZLR 507 at [351].

³⁰⁹ At [279].

³¹⁰ At [377].

³¹¹ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 158 and 176. Caldwell observes that the full ramifications of introducing s 15 on the maintenance regime may not have been properly appreciated at the time, given the possibility of integrating the separate maintenance and relationship property regimes was neither considered nor addressed: John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 411.

³¹² John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 411–412.

properly addressed or answered. Perhaps the need for relationship-derived compensation does offer some explanatory rationale for maintenance in overseas jurisdictions. However ... this particular justification has been rendered otiose in New Zealand (at least where there is sufficient relationship property from which to make a compensatory section 15 award). The statutory provisions of the [Family Proceedings Act] are simply not designed to cover the issue of economic disparity specifically. And while the [Family Proceedings Act] does expressly provide that the means, earning capacity, responsibilities and needs of the respondent may affect the quantum of any maintenance, it regrettably fails to shed any light on why maintenance liability to meet the applicant's living expenses should fall on the respondent in the first place.

- 5.19 These issues have led to calls for greater rationalisation of the two remedies, with some preferring maintenance over section 15,³¹³ while others preferring to reform section 15 so that the role of maintenance can be subsumed within it.³¹⁴

Results of consultation

- 5.20 A strong theme of consultation was that section 15 requires reform. Several practitioners we spoke with expressed frustration with being unable to advise their clients with any certainty as to the likely outcome if a section 15 application is pursued. Submitters generally agreed on the need for reform to achieve a just outcome that recognised the reality of what one partner had given up and one partner had gained in terms of their respective careers.
- 5.21 Many members of the public focused on the unfairness to women who had stayed at home to raise children and whose careers had suffered as a result. A common theme amongst the personal stories shared was of a mother who left work (or worked part-time) and had primary responsibility for the care of children and domestic tasks while the father was the primary earner. In these stories, it was considered that during the relationship there was a mutual understanding that the partner's respective contributions were for the benefit of their family. These submitters expressed a strong sense of injustice when the mother no longer received the financial benefits after the relationship ended. There was the perception that the mother had likewise worked for these benefits and simply splitting the relationship property did not reflect her contributions to the family.
- 5.22 Another theme from these stories was that the period post separation was very difficult as the earning partner would often have control of all the money and the partner who stayed at home would have to take on a loan or apply for a State benefit in order to make ends meet financially. The ongoing financial impact of separation was noted by several submitters who commented that they worried how they would be able to save for retirement or their own home in the future as their reduced income was being used to meet daily living costs for themselves and their children. The Ministry for Women noted the time that women take out of the workforce to care for their dependants may have a negative impact on their lifetime earnings.

³¹³ Atkin argues that "conceptually, redressing economic disparity fits more easily under the law of maintenance", as maintenance payments are periodic, and "are therefore arguably a more precise tool in redressing income disparities rather than a lump sum or transfer of property": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 129. See also *G v G* [2003] NZFLR 289 (FC) at [132]; and *Hammond v Hardy* [2007] NZFLR 910 (HC) at [97].

³¹⁴ See for example John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 411.

- 5.23 Some members of the public considered that sharing anything beyond the relationship property was not appropriate. The need for a clean break was an implicit reason behind opposition to sharing future income. The role of child support to meet the financial needs of any children was also cited. One member of the public remarked that income is linked to the effort and ability of the income earner and should not be shared after the relationship ends.
- 5.24 Many members of the public also criticised maintenance and child support as providing inadequate support for the primary caregiver following separation. Practitioners we spoke with in public and practitioner meetings described maintenance applications as expensive and time consuming, while the awards were described as conservative.

Results of the Borrin Survey

- 5.25 The Borrin Survey provides evidence of New Zealander's public attitudes and values about how the economic advantages and disadvantages arising from a relationship should be shared on separation. As we discussed in Chapter 3: Division, the Borrin Survey identified a high level of support for the general rule of equal sharing of relationship property, with 74 per cent of respondents agreeing with the current law. But 88 per cent of respondents who agreed with the current law thought it was appropriate to depart from equal sharing in certain situations.
- 5.26 One of these situations set out in the Borrin Survey was where one partner (Partner A) had put their career on hold in order to stay at home and look after the couple's children, while the other partner (Partner B) earned the family's income.³¹⁵ When the partners separated after 10 years, Partner B had an established career and good income, but Partner A was struggling to find a job. Respondents were asked whether Partner A should receive additional financial support from Partner B after they separate.
- 5.27 The majority of respondents (59 per cent) felt Partner A definitely or probably should receive additional support and 35 per cent said they definitely or probably should not (three per cent said "it depends" and three per cent responded "don't know").³¹⁶ Those respondents who felt Partner A should receive additional support were asked how that additional financial support should be received. Just under half (49 per cent) felt Partner A should receive a share of Partner B's income for a set period, while 27 per cent felt they should receive more relationship property.³¹⁷ The rest were either unsure or provided various responses, most of which focused on the need to tailor a solution based upon the individual circumstances of the couple.³¹⁸

³¹⁵ The survey used the names "Alice" and "James" in this scenario, but their roles were randomly reversed so that in some surveys Alice was Partner A, and in others James was Partner A. Interestingly when James was Partner A, the proportion of respondents who thought that he should receive additional financial support dropped to 51 per cent, and when Alice was Partner A, the proportion of respondents who thought that she should receive additional financial support increased to 68 per cent. See discussion in I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [180]–[183].

³¹⁶ At 37 (Figure Eight).

³¹⁷ At 38 (Figure Nine).

³¹⁸ At [179].

SHARING ECONOMIC ADVANTAGES AND DISADVANTAGES IN COMPARABLE JURISDICTIONS

5.28 The challenge of how to share economic advantages and disadvantages arising from a relationship is not isolated to New Zealand. Before outlining our preferred approach, it is useful to briefly consider how comparable jurisdictions recognise and address this issue. The fact that each jurisdiction takes a different approach illustrates that there is no "silver bullet" solution.

5.29 Jurisdictions New Zealand often compares itself with (Australia, England and Wales and Ireland) have different approaches to dividing relationship property. Regimes in these jurisdictions are discretionary, rather than rules-based. A court has broad powers to adjust a partner's property interests on separation if it considers it just to do so.³¹⁹ There is no general rule of equal sharing. This gives a court greater flexibility to take into account the economic advantages and disadvantages arising from the relationship. In some jurisdictions, the legislation specifically directs a court to consider future earning capacity when making orders. For example, in England and Wales future earning capacity is a factor a court must take into account when exercising its overall discretion in making financial orders when spouses divorce.³²⁰ In Ireland, a court must, when considering whether to make financial orders, have regard to:³²¹

the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.

5.30 Scotland is more comparable to New Zealand because, while it is a discretionary regime, judicial discretion is limited by a set of statutory principles, one of which presumes the equal sharing of matrimonial property.³²² Another principle is that:³²³

fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other or of the family.

5.31 In Scotland, a court does not divide the partner's earning capacity as if it were an item of property. Rather, a court divides the partners' capital assets with regard to the partners' relative earning capacities.³²⁴ In addition, a "periodical allowance" may be ordered for a period of up to three years after divorce is granted,³²⁵ but this will only be ordered if there is insufficient capital for lump-sum financial orders.³²⁶

³¹⁹ Family Law Act 1975 (Cth), s 79; Matrimonial Causes Act 1973 (UK), s 25; and Family Law (Divorce) Act 1996 (Ireland), s 16.

³²⁰ Matrimonial Causes Act 1973 (UK), s 25(2)(a).

³²¹ Family Law Act 1995 (Ireland), s 16(2)(g).

³²² Family Law (Scotland) Act 1985, ss 9(1) and 10(1).

³²³ Section 9(1)(b).

³²⁴ In an empirical study of family law practitioners' views on the Family Law (Scotland) Act 1985 and Family Law (Scotland) Act 2006, researchers found that there was a perception that it was hard to obtain a departure from equal sharing in order to address economic disadvantages. The practitioners responded that claims were complex to argue and difficult to prove given the difficulties of quantifying economic advantages and disadvantages: Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2015) at 75.

³²⁵ Family Law (Scotland) Act 1985, s 9(1)(d).

5.32 The law in Canada is most comparable to New Zealand, as the division of relationship property is dealt with under a rules-based relationship property regime, with a separate regime for maintenance. However the Canadian approach varies in two key respects. First, maintenance in Canada has the dual objectives of compensating for economic disparity as well as meeting financial need.³²⁷ Second, comprehensive maintenance guidelines that have been judicially endorsed provide a framework for determining the amount and duration of maintenance awards, making it a more accessible and predictable remedy (see discussion in Issues Paper at [19.72]–[19.82]). In addition to a broader maintenance regime, some Canadian provinces also provide for unequal sharing of relationship property when a just division of all the economic advantages and disadvantages will not be achieved through equal sharing.³²⁸

OPTIONS FOR REFORM

5.33 In Chapter 19 of the Issues Paper we proposed three options for reform:

- (a) **Option 1: Retain section 15 but lower the hurdles the applicant must overcome.** We proposed removing reference to living standards and focusing instead on financial inequality on separation; replacing the causation requirement with a rebuttable presumptive entitlement to compensation if there are both financial inequality and a division of functions; and broadening the property that can be used to satisfy a section 15 award.
- (b) **Option 2: Repeal section 15 and address financial inequality in other rules under the PRA.** We identified ways financial inequality could be addressed under other PRA rules. Earning capacity could be treated as property in its own right under the PRA, which would enable the classification of enhanced earning capacity as relationship property that could be divided equally alongside the partners' other property. Alternatively, a court could be given the power to depart from equal sharing when satisfied that equal sharing would not fairly allocate the economic advantages and disadvantages resulting from the relationship.
- (c) **Option 3: Replace section 15 with financial reconciliation orders.** This option proposed the introduction of a new regime of financial reconciliation payments to support the economically disadvantaged partner until the financial inequality resulting from the division of functions during, and after, the relationship, ends. It proposed combining the functions of section 15 awards and maintenance payments under the Family Proceedings Act.

Results of consultation

- 5.34 Views were mixed on the preferred option for reform. Submitters were generally divided between favouring Option 1 and Option 3.
- 5.35 Practitioners who made a written submission tended to prefer Option 1, citing the period of time that has passed since section 15 was introduced and the perception that issues with section 15 were ameliorating. However, many practitioners we spoke with at public and practitioner consultation meetings preferred Option 3.

³²⁶ Section 13(2)(b).

³²⁷ Divorce Act RSC 1985 c 3, s 15.2(6).

³²⁸ For example, British Columbia: see Family Law Act SBC 2011 c 25, s 161.

- 5.36 The New Zealand Law Society (NZLS) favoured Option 1 and considered it would address the key problems with section 15. In relation to quantum, NZLS set out the judgment of Arnold J in *Scott v Williams* as a model for how quantum could be assessed. NZLS considered there to be a need for guidance on the range of outcomes to increase certainty and consistency, and that awards should have access to separate as well as relationship property.
- 5.37 There was some support from members of the public for Option 2, and in particular the proposal to treat enhanced earning capacity as an item of relationship property. However, no solutions to deal with the considerable hurdles associated with Option 2 were suggested (see discussion in Issues Paper at [19.32]–[19.40]).
- 5.38 Option 3 received the most support from members of the public,³²⁹ and was also supported by practitioners and academics we spoke with during public and practitioner consultation meetings. Some practitioners also highlighted the need to be able to capitalise periodic payments if Option 3 were adopted. Members of the public pointed to the advantages of Option 3, including access to money immediately after separation, the use of a formula to determine the amount payable and the end of maintenance.
- 5.39 The Judges of the Family Court preferred Option 3, although they also expressed support for Option 1. They submitted that, if Option 1 were preferred, consideration should be given to ensuring that section 15 is accessible to the "average" relationship, ensuring there is an effective enforcement mechanism, and to providing legislative guidance as to quantum. NZLS saw merit in Option 3 but cited the benefits of lump sum over periodic payments, the attraction of a clean break and issues relating to enforcement as factors working against Option 3. If Option 3 were adopted, NZLS considered that the period that payments were to endure should perhaps be longer if there are dependent children of the relationship, or if the relationship was long (because the post relationship effects on an older partner will probably endure longer). It did not consider an arbitrary cut off point was appropriate, instead preferring the end date to be determined by a court.
- 5.40 The Ministry for Women did not express a preference for an option but submitted that, when dividing property, the projected future income and employment opportunities of both the primary caregiver and the other party should be considered.
- 5.41 Regardless of their preferred option, submitters generally supported reform that provides a solution that is easy to understand and to access. Submitters also noted that the need to prove that the division of functions caused a partner's economic disadvantage should be removed or reduced.

³²⁹ This is reflected in submissions received through the consultation website. 25 submitters preferred Option 3, 12 submitters preferred Option 1, and six submitters preferred Option 2.

PREFERRED APPROACH

P18

Section 15 of the PRA and maintenance under Part 6 of the Family Proceedings Act 1980 should be repealed and replaced with a new, limited entitlement to share future family income through a Family Income Sharing Arrangement or FISA.

P19

A partner (Partner A) should be entitled to a FISA in the following circumstances:

- a. the partners have a child together; or
- b. the relationship was 10 years or longer; or
- c. during the relationship:
 - (i) Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or
 - (ii) Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.

P20

The amount and duration of a FISA should be determined by a statutory formula that equalises the partners' incomes for a period of time that is approximately half the length of the relationship, up to a maximum of five years.

P21

Entitlement to a FISA should arise from the date of separation and default rules should provide for the implementation of a FISA by way of monthly periodic payments, unless the partners agree otherwise.

P22

Partners should be able to make their own agreement as to the amount, duration and implementation of a FISA. The PRA should specify when an agreement should be regarded as a settlement agreement under section 21A, requiring compliance with the safeguards in section 21F in order for it to be enforceable.

P23

A court should be able to adjust a FISA and depart from the statutory formula and/or default rules of entitlement if satisfied failure to grant the application would result in serious injustice, having regard to a number of specified considerations.

P24

Partners should be able to contract out of the FISA provisions before or during the relationship under section 21 of the PRA.

P25

Strict enforcement measures should be put in place to ensure that, when partners cannot reach agreement, a FISA is implemented in accordance with the statutory formula and default rules of implementation or as otherwise ordered by the court.

P26

The Government should consider extending the existing administration and enforcement role of the Inland Revenue Department under the Child Support Act 1991 to include the administration and enforcement of FISAs.

A new entitlement

- 5.42 Our preferred approach is to replace both section 15 of the PRA and maintenance under Part 6 of the Family Proceedings Act with a new, limited entitlement to share future family income through a Family Income Sharing Arrangement (FISA).³³⁰ Currently section 15 and maintenance are often used interchangeably, but both fail to provide an effective and accessible remedy for most New Zealanders, for the reasons we discussed above.
- 5.43 The objective of a FISA is to share the economic advantages and disadvantages arising from a relationship or its end. But FISAs are not intended to achieve an exact account and division of all economic advantages and disadvantages. This would likely result in the same issues that frustrated section 15 in practice, such as the need for extensive and expensive advice from valuers, forensic accountants, human resource specialists and other experts. Our preference therefore is to use a formula that shares the future family income of the partners for a specified period, subject to the court's power to adjust the entitlement when necessary to avoid serious injustice. We consider this provides a workable, effective and accessible solution.
- 5.44 FISAs are effectively a hybrid of Option 1 and Option 3 from the Issues Paper. We expressed a preference for Option 3 in the Issues Paper, referring to the Canadian regime for spousal support and the Canadian Spousal Support Guidelines. However, further research, the results of consultation and the development of our thinking has led us to conclude that although there are features of the Canadian regime that we can draw upon (such as the use of a simple and easy to use formula to determine the amount owing), it was designed specifically for Canada and certain features would not be appropriate in the New Zealand context (such as the potential unlimited duration of spousal support). New Zealand needs an approach suitable to the social and legal context of this country.
- 5.45 FISAs are not intended to substitute the role of child support under the Child Support Act, which is discussed in Chapter 7: Children's interests. However given that the economically disadvantaged partner is often the primary caregiver (see paragraph 5.9 above), FISAs will also often benefit dependent children of the relationship.
- 5.46 In reaching our preferred approach we have been guided by the need to ensure our proposals:

³³⁰ We are not alone in proposing a period of future income sharing following separation, either as a remedy in itself or as a proxy for identifying and sharing the economic advantages resulting from the relationship. In Mark Henaghan "Sharing family finances at the end of a relationship" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 293 at 323–325, Henaghan proposes repealing s 15 and instead classifying and dividing earning capacity as relationship property in its own right. As a way to calculate the value of earning capacity that ought to be shared, Henaghan proposes a "combined income equalisation payment approach", which is similar to a FISA and involves identifying and combining the partners' respective future incomes for the 12 month period after separation, dividing that total in half, and then multiplying by half the number of years the partners have been together, up to a maximum of 10 years. Henaghan also proposes that a court use its discretion to adjust the figure for relevant contingencies. This could then be paid as a lump-sum or periodic payment. Likewise, in his paper "Relationship Property – A Practitioner's Perspective" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) 83 at 89, Stephen van Bohemen mooted a similar idea of sharing family income for a prescribed period. A judge of the Family Court, in a submission on the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017)) also suggested treating future income as relationship property until the partners' property matters are resolved, in order to incentivise prompt resolution of relationship property matters.

- (a) give effect to the purpose of the PRA and the principle that the economic advantages and disadvantages arising from the relationship or its end should be shared;
- (b) provide an accessible remedy, with minimal need for legal or other professional advice and without the need to go to court in most cases;
- (c) provide immediate relief on separation, as this is often the period during which the economically disadvantaged partner suffers the most; and
- (d) strike a pragmatic balance between providing a workable and predictable outcome that the partners can be confident will endure, and providing an outcome tailored to the partners' individual circumstances (this is sometimes referred to as the need to balance "average" with "individualised" justice).³³¹

Repeal of maintenance

- 5.47 FISAs have a different objective to maintenance, which is about meeting financial need. However a natural consequence of sharing economic advantages and disadvantages under a FISA will be that the economically disadvantaged partner is in a better position to recover financially from separation and to transition out of the family joint venture, as is the intention with maintenance. FISAs share three key characteristics with maintenance. First, FISAs are short-term, but as we propose that the length of the entitlement should be linked to the length of the relationship, partners in longer relationships will have greater assistance to transition from the relationship. Second, FISAs will be available immediately on separation. Third, the amount of a FISA is an approximation rather than an exact calculation. FISAs will, therefore, fundamentally displace the role of maintenance.
- 5.48 By replacing maintenance with FISAs there will be a small group of people who will no longer be entitled to income sharing on separation. These are married or civil union partners who were in a relationship for less than 10 years, did not have children together, and suffer financial need on separation for reasons unconnected to the relationship or its end.³³² These partners are currently entitled to maintenance but only until their marriage or civil union is dissolved. We are not satisfied of the merits in retaining a maintenance regime for this group alone. The availability of maintenance for this group appears to reflect a traditional view that, on formalising a relationship through marriage or civil union, partners undertake a responsibility to support each other that endures beyond separation.³³³ We consider this view to be outdated and also inconsistent with the courts'

³³¹ Carol Rogerson and Rolie Thompson concluded in their review of the Canadian Spousal Support Guidelines that "in this highly-contested area of family law, the greater consistency and predictability of outcomes ultimately leads to greater fairness and legitimacy for the substantive remedy itself": C Rogerson and R Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Fam LQ 241 at 269. See also the discussion in Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 261 at 289–290. See also Ira Mark Ellman "The Theory of Alimony" (1989) 77 California Law Review 3.

³³² Specifically, married or civil union partners who suffer a physical or mental disability, or who are otherwise unable to obtain adequate and reasonable work, are entitled to maintenance until the marriage or civil union is dissolved under s 63(2)(d)–(e) of the Family Proceedings Act 1980. There is no equivalent entitlement for de facto partners. Unless these partners can establish an entitlement to a FISA, they will no longer be entitled to income sharing.

³³³ Atkin observes in Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 164 that the logic of the distinction between an entitlement to maintenance on these grounds during, but not after dissolution of a marriage or civil union, is that:

record of short or interim awards of maintenance for conservative amounts. When financial need is unconnected to the relationship, in our view it is the responsibility of the State, rather than the other partner, to meet those needs through the provision of social welfare where the individual is unable to do so.³³⁴

5.49 The rest of this chapter explains how we propose the FISA regime will work.

When entitlement to a FISA arises

5.50 We propose that the PRA specify the circumstances in which a partner³³⁵ will be entitled to a FISA, rather than simply providing a general entitlement for a partner who is economically disadvantaged as a result of the relationship or its end. A clear statement of statutory entitlement will enable couples, lawyers and the courts to easily identify those relationships that give rise to an entitlement, reducing the scope for dispute and promoting the inexpensive, simple and speedy resolution of PRA matters.

5.51 A partner (Partner A) will be entitled to a FISA in the following circumstances:

- (a) the partners have a child together; or
- (b) the relationship was 10 years or longer; or
- (c) during the relationship:
 - (i) Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or
 - (ii) Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.

5.52 When any of these circumstances apply, Partner A will not need to show that the relevant circumstance caused economic advantages or disadvantages, unlike the current test under section 15. There are two main reasons why we have not proposed a requirement to prove causation. First, we are satisfied that in each of these circumstances the partners' contributions can reasonably be expected to give rise to economic advantages and/or disadvantages. Causation can therefore be deemed. Second, as we outline below at paragraphs 5.99–5.102, Partner B can apply to a court to adjust a FISA if, having regard to the extent to which the partners have been economically advantaged or disadvantaged as a result of the relationship, failure to grant an adjustment would result in serious injustice. The regime therefore places an onus on Partner B to show the circumstances of the relationship *did not* result in economic advantage or disadvantage. Given the difficulties experienced in providing causation under section 15, we think it is appropriate that the onus be reversed.

during the marriage, the vows 'or richer or poorer, in sickness and in health' will still hold sway but, after divorce, they lose all their force. Disability and failure to get a job because of high unemployment are usually personal or externally generated factors, not ongoing effects of having lived with someone.

³³⁴ Caldwell notes that when the cause of financial difficulty is attributable in the main to considerations such as prevailing socio-economic circumstances, societal values, or an individual's personal skill set, it is hard to determine why, once the compensatory obligation is discharged (that is, an adjustment is made for the relationship-caused disparity), a former partner bears any responsibility at all to meet the other's reasonable needs: John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 413.

³³⁵ In this chapter we use the term "partner" to mean a partner who is in a qualifying relationship. For discussion of what is a qualifying relationship see Chapter 4: Eligibility criteria.

- 5.53 The circumstances in which a partner is entitled to a FISA are designed to capture situations where, through the partners' varying contributions, there is an (often implicit) expectation to share economic advantages and disadvantages throughout the relationship. When the relationship ends, the partners' expectations are defeated. In general, this expectation will increase with time or with a key event such as the birth of a child. But we also recognise that important contributions can be made in shorter, child-free relationships that also give rise to an expectation of sharing economic advantages and disadvantages. This is recognised in category (c). Unlike under section 15, Partner A will not have to establish a difference in income and living standards due to the division of functions during the relationship.
- 5.54 We consider that these circumstances (explained in more detail below) reflect New Zealanders' attitudes and values as to when an obligation to share the economic advantages and disadvantages resulting from a relationship should arise. As noted at paragraphs 5.25–5.27 above, results of the Borrin Survey indicate that most New Zealanders support the idea of sharing the economic advantages and disadvantages associated with having children. Another relevant finding from the Borrin Survey is that nine in 10 respondents thought that having children together, buying a house together, living together as a couple and sharing finances were all important factors to consider when deciding whether to apply the equal sharing law.³³⁶ This indicates that New Zealanders place significant weight on whether a couple has children together, and the extent of their interdependence, when deciding whether the partners should have property sharing obligations. It is reasonable to think that the same attitudes and values will extend to sharing all the economic advantages and disadvantages of the relationship.
- 5.55 Entitlement to a FISA is established as at the date of separation. If a partner is entitled to a FISA, they remain entitled for the length of the FISA.

The partners have a child together

- 5.56 A partner will be entitled to a FISA if the partners have a child together. The child must be the child of both partners (for example an adopted or biological child of the partners). This is more limited than the PRA's definition of "child of the relationship", which can, for example, include children from one partner's previous relationship (see discussion in Chapter 7: Children's interests). This distinction is drawn in the context of FISAs because when both partners are the parents of a child, it is reasonable to infer that they expect to share the economic advantages or disadvantages arising from satisfying the responsibilities associated with having and raising the child, and make contributions to the relationship on that basis.³³⁷ The same can be said in respect of a child of both partners who is born after the relationship ends, and so an entitlement should also arise if one partner was pregnant with the partners' child at the time of separation.

³³⁶ I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [124].

³³⁷ Fisher explains that the care of children of the relationship is the equal and continuing responsibility of both parents. If the custodial parent discharges that responsibility on behalf of the non-custodial parent, the latter should compensate the caregiver accordingly: Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 329 at 334. While Fisher was commenting here on the rationale of maintenance stemming from the care of dependent children of the relationship, his comments are also relevant to the basis for sharing the economic advantages and disadvantages resulting from the care of children of the relationship.

- 5.57 While the same expectations *may* arise in relation to a child from a previous relationship, this cannot be presumed to the same extent and does not necessarily endure beyond the partners' separation. We note, however, that the care of *any* child of the relationship is a relevant contribution to the relationship under category (c) of the statutory entitlement (see paragraph 5.61–5.62).
- 5.58 We do not propose limiting the entitlement to circumstances where the child is a minor or dependent child at the time of separation. It is the presence of a child, rather than their age, that establishes an expectation of sharing the economic advantages and disadvantages. Further, decisions the partners make in relation to the care of their children can have long-term effects on the partners earning capacity that extend beyond the child's dependency. However we note that most relationships with adult children will have lasted for 10 years or longer and will therefore give rise to an entitlement to a FISA in any event (see below).

The relationship was 10 years or longer

- 5.59 A partner will be entitled to a FISA if the relationship was 10 years or longer. This recognises that, over time, partners will usually become increasingly interdependent and can be presumed to have made all kinds of contributions to the relationship with the expectation that the economic advantages and disadvantages arising from those contributions would be shared had the relationship continued.
- 5.60 Ten years is an arbitrary length of time, but we prefer this over a more discretionary threshold such as "a long-term relationship". A 10 year threshold provides a bright line that is certain and predictable, and reduces the scope for dispute. The risk of strategic behaviour, such as ending or maintaining a relationship just within or outside the 10 year mark, is, we think, small given the ability to establish entitlement to a FISA by other means.

A partner's earning capacity has been reduced, sustained or enhanced by the relationship

- 5.61 The third category of circumstances that give rise to an entitlement recognises that even in child-free, shorter-term relationships, partners may make contributions to the relationship that have economically advantaged or disadvantaged either or both partners, with an expectation that all economic advantages and disadvantages would be shared had the relationship continued. The PRA defines contributions to the relationship in section 18.
- 5.62 An entitlement will arise where Partner A has stopped, reduced or did not ever undertake paid work in order to make contributions to the relationship. This might include caring for a child from a previous relationship or other dependent family members, managing the household or supporting Partner B, for example by relocating in order to support a career opportunity (even if Partner A worked in the new location).
- 5.63 An entitlement will also arise where Partner B has been enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions made by Partner A to the relationship. This may include the provision of financial, emotional or professional support, or assuming greater responsibility for household management.

EXAMPLE: LEON AND NINA

Leon and Nina were married for five years and have no children. During the marriage Nina stopped work to go to university and retrain as a lawyer. Leon paid for most of the couple's expenses while Nina was studying. Nina graduated one year before the partners separated. Leon is entitled to a FISA.

EXAMPLE: JI-WOO AND GAVIN

Ji-Woo and Gavin were in a de facto relationship for six years. During the relationship Ji-Woo's disabled mother came to live with them and Gavin dropped from full-time to part-time work to care for Ji-Woo's mother. Gavin is entitled to a FISA.

Establishing an entitlement

- 5.64 If Partner A considers they are entitled to a FISA based on one or more of the categories of statutory entitlement, all that is required in order to activate the FISA regime is for Partner A to give written notice to Partner B. Notice can be given at any time after separation, up until the partners have resolved all their PRA matters (either by court order or by agreement under section 21A of the PRA).
- 5.65 Once Partner A's entitlement to a FISA is established (by giving notice to Partner B or the partners otherwise agreeing), the partners must work out the amount and duration of the FISA, guided by the statutory formula, and decide whether they want the FISA to be implemented in accordance with the default rules of implementation, or to agree an alternative arrangement.
- 5.66 A FISA is payable from the date of separation, but partners should be given a reasonable period of time to make the necessary arrangements before penalty interest on any unpaid amount starts to accrue.³³⁸ We propose a period of eight weeks from the date that Partner A's entitlement is established would provide sufficient time for partners to seek advice on implementing a FISA, and reach an agreement.
- 5.67 If the partners cannot reach an agreement within eight weeks about how the FISA is to be implemented, the default rules of implementation will apply. Under the default rules, Partner B must make monthly payments to Partner A of the amount and for the duration determined under the statutory formula. The first payment must be made within eight weeks from entitlement being established and should include any amount owing for the period between separation and the first payment. Failure to make the first payment within eight weeks will mean that interest starts to accrue on all outstanding sums, and Partner A can take steps to enforce the FISA on the basis of the statutory formula and default rules. We discuss enforcement at paragraphs 5.103–5.107 below.
- 5.68 If there is any disagreement as to how to apply the statutory formula and default rules that requires resolution by a court (for example, disagreements over the partners' income or the date of separation), a court may make an order for correction for any underpayment or overpayment, along with interest and costs, if appropriate. The court would do this when an entitlement is challenged or an adjustment order is sought, as discussed below.

³³⁸ Caldwell notes in John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 409 that it would be:

somewhat heartless to expect an instant reordering of financial lives while the parties are still coming to terms with the emotional and financial fallout of their separation. Some buffer zone does seem desirable.

Challenging an entitlement

- 5.69 Partner B can challenge the entitlement of Partner A by seeking a declaration of non-entitlement from a court. However, an intention to challenge Partner A's entitlement does not affect Partner B's obligation to pay the FISA in the interim. This will ensure that the effectiveness of FISAs in providing immediate relief on separation is not undermined by Partner B seeking to challenge the entitlement. Should Partner B's challenge be successful, a court may order repayment of any amount that was paid under a FISA, with interest and costs if appropriate in the circumstances.
- 5.70 A declaration of non-entitlement can be sought at any time, up until the partners have resolved all their PRA matters (either by court order or by agreement under section 21A of the PRA).
- 5.71 A court may make a declaration of non-entitlement if it is satisfied that none of the categories of statutory entitlement apply. The onus of proof will be on Partner B. We expect that successful challenges will be rare and, given the objective nature of categories (a) and (b), will be limited to child-free relationships that lasted less than 10 years. In respect of category (c), if Partner A stopped, reduced or did not ever undertake paid work, we expect that it will be difficult for Partner B to prove that this was not in order to perform other contributions to the relationship. Similarly, if Partner B undertook training, education, or other career sustaining or advancing opportunities, it would be difficult for them to prove they were not enabled to do so, due to Partner A's contributions to the relationship. Partner B could however challenge the amount and duration of a FISA through an adjustment order. Adjustment orders are discussed at paragraphs 5.99–5.102 below.

EXAMPLE: DENISE AND ROD

Denise and Rod were married for eight years and had no children. Denise stopped work four years after they were married in order to write a novel, telling all their friends of her plans. At the same time Rod was offered a post in Sydney for three years and the partners moved there together. The partners separated a year after moving back to New Zealand and Denise was unable to find work. Rod successfully applied for a declaration of non-entitlement, having satisfied the court that Denise did not stop work in order to make other contributions to the relationship (such as to relocate with Rod) but to write a novel.

EXAMPLE: ALAN AND BETH

Alan and Beth were in a de facto relationship for five years. Three years after the relationship started Alan was in a workplace accident and had to stop work. His recovery was slow and when he was able to return to work it was only part-time and in a much lower-paid role. When the partners separated Beth successfully applied for a declaration of non-entitlement having satisfied the court that the reason Alan stopped work and subsequently undertook part-time work was due to personal injury and not to make other contributions to the relationship.

- 5.72 A declaration of non-entitlement can be sought under urgency, but only on the grounds that payment of the FISA would result in serious and irreversible injustice. This is a high threshold. A court will need to be satisfied that the possibility of future repayment of the FISA, along with costs and interest, would fail to undo the serious injustice caused by requiring Partner B to pay the FISA in the interim.

The statutory formula

5.73 The amount and duration of a FISA will be determined by a statutory formula. The objective of the statutory formula is to equalise the partners' incomes following separation for a period of time that is approximately half the length of the relationship, up to a maximum of five years.

Amount of a FISA

5.74 Under the statutory formula Partner A will be entitled to half the family income, which will be defined as the combined net (post tax) income of both partners.

5.75 The statutory formula will use each partner's annual income, as at the date of separation, with six monthly adjustments (if needed) to take into account changes in the income of either partner during the FISA.

Definition of income

5.76 Income should include any form of taxable and non-taxable income a partner receives, except for those specifically excluded below (at paragraph 5.80).

5.77 A court may impute income if it considers that the amount declared by a partner for the purposes of calculating a FISA does not fairly reflect all the income available to that partner. We propose including a comprehensive list of circumstances in which a court may impute income, in order to provide clear guidance to partners. This will encourage and facilitate the resolution of any disputes over declared income out of court wherever possible.

5.78 The circumstances in which a court may impute income should include (but not be limited to) where a partner:³³⁹

- (a) is a shareholder, director or officer of a company and the amount of income declared by that partner does not fairly reflect the financial resources available to that partner;
- (b) is intentionally under-employed or unemployed, other than to meet the needs of a child or other dependant or by the reasonable educational or physical or mental health needs of that partner;
- (c) has diverted income so that it is not able to be included in the calculation of a FISA (regardless of intent);
- (d) owns property that is not reasonably utilised to generate income;
- (e) fails to disclose income information so there is insufficient or no information available on which to calculate a FISA;
- (f) unreasonably deducts expenses from income;
- (g) fails to declare the value of non-taxable benefits; or
- (h) is a discretionary beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

³³⁹ Similar provision is made for imputing income in the Federal Child Support Guidelines (SOR/ 97-175, Canada) at cl 19(1), which are used as the starting point for income determination in the Canadian Spousal Support Guidelines: Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 46.

5.79 For the purpose of imputing income a court may either:

- (a) have regard to the partner's income over the three years prior to separation and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years; or
- (b) where appropriate, impute an amount the partner would have otherwise received from a relevant third party.

Excluded income

5.80 We propose explicitly excluding from the definition of income:

- (a) any child support received or paid in relation to any child;
- (b) State benefits, including student allowances and New Zealand Superannuation payments;
- (c) income derived from any property acquired from a third person after separation by succession, survivorship, or gift; and
- (d) income received as a beneficiary under a trust settled by a third person after separation.

5.81 We consider it would be inappropriate to require partners to share the value of child support payments and State benefits, as these are designed to meet the needs of the child or recipient partner.³⁴⁰ We also propose excluding income received in relation to third party gifts and inheritances that one partner receives following separation, as this cannot be regarded as being an economic advantage arising from the relationship.

EXAMPLE : ANNE AND BOB

Anne and Bob were in a de facto relationship for 10 years and have three children aged three, five and eight when the partners separate. Anne had stopped work to stay at home with the children. Anne is entitled to a FISA for five years. On separation Bob is earning \$95,000 (post tax) and Anne is earning \$35,000 (post tax). Bob pays child support for the three children of \$14,000 annually. Bob also has a child from a previous relationship and pays annual child support of \$6,200 for that child. Bob's income for the purposes of the statutory formula is \$74,800. Anne's income for the purposes of the statutory formula is \$35,000. The family income is \$109,800 and each partner is entitled to an equal share of \$54,900. Bob must pay Anne \$19,100 per annum.

Income thresholds

5.82 We propose setting a minimum income threshold that Partner B must meet in order for Partner A to receive FISA payments under the statutory formula. This recognises that it would be undesirable to require partners to share income if the result would be that both partners are put in a position of financial hardship. Further work is required to determine an appropriate minimum income threshold, having regard to the need to minimise the risk of perverse incentives and ensure that access to State benefits is not compromised.

5.83 Whether Partner B meets the minimum income threshold would be determined as at the date of separation, and would be revisited at each subsequent adjustment event (discussed at paragraph 5.88 below) for the duration of the FISA.

³⁴⁰ We note that eligibility for State benefits will likely take into account any FISA payments received.

- 5.84 We do not propose an upper limit or cap on the income to be used to calculate a FISA under the statutory formula. However Partner B could seek an adjustment from the statutory formula (see paragraphs 5.99–5.102 below).

Duration of a FISA

- 5.85 We propose that the duration of a FISA should reflect the length of the relationship. This is on the basis that the longer the relationship, the greater the partners' contributions will have been, and the greater the expectation of sharing the product of those contributions. We think this reflects the interdependence that grows in a relationship over time, as choices and decisions relating to the family joint venture are made, whether actively or not.
- 5.86 Under the statutory formula, the duration of a FISA will be calculated by halving the length of the relationship, and rounding up to the nearest three months for relationships shorter than two years, or six months for longer relationships, up to a maximum of five years. The five year maximum is an arbitrary length of time, but we are not convinced a longer period is justifiable in contemporary New Zealand, or practically achievable.³⁴¹ The examples below illustrate how the duration of a FISA would be calculated, assuming the entitlement is established.

EXAMPLE: CAROLINE AND RANGI

Caroline and Rangi were married for 10 months (they were not in a de facto relationship before they got married). Caroline is entitled to a FISA. The duration of the FISA is six months.

EXAMPLE: STEVE AND EMMA

Steve and Emma were in a de facto relationship for eight years and two months. Emma is entitled to a FISA. The duration of the FISA is four years and six months.

EXAMPLE: CHEN AND TROY

Chen and Troy were married for twelve years and three months and the marriage was preceded by a de facto relationship that lasted four years and six months. Chen is entitled to a FISA. The duration of the FISA is five years.

- 5.87 Basing the duration of a FISA on the length of the relationship will inevitably increase the risk of disputes over when the relationship began and ended. By rounding up to the nearest three months for relationships shorter than two years, or six months for longer relationships, we hope to minimise this risk. Limiting FISAs to a maximum duration of five years for relationships of 10 years or longer will also minimise the risk of disputes in longer relationships, when it will be harder to look backwards and determine when the relationship began.

Adjustments for changes in income

- 5.88 The family income may be reassessed on a six monthly basis under the statutory formula and adjusted if necessary to reflect any increase or decrease in the income of either partner. This means that Partner A's entitlement may go up if Partner B's income

³⁴¹ We note that Henaghan proposes a period of income sharing to a maximum of 10 years, while van Bohemen proposes a period of 2 years: see Mark Henaghan "Sharing family finances at the end of a relationship" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 293 at 323–325; and Steven van Bohemen "Relationship Property – A Practitioner's Perspective" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) 83 at 89.

increases. Or Partner A's entitlement may go down, if their income increases or Partner B's income decreases. While Partner A's entitlement could reduce to nil if Partner B's income equals Partner A's, the formula would not permit Partner A's entitlement to become a negative amount (if Partner B's income is less than Partner A's income).

EXAMPLE: BOB AND JANE

Bob is entitled to a FISA for four years. On separation Bob's income is \$20,000 and Jane's income is \$65,000, resulting in a family income of \$85,000. Bob is therefore entitled to a FISA of \$22,500 per year.

One year after separation Bob starts a new job and his income increases to \$50,000. At the next adjustment date the family income is adjusted to \$115,000 and Bob's entitlement drops to \$7,500 per year.

Five months later Jane is made redundant. At the next adjustment date (one month after redundancy) the family income drops to \$50,000 and Bob's entitlement drops to nil.

Jane finds a new job three months later and her income increases to \$70,000. At the next adjustment date the family income is adjusted to \$120,000 and Bob's entitlement increases to \$10,000.

Partners can make their own FISAs

- 5.89 Our proposals seek to encourage partners to reach their own, mutually satisfactory agreement as to the amount, duration and implementation of a FISA, whenever possible. This will give partners the freedom to choose an arrangement that best meets their needs and circumstances, including the needs of their children, in the period immediately following separation. Such agreements are more likely to endure and to be complied with by both partners. Partners are guided by a clear statement of statutory entitlement to a FISA, a statutory formula for calculating the amount and duration of a FISA, and default rules of implementation. In addition, the statutory threshold for making an adjustment order, and the range of relevant considerations a court must consider, also provide guidance as to when and how a court might adjust the FISA in the partners' circumstances.
- 5.90 The partners might agree to vary the frequency of periodic payments (for example from monthly to fortnightly or weekly), or the amount and duration of periodic payments (for example, the partners might agree to a smaller amount being paid over a longer duration, or vice versa). Or partners might agree to offset a FISA entitlement against the payment of occupational rent, allowing Partner A to remain in the family home without diminishing their share of relationship property. Partners can also agree to capitalise a FISA entitlement.

Partners can agree to capitalise a FISA entitlement

- 5.91 The partners might agree to capitalise a FISA entitlement through the payment of a lump sum or the transfer of property. We expect that it will be common for partners to capitalise the FISA entitlement when settling relationship property matters under the PRA, for example by adjusting Partner A's share of relationship property or by vesting key items of relationship property in Partner A.³⁴²

³⁴² As Caldwell notes, any agreements negotiated between separated partners are likely to involve bargaining property against income support, so a less generous provision of relationship property may be offered alongside an extended FISA (and vice versa). It therefore makes sense for the partners to resolve all of their property matters, relating to both capital and income, at the same time. See John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and

- 5.92 Capitalising a FISA entitlement has many advantages. It avoids the enforcement issues that can arise with periodic payments, and helps the partners to achieve a clean financial break and avoid the risk of future disputes over the extent of the entitlement. Partner A may also benefit from having early access to the full entitlement, for example it might allow them to put a deposit on a new home, or to buy out Partner B's share in the existing family home.
- 5.93 Capitalising a FISA entitlement also has disadvantages. Capitalisation occurs with no knowledge of the future, whereas periodic payments can be adjusted to take into account changes in the partners' circumstances, including any changes in their income over the duration of a FISA. The partners may also prefer periodic payments as they may be more affordable for Partner B, and may provide a more consistent stream of income to Partner A (presuming no enforcement issues arise). Capitalisation of a FISA entitlement may often be agreed to as a compromise, including when settling relationship property matters, and so might not reflect the full value of the FISA had it been paid periodically. If the partners do agree to capitalise a FISA entitlement, they should do so having considered these advantages and disadvantages.

Some agreements must be subject to safeguards

- 5.94 It is important to strike a balance between enabling partners to make their own FISAs with minimal costs and delay, and protecting vulnerable partners from making bad bargains. The PRA already enables partners to settle any differences as to the status, ownership and division of their property by agreement (section 21A), but in order for that agreement to be enforceable, it must comply with certain safeguards. In particular, the agreement must be in writing and signed by both partners, and each partner must have received independent legal advice before signing the agreement (section 21F). Settlement agreements are discussed further in Chapter 8: Contracting out and settlement agreements.
- 5.95 We propose that some agreements between the partners relating to a FISA entitlement should be regarded as a settlement agreement under section 21A, and must therefore comply with the safeguards in section 21F in order for it to be enforceable. This includes agreements that:
- (a) adjust the amount of FISA payments, with the effect that the total amount payable under the agreement is materially different to the amount payable under the formula (this would include any agreement to capitalise a FISA entitlement);
 - (b) adjust the duration of the FISA and/or frequency of FISA payments, with the effect that the duration of the FISA under the agreement is more than twice the duration determined under the statutory formula, or the time between FISA payments is longer than six months; or
 - (c) is an agreement that neither partner is entitled to a FISA.
- 5.96 An agreement that does not fall within one of these categories will not be treated as a settlement agreement under section 21A, and will not have to satisfy the procedural requirements in section 21F. This includes agreements that adjust the family income in

others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 402.

accordance with the statutory formula to reflect a change in income of either partner, following an adjustment event (discussed at paragraph 5.88 above).

- 5.97 It is likely that many FISAs will require adjustment, either temporarily or permanently, throughout the duration of the FISA in order to respond to changes in income or life events. Requiring all agreements to satisfy the requirements in section 21F would be costly, inefficient and would act as a disincentive to partners making their own, mutually beneficial agreements. But for any agreement partners should be encouraged, through professional advice and information provided about the FISA regime, to clearly identify the reasons why an adjustment is being agreed.
- 5.98 We discuss the partners' ability to contract out of the FISA provisions before or during the relationship below.

Seeking an adjustment to the statutory formula or default rules

- 5.99 Either partner may apply to a court for an order adjusting the amount, duration (including a break in payments) or implementation of a FISA at any time during the life of the FISA (adjustment order).
- 5.100 A court may make an adjustment order if it is satisfied that, having regard to the extent to which the partners have been economically advantaged or disadvantaged as a result of the relationship or its end, failure to grant the application would result in serious injustice. We also propose including a list of statutory considerations that the court must have regard to, in addition to the purpose and principles of the legislation, when determining any application for an adjustment order. These statutory considerations should include:
- (a) the length of the relationship;
 - (b) the age of the partners;
 - (c) each partner's obligations in relation to the care of any minor children or other dependents;
 - (d) each partner's current and likely future employment situation;
 - (e) the financial resources (being broader than income) available to each partner, including the income-generating potential of any property owned by either or both partners, and whether that potential is being realised;
 - (f) any other agreements or orders made under the PRA, in relation to a FISA or otherwise, and including any payment or transfer of property between the partners, or any payment of relationship debt;
 - (g) any significant change in financial circumstances that have arisen since separation; and
 - (h) any other relevant circumstance.³⁴³

- 5.101 A court should state its reasons for its decision with reference to these considerations.

EXAMPLE: PARKER AND DIANE

Parker and Diane met at high school and were married for 30 years. They have four children together. Diane worked at home throughout the relationship, raising the couple's four children and taking responsibility for the couple's house and garden, while Parker was

³⁴³ This might include, for example, whether Partner B is already subject to a FISA payable to a third party.

employed full time. The couple were 52 when the marriage ended and they divided the relationship property pool of \$1,000,000 equally. Diane's skills are not easily converted into paid work skills and she is struggling to find paid work. She is currently receiving a benefit of approximately \$8,000 per year. Parker is a senior police officer earning \$160,000. Diane is entitled to a FISA for five years. However given the length of the relationship, the age of the partners and the challenges Diane faces in recovering financially from the separation compared to Parker who has an established career, Diane successfully seeks an adjustment order seeking payment of the FISA for an extended duration of 10 years.

EXAMPLE: TAYLOR AND ELLIE

Taylor and Ellie were in a de facto relationship for 11 years. On separation, they have twins aged three. When the twins were born, it was agreed that even though Ellie earned more as a HR consultant (\$150,000), she would be the one to stay at home while Taylor kept working. Taylor was a junior doctor and his career progression would be jeopardised by taking family leave. The partners had savings they relied on to supplement Taylor's salary. After the parties separated, Ellie returned to work but has struggled to rebuild a client base and earns \$100,000. Taylor's career has progressed well and a surgical position is expected within the next few years. However at the time of separation Taylor's salary as a junior doctor is \$65,000. The twins live with Ellie due to Taylor's work commitments. Because the couple have children together, Taylor is entitled to a FISA for five years. However, despite having the larger income, it is Ellie who made and continues to make significant non-financial contributions to the relationship and whose earning capacity has reduced as result. Meanwhile, Taylor has been able to enhance his career prospects as a result of Ellie's contributions, and a much higher salary is anticipated in future. Ellie will not benefit from this, despite having supported Taylor throughout their relationship. Ellie successfully applies for an adjustment order reducing the entitlement to nil.

- 5.102 As with applications for a declaration of non-entitlement (see paragraphs 5.69–5.72), urgent applications for an adjustment order may only be made on the grounds that a payment of the FISA would result in serious and irreversible injustice, and a partner's obligation to comply with the FISA according to the statutory formula and default rules of implementation will continue until such time as the court makes an adjustment order. This may mean a court also makes an order for correction in relation to any prior overpayment or underpayment of the FISA. A court may make any orders it deems necessary to satisfy that debt, including interest, taking into account the circumstances of the partners and the need to avoid imposing economic hardship on either partner.

Enforcing a FISA

- 5.103 Enforcement of FISAs will be a key issue.³⁴⁴ While our proposals seek to encourage partners to reach their own, mutually satisfactory agreement whenever possible, there will be situations where a partner cannot, or will not, meet their obligations under the FISA regime. Non-payment of a FISA, regardless of the reasons, can have serious financial implications for the partner entitled to the FISA and any dependents in their care. The stress and anxiety associated with non-payment may also inhibit that partner's ability to recover from the separation and become economically self-sufficient. The State is also directly affected, as recourse to a State benefit may be necessary.
- 5.104 We therefore propose that strict enforcement measures should be put in place to ensure FISAs are implemented in accordance with the statutory formula and default rules, or as

³⁴⁴ Enforcement is a broader issue across all areas of the Property (Relationships) Act 1976. For broader discussion on the question of enforcement see Chapter 10: Resolution.

otherwise ordered by the court or in accordance with the partners' agreement. In particular, we propose that the same mechanisms used to enforce the child support regime under the Child Support Act are available to enforce the FISA regime.³⁴⁵

- 5.105 Further work is required to determine whether other enforcement measures would be appropriate in different circumstances. We note in particular that coercive or punitive enforcement measures will be ineffective and counterproductive in situations where Partner B *cannot* pay.³⁴⁶ In these cases, a negotiated or mediated agreement between the partners may be a more appropriate option.³⁴⁷ Further work is also required to determine whether stricter enforcement measures than those provided for under the child support regime should be available in circumstances where Partner B *will not* pay.
- 5.106 We also propose that the Government consider extending the existing administration and enforcement role of the Inland Revenue Department under the Child Support Act to administer and enforce the FISA regime. This would rationalise the use of existing logistical support already available to support families and the transfer of finances.
- 5.107 In Chapter 10: Resolution we propose that the Ministry of Justice develop a comprehensive information guide for separating partners that explains the property sharing regime and provides information about the different options for resolving relationship property disputes. This should include describing the scope of the FISA entitlement under the statutory formula and default rules, and the ability for partners to make their own agreements or seek an adjustment from the court.

Contracting out of the FISA regime

- 5.108 Partners should be able to contract out of the FISA provisions before or during a relationship under section 21 of the PRA.
- 5.109 As FISAs are an entitlement to share the economic advantages and disadvantages arising from the relationship through sharing future family income, the partners cannot predict the value of that entitlement before separation. Therefore any agreement made between the partners before or during the relationship that relates to the FISA provisions should be treated as a contracting out agreement under section 21, and the procedural safeguards in section 21F, including the requirement that both partners seek independent legal advice, will apply. This differs from our proposals in relation to some agreements that may be entered into after separation (see paragraphs 5.94–5.98), when the value of any FISA entitlement is clear.
- 5.110 A contracting out agreement that deals with an entitlement to a FISA may be vulnerable to a challenge on the ground that giving effect to the agreement would cause serious injustice, if the partners' circumstances have changed since the agreement was made

³⁴⁵ Under the Child Support Act 1991, the Family Court has the power to make a charging order against income, order a non-payer to complete community service, issue a warrant for arrest, order surrender of a passport and sentence a nonpayer to imprisonment: Child Support Act 1991, ss 189–199.

³⁴⁶ For example, the use of punitive penalties in relation to the non-payment of child support was a focus of reforms in 2006, due to the negative impact these penalties had on the non-paying parent's capital: Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 175. A similar outcome could be expected in the context of FISAs if such an approach were taken. For further discussion see Law Commission of England and Wales *Enforcement of Family Financial Orders* (LAW COM No 370, 2016).

³⁴⁷ This may include a delayed or moderated payment scheme: Partner A may agree to accept a smaller amount over a longer period, or Partner A may accept a greater percentage of the relationship property pool. See discussion on agreements below.

(section 21J).³⁴⁸ We are satisfied that section 21J provides an appropriate safeguard given the inevitable uncertainty in seeking to predict the future.

- 5.111 In order to minimise the risk of contracting out agreements being challenged, partners should be encouraged, through professional advice and information provided about the FISA regime (see paragraph 5.107), to revisit their agreement throughout the relationship and at key life events, such as when the partners start planning or having children together, when the relationship passes the 10 year mark, and when the partners are contemplating decisions that would significantly affect one partner's earning capacity (such as the partners moving countries in order for one partner to take up a new job).

Effect of the death of one of the partners

- 5.112 Our proposals apply when a relationship ends on separation. We have not considered whether a surviving partner should be entitled to a FISA when a relationship ends on the death of one partner, for the reasons discussed in Chapter 1.
- 5.113 If either partner dies following separation but during the FISA, we propose that Partner A's entitlement should come to an end. This is on the basis that the deceased partner can no longer be said to be economically advantaged or disadvantaged as a result of the relationship. That is, if Partner B dies, they can no longer enjoy any economic advantages arising from the relationship that ought to be shared with Partner A. Similarly if Partner A dies, they are no longer shouldering the burden of economic disadvantage that Partner B ought to share.
- 5.114 We recognise that this approach may lead to anomalous or unfair outcomes in some situations. For example, if a FISA was capitalised by way of a lump sum payment or transfer of property before either partner died, Partner A (or their estate) would have received more (and Partner B would have paid more) than they would have, had the partners agreed to periodic payments. We also recognise that this approach might be unfair on Partner A if their entitlement ends as a result of the death of Partner B, as they may still be suffering economic disadvantage as a result of the relationship or its end. We note however that the surviving partner may have a claim against the deceased's estate under the Family Protection Act 1955.
- 5.115 Ultimately, however, we prefer an approach that promotes simplicity and pragmatism. If the entitlement were to continue after the death of one of the partners, this is likely to add to the complexity and costs of administering the deceased's estate. For example if Partner B died, their personal representative would have to apply for an adjustment order in order to stop or reduce the amount payable under a FISA.

³⁴⁸ A similar issue arises currently in the context of contracting out of section 15. See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.73]–[30.76]. We received a submission from McWilliam Rennie Lawyers who felt it was not possible to contract out of s 15 in advance, while NZLS submitted that partners should be able to contract out of s 15, as with any compensatory entitlement under the PRA. For further discussion see also Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker "Section 21 Agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 53–55.

CHAPTER 6

Trusts

IN THIS CHAPTER:

we consider the relationship between the PRA and trusts.

INTRODUCTION

- 6.1 New Zealand has one of the highest rates of trusts in the world. Many New Zealand families use and enjoy property that is held on trust. Widespread use of trusts is an issue when relationships end because, as a general rule, trust property is not subject to division under the PRA.

CURRENT LAW

- 6.2 The purpose of the PRA is to achieve a just division of property when relationships end. But the PRA only applies to property owned by the partners. When a person validly places property on trust, they pass legal ownership to the trustees. As a result, trust property only falls under the PRA to the extent each partner is said to have a beneficial interest under the trust, and that interest constitutes "property" within the meaning of the PRA.
- 6.3 Whether a beneficial interest under a trust constitutes property depends on the nature of that interest. In the Issues Paper we explained that a vested or contingent beneficial interest constitutes property, but a discretionary beneficial interest does not.³⁴⁹
- 6.4 Powers to control a trust may also constitute property under the PRA. In *Clayton v Clayton [Vaughan Road Property Trust]* the Supreme Court held that Mr Clayton's collection of powers under the trust deed amounted to property because they allowed him to give all the trust property to himself, even if that conflicted with the interests of the other beneficiaries.³⁵⁰ Case law is still developing in this area. However, recent cases suggest that powers only constitute property under the PRA if they allow unfettered control of trust property, unconstrained by fiduciary duties.³⁵¹ Few trusts will grant a

³⁴⁹ For a discussion on the different types of beneficial interests under a trust, see Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [20.31]–[20.34].

³⁵⁰ *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

³⁵¹ See *Da Silva v Da Silva* [2016] NZHC 2064 at [53]; *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529; and *Darlow v Raymond* [2017] NZHC 269, [2017] 3 NZLR 353 at [127].

partner such extensive powers, which means a partner's powers to control a trust will likely only be property in exceptional cases.

- 6.5 Most trusts will be structured so that beneficiaries only have a discretionary beneficial interest in the trust, and no person has unfettered powers to control a trust that would amount to property. Therefore, trust property will not usually be subject to division under the PRA.

Existing remedies to access trust property at the end of a relationship

- 6.6 There are several remedies available to a partner to access trust property if the trust frustrates the just division of property at the end of a relationship. But each remedy has its own limitations. These remedies were discussed in detail in the Issues Paper, and are summarised below (Issues Paper at [20.41]–[20.71]).

Remedies under the PRA

- 6.7 There are two remedies under the PRA that apply to dispositions of property.³⁵²
- 6.8 Section 44 applies when a person has disposed of property, including to a trust, in order to defeat a partner's claim or rights under the PRA. If section 44 applies, section 44(2) gives a court the power to unwind the disposition and recover property from a trust, or order that compensation be paid to satisfy a partner's rights to relationship property. Section 44(4) provides that a court should not grant relief if the person from whom relief is sought received the property or interest in good faith, and has altered their position in reliance on having that interest in the property.
- 6.9 Section 44C applies specifically to dispositions of property to a trust that have the effect of defeating one partner's claim or rights under the PRA. There is no need to prove an intention behind the disposition. However, section 44C requires several elements to be met:
- (a) the property disposed of must have been relationship property;
 - (b) the disposition must have been made after the relationship began; and
 - (c) the disposition must defeat the claim or rights of one of the partners.
- 6.10 If these elements are satisfied, under section 44C(2) a court can order one partner to compensate the other from relationship property or separate property. As a last resort a court can require the trustees to pay the affected partner compensation from the income of the trust. There is, however, no power to order that property be recovered from the trust's capital.

Section 182 of the Family Proceedings Act

- 6.11 Section 182 of the Family Proceedings Act 1980 gives the court power to vary "nuptial settlements" following a couple's divorce or civil union dissolution. It does not apply to de facto relationships.

³⁵² The term "disposition" is given a wide meaning. It can sometimes include a transfer of property directly from a third party vendor to a trust, for example where the transfer is in accordance with a Deed of Nomination under which a partner nominates the trust as purchaser. See *Re Polkinghorne Trust, Kidd v Kidd* (1988) 4 NZFLR 756 (HC) (in the context of s 44); applied in relation to s 44C in *B v P FC Rotorua* FAM-2005-063-695, 7 October 2008 at [41]; affirmed on appeal in *P v B* [2009] NZFLR 773 (HC) at [13], although the Court overturned the Family Court's decision on the basis that the disposition was not one of relationship property. See also *O v S* (2006) 26 FRNZ 459 (FC) at [95].

- 6.12 The Supreme Court has described a nuptial settlement as a settlement that makes some form of continuing provision for one or both parties to a marriage in their capacity as spouses.³⁵³ This means there must be some connection between the settlement and the marriage. A court will exercise its discretion under section 182 to address the failure of the spouses' expectation that the marriage would continue. To do this, the Supreme Court has said the first step is to examine what the spouses reasonably expected of the nuptial settlement when they assumed the marriage would continue. The second step is to compare those expectations to the spouses' expectations of the settlement in the circumstances after separation.³⁵⁴ A court will also take into account other factors, such as the interests of children, the source and character of the assets, the length of the marriage and the suitability of the trust structure because of the changed circumstances.³⁵⁵

Remedies in trust law

- 6.13 The law of trusts also provides remedies that can be used to access property held on trust at the end of a relationship, including:
- (a) Invoking the High Court's supervisory jurisdiction to ensure the trust is properly administered. This may result in the Court replacing the trustees,³⁵⁶ reviewing trustee decisions,³⁵⁷ or ordering that information be provided to the beneficiaries.³⁵⁸ The Trusts Bill currently before Parliament contains provisions on these matters.³⁵⁹
 - (b) A claim that the trust is invalid, either because the partner lacked an intention to create a trust, or that the trust purportedly created did not effectively alienate the settlor's beneficial interest in the property.³⁶⁰
 - (c) A claim that the trust is a sham, because the settlor and trustee held a common intention to create different rights and obligations in respect of the trust property than those purportedly created through the trust instrument.³⁶¹
 - (d) A claim that the trust is subject to a constructive trust in the partner's favour, based on that partner satisfying the requirements in *Lankow v Rose*.³⁶² A constructive trust claim was the primary form of relief available to de facto partners prior to their inclusion in the PRA in 2001. Now it is generally only used in respect of property

³⁵³ *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [34].

³⁵⁴ At [53].

³⁵⁵ At [59].

³⁵⁶ Trustee Act 1956, s 51.

³⁵⁷ Section 68. Note an application under this section cannot be initiated by a discretionary beneficiary.

³⁵⁸ The High Court's power to order that information be provided to the beneficiaries is part of its supervisory jurisdiction in respect of trusts. The Supreme Court has recently considered how the court should exercise this supervisory jurisdiction in *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

³⁵⁹ Trusts Bill 2017 (290-1).

³⁶⁰ In two recent cases (one from England and Wales and the other from the Cook Islands), claims that a trust is invalid were successful: *JSC Mezhdunarodniy Promyshlenniy Bank & Ors v Pugachev & Ors* [2017] EWHC 2426 (Ch); and *Webb v Webb* [2017] CA No. 7/17 (Court of Appeal of the Cook Islands) at [56] and [65].

³⁶¹ *Official Assignee v W* [2008] NZCA 122, [2008] 3 NZLR 45; *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; and *Vervoot v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807.

³⁶² *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294 per Tipping J. See *Murrell v Hamilton* [2014] NZCA 377; *Vervoot v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397. See also *Prime v Hardie* [2003] NZFLR 481 (HC); and *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766.

outside the jurisdiction of the PRA, such as trust property and Māori land (which is excluded under section 6 of the PRA).

ISSUES

6.14 In Chapter 21 of the Issues Paper we identified several problems with the relationship between the PRA and trusts. These issues are summarised below.

The PRA does not ensure the just division of property held on trust

- 6.15 Many people in New Zealand use trusts as a means of holding property. The Law Commission has previously estimated there may be anywhere between 300,000 to 500,000 trusts in New Zealand.³⁶³ In the 2013 Census, 14.8 per cent of households reported that their home was held on trust.³⁶⁴ In 2015, Statistics New Zealand found that 19 per cent of households had involvement with a trust, meaning at least one member of the household was involved as a settlor, beneficiary or trustee.³⁶⁵
- 6.16 Because property held on trust generally falls outside the PRA, there is no requirement that trust property be divided at the end of a relationship. The remedies available under the PRA to access trust property at the end of a relationship are also of limited effect, either because they are hard to claim or give the court inadequate powers.
- 6.17 The result is that the PRA does not ensure the just division of significant amounts of property used and enjoyed by families in New Zealand. In the Issues Paper we identified a number of instances where the failure to divide trust property might be considered unfair, including where:
- (a) the trust holds what would otherwise be significant items of relationship property, such as the family home or other property acquired or maintained through the partners' income earned during the relationship;
 - (b) the trust structure is inappropriate for post-separation circumstances, because it was originally settled during the relationship to hold assets central to family life; or
 - (c) only one partner controls the trust, which means that in reality they may be able to treat the trust property as their own.

In practice, partners may divide trust property as if the trust did not exist

6.18 We understand that many couples will divide trust property upon separation as if the trust did not exist.³⁶⁶ While this might present a pragmatic way to resolve property disputes, it is reasonable to assume that in some cases this way of dealing with trust property will be inconsistent with the terms of the trust or will breach some principles of trust law. This is undesirable. In principle, laws should be respected and trust deeds followed. People should not be able to take advantage of the legitimate benefits of a trust structure, but then ignore the trust structure when it becomes inconvenient. Further,

³⁶³ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [2.3].

³⁶⁴ Statistics New Zealand *2013 Census QuickStats About Housing* (March 2014) at 12.

³⁶⁵ Statistics New Zealand "Household Net Worth Statistics: Year ended July 2015" (28 June 2016) <www.stats.govt.nz>. The survey excluded independent trustees.

³⁶⁶ For example see *Willis v Willis* [2017] NZHC 2586 at [26]. Some partners may have previously established mirror trusts, which may present fewer difficulties in terms of property division on separation. See for example *M v S* [2012] NZFLR 594 (HC).

there is a real concern that the rights and interests of other beneficiaries, particularly children, are not given appropriate attention when the trust property is simply treated as the partners' own property on separation.

Inconsistencies with the contracting out regime under the PRA

- 6.19 The ability for one partner to unilaterally affect the division of property by settling property on a trust that would otherwise form part of the relationship property pool is inconsistent with the PRA's contracting out regime. When entering a contracting out agreement, the PRA requires compliance with a procedure designed to ensure both partners enter the agreement with informed consent and do not unwittingly compromise their rights under the PRA (section 21F). If this procedure is not complied with, the agreement is of no effect. There is no comparable procedure to govern how the partners settle property on trust during or in contemplation of a relationship.

The law on what interests in a trust constitute property under the PRA is inaccessible and complex

- 6.20 The law governing whether a person's interest in a trust constitutes "property" is found in case law, which is likely to be inaccessible for many people. The nature of case law also means that the law is always subject to change, as in the developing area of whether powers to control a trust constitute property under the PRA.³⁶⁷
- 6.21 The approach a court takes to determining what interests in a trust constitute property under the PRA is complex and can also appear illogical, as it generally ignores the likelihood that the beneficiary will receive a distribution of the trust property. Even if a partner's interest in the trust does constitute property under the PRA, it is unclear whether that interest should be classified as separate property or relationship property.³⁶⁸

The remedies in the PRA are limited

- 6.22 Section 44 of the PRA rarely applies because it is difficult to show the required subjective intention, namely, that a partner disposed of property in order to defeat the other partner's rights under the PRA.
- 6.23 Partners can also easily avoid being captured by section 44C. It only applies when a partner has disposed of relationship property to a trust after the relationship has

³⁶⁷ The Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 leads to residual uncertainties. One area of uncertainty is whether, if a partner's powers are property, the partner holds an interest directly in the underlying trust assets. In *U v M* [2015] NZHC 742 and *B v B* [2017] NZHC 131 the courts accepted that the partners' powers under a trust gave them an interest in the trust property sufficient to support a notice of claim. In *H v JDVC* [2015] NZCA 213, (2015) 30 FRNZ 521, however, the Court of Appeal reached the opposite conclusion. In *B v S* [2017] NZFC 5741 the Family Court held that a partner's interest in a trust based on his powers to control the trust was sufficient to allow the Court to grant an occupation order to the other partner. This finding was not contested on appeal: *S v B* [2017] NZHC 2370, [2017] NZFLR 779.

³⁶⁸ In *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 the Supreme Court said at [85]–[90] that as Mr Clayton acquired powers under the trust during the relationship, and as those powers amounted to property, the powers should be classified as relationship property pursuant to s 8(1)(e) of the Property (Relationships) Act 1976. This suggests an interest under a trust arising during the relationship should also be relationship property. Some commentators disagree. They suggest that the interest under the trust should reflect the classification of the assets held on the trust. Thus, if separate property is held on the trust, a partner's beneficial interest under the trust should likewise be separate property: RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [4.47].

commenced.³⁶⁹ This limitation was illustrated in *G v G*.³⁷⁰ In that case the partners entered into a relationship shortly after meeting in 1994, but the Family Court found that a qualifying relationship did not commence until the end of 1998. In 1997 Mr G disposed of separate property to a trust, which was then used by the trust to acquire the family home. As the initial disposition of property to the trust occurred before the qualifying relationship began, and was a disposition of separate property, section 44C did not apply.³⁷¹

- 6.24 It is also implicit that section 44C only applies where the disposition of property defeats the rights of one partner, not both of them. This means section 44C could be avoided if a partner disposed of property to a trust in which both partners only hold discretionary interests. Finally, even when the elements of section 44C can be satisfied, there may be insufficient relationship property or separate property available to adequately compensate a partner whose interests were defeated by the disposition to the trust.³⁷² The court has no power in that situation to order that the disposed property be recovered from the trust's capital.

The remedies outside the PRA are complex, inconsistent with the purpose of the PRA and create procedural problems

- 6.25 The alternative avenues to access trust property do not sit happily alongside the PRA or even with each other. They are based on different policy grounds or seek to protect different interests in the trust property. They sometimes require a partner to make claims under different statutes which, in some instances, must be filed in a different court and at a different time to an application under the PRA.
- 6.26 Section 182 of the Family Proceedings Act is based on a very old provision designed to deal with marriage settlements in the mid-nineteenth century. It is out of step with the PRA's principles and procedures. Section 182 gives the court a very wide discretion to vary a trust, in contrast to the much narrower jurisdiction under section 44C of the PRA, which prevents a court from interfering with the capital of a trust. But section 182 only applies to partners who were married or in a civil union. It does not apply to de facto relationships, as the PRA does. Further, a court can only make orders under section 182 after making an order dissolving the marriage or civil union. In contrast, a court can make orders under the PRA after the partners have separated but before formal dissolution.³⁷³ There can therefore be an issue with timing as a partner is able to make an application under the PRA before they can make an application under section 182.
- 6.27 Remedies in trust law are also different in nature to those under the PRA. A partner's claim under the High Court's supervisory jurisdiction, a claim that the trust is invalid or a sham, or a claim for a constructive trust over an express trust all concern the legitimacy of the trust and its administration rather than a just division of property between two

³⁶⁹ See Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2017) 47 VUWLR 443 at 451–452; and Nicola Peart "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1190–1191.

³⁷⁰ *G v G* [2006] NZFLR 1119 (HC). See also *JEF v GJO* FC Hamilton FAM-2009-019-797, 3 October 2011, which was upheld on appeal in *JEF v GJO* [2012] NZHC 1021, (2012) 3 NZTR 22-010.

³⁷¹ *G v G* [2006] NZFLR 1119 (HC) at [73]–[75].

³⁷² Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.12].

³⁷³ Property (Relationships) Act 1976, s 25(2)(a).

partners at the end of a relationship. Claims in trust law may require the partner to file separate proceedings in the High Court.

- 6.28 The different remedies create complexities for litigants. The procedural disharmonies can be costly and inefficient. People also struggle to understand the law as they cannot go to a single statute to determine how their property affairs should be resolved. This is contrary to the PRA's claim that it is a code.³⁷⁴

Results of consultation

- 6.29 We received 59 submissions addressing the relationship between the PRA and trusts. There were 41 submissions from members of the public, nine submissions from law firms, trustee companies and other organisations, and nine submissions from individual practitioner and academic experts. Several clear themes emerged from these submissions.

The protection given to trusts over the rights of partners under the PRA is problematic

- 6.30 Most submitters, including the New Zealand Law Society (NZLS), agreed that the protection given to trusts over the rights of partners under the PRA, and the existing remedies to access trust property at the end of a relationship, are problematic.
- 6.31 Many submitters said that a trust can be used to disadvantage one partner at the end of a relationship. Business and Professional Women of New Zealand also argued that the partner in control of the trust will typically have the resources and experience to seek and retain stronger legal support on separation. NZLS submitted that the use of a trust can also create injustice when it has the effect of circumventing other provisions of the PRA that deal with occupation orders, deferring the sharing of relationship property, occupation rent, compensation for economic disparity and compensation for post-separation contributions. NZLS submitted that section 44C in particular needs a radical overhaul to avoid injustice.
- 6.32 Several submitters said that, in practice, most disputes over trust property arise when the family home is held on trust. Unless both partners agree to treat the family home as if it were relationship property and divide it accordingly, one partner typically feels they are not getting their fair share of property at the end of the relationship. Practitioners also noted that disputes can arise where relationship property (for example income) is used to pay the mortgage, rates, insurance and maintenance on a home that is held on trust. Rural Women New Zealand noted that many farms, agricultural contractors and agribusinesses are owned as partnerships, family trusts or companies, and when a relationship ends the complexities of these add to the grief and confusion often associated with relationship dissolution.
- 6.33 Some submitters also pointed to the lack of clarity as to when rights to trust property arise under different areas of law, which can result in expensive and lengthy disputes.
- 6.34 The few submitters who did not think that the current law is problematic (comprising mainly legal practitioners) thought it was appropriate that the law give priority to the preservation of trust structures. They considered the existing remedies available under the PRA were broadly achieving an adequate balance between upholding the trust structure and providing remedies for partners at the end of the relationship. Chapman

³⁷⁴ Section 4.

Tripp, while not agreeing with the general proposition that the protection given to trusts is problematic, did agree that the PRA was due for improvement in respect of its application to trusts. Chapman Tripp agreed that section 182 of the Family Proceedings Act is inconsistent with the PRA, and that this inconsistency leads to uncertainty when advising clients on whether a trust could be subject to a future section 182 claim.

Many people settle trusts without understanding the implications under the PRA

- 6.35 Many submitters told us that people often do not understand the implications of settling property on a trust, including the implications under the PRA. Perpetual Guardian said that, in its experience, a number of trusts were set up because it was reasonably cheap and easy to do so following professional advice, and because it was a trend for a time to "have a trust". These settlors may now find it difficult to articulate exactly why the trust was established. Vicki Ammundsen Trust Law Ltd similarly submitted that a significant number of trusts are settled in circumstances where the settlor has little appreciation of what a trust is, and trustees are largely unaware of what that role entails. Some practitioners noted that the remedies available under the PRA are often used to remedy failings in professional advice at the time the trust was settled. These submitters questioned the extent to which the PRA should intervene to adjust for failings or shortcomings in legal advice, refusal to accept legal advice, or generally disadvantageous decisions made by capable adults.
- 6.36 Several submitters, including Jan McCartney QC, favoured more education for members of the public as well as lawyers about the implications of settling property on a trust. Chapman Tripp noted that the current review of the law of trusts aims to make trust law more accessible to New Zealanders, and hopes that this would avoid some of the problems that arise when partners settle property on a trust without understanding the consequences.

Trusts are used for a wide range of legitimate purposes

- 6.37 Several submitters told us that many people use trusts for a wide range of legitimate purposes, including estate planning and protection against creditors. Chapman Tripp submitted that, in their experience, many New Zealand families see trusts as a protection mechanism for their key asset, usually the family home, from something "unanticipated but possible". It said that settling a trust is a sensible asset planning mechanism which aims to ensure the family home is not vulnerable due to a business-related liability of one member of the family. It submitted that any reform of the PRA must not prejudice the legitimate use of trusts for family asset management.
- 6.38 Protection of separate property from future claims under the PRA was often cited as a common and, many argued, legitimate reason for settling property on a trust. Several submitters said that many people decide to settle property on a trust after the dissolution of a previous relationship, because they want to protect their property from division in the event of a new or future relationship ending. This is driven by what many see as unfairness in the existing rules of classification, which, as we discussed in Chapter 2: Classification, means that the family home will be shared even if it was owned by one partner before the relationship began, or was received by one partner from a third party as a gift or inheritance. Jan McCartney also submitted that some people prefer using a trust structure over a contracting out agreement because the PRA "bites so viciously if

the court determines a contracting out agreement has become unjust". We discuss contracting out agreements in Chapter 8.

Not all trust property should be subject to PRA claims

- 6.39 Submitters gave most attention to distinguishing between trust property that ought to be shared at the end of a relationship, and trust property that should be protected from claims under the PRA.
- 6.40 Several submitters, including NZLS and academic Professor Nicola Peart, submitted that any remedy should ensure that a court's powers extend to all trust property that would have been relationship property "but for" the trust. In other words, the remedy should mirror the underlying approach to classification in the PRA, which is discussed in Chapter 2.
- 6.41 Submitters were generally in agreement that, if the property held on trust represented the fruits of the relationship (that is, if it was acquired through the efforts of either partner during the relationship), the trust property ought to be subject to the PRA and divided at the end of the relationship.³⁷⁵ However, submitters were less sympathetic where the partners had knowingly settled property on trust for the purpose of benefiting others.³⁷⁶
- 6.42 A few submitters, including the National Council of Women of New Zealand (NCWNZ), considered that the family home should always be shared, regardless of whether it is trust property or when or how it was acquired. However, many submitters felt that the PRA should not interfere with a trust simply because the trust property is used as the family home during the relationship. These submitters preferred to focus on how the property was acquired, rather than how it was used, to justify sharing. They thought that preserving the trust structure should be given more weight, as trusts are a legitimate tool and other beneficiaries may reasonably expect the trust structure to remain in place.
- 6.43 Some submitters pointed to different "types" of trusts, which they felt should be treated differently to trusts that represent the fruits of the relationship. In particular:
- (a) **Trusts settled by a third party.** Chapman Tripp noted that this typically includes trusts settled by parents, who intend that the trust property remains in the family. Their children's partners may be deliberately excluded from the beneficiary classes and from the possibility of becoming an office holder. Or the intention may be that partners benefit only to the extent they remain in a relationship with a beneficiary. Several submitters used the example of farms that have been in a family for years,

³⁷⁵ This was also evident from submitter responses to scenario 1 on the consultation website. In scenario 1 (Hugh and Phil) the partners purchased a rental property during the relationship using their joint savings. The property was settled on trust by Hugh to protect it from creditors. Submitters were asked what should happen if the partners separated. We received 25 responses. Only one submitter responded that Phil should not get a share in the rental property because it was held on trust, but that submitter said that Phil should have been required to obtain legal advice beforehand. The most common response (17 submitters) was that the trust should not apply and the partners should be able to divide the rental property equally. Four submitters preferred that Phil receive compensation from Hugh, while three submitters preferred another way to recognise Phil's interest in the trust property.

³⁷⁶ Submitter responses to a scenario on the consultation website which explored this issue were mixed. In scenario 3 (Talía and Sione) the partners settled a sum of money on trust for their children, having received advice at the time that the trust would mean the money could no longer be used as they like. The partners separate and Talía finds it hard to make ends meet and wants to unwind the trust. We received 15 responses. Six submitters said that Talía should not get the property held on trust, while six submitters said the court should be able to vary the trust to provide Talía with some or all of the property. Three submitters thought that Talía should get something else, such as a right of occupation over the family home and maintenance from Sione.

and that have been developed with the intention that they be enjoyed by future generations.

- (b) **Trusts settled before the relationship.** In this category are trusts settled by one partner well before the relationship began, perhaps for the benefit of their children from a previous relationship, and to protect important assets such as the family home from future claims under the PRA.

6.44 While many submitters thought that trust property should not be treated as relationship property if the trust was settled by a third party or settled before the relationship, submitters did generally agree that a partner should receive some form of compensation if they contributed to increasing or preserving the value of the trust property during the relationship.³⁷⁷ NCWNZ submitted that people can invest in trust property in many ways, and they should be entitled to receive some benefit from that investment if the relationship ends. Rural Women New Zealand said that many women work on farms in an unpaid capacity due to the nature of seasonal peaks in work, because they tend to be the primary caregiver and because opportunities for work off-farm are limited by distance and/or infrastructure.

Other mechanisms used to avoid the PRA

- 6.45 Some submitters, including Nicola Peart, were concerned that if trusts became a less effective device for avoiding claims under the PRA partners would attempt to use other avoidance mechanisms, such as company structures or third party ownership (for example, parents retaining legal title of a property they purchase for a child and their partner to live in). Nicola Peart argued that rather than looking at ways to "bust trusts", the question should be what sort of exemptions from the property sharing regime, other than contracting out, should be tolerated.
- 6.46 Two practitioners pointed to examples of how company structures can already be used to avoid the PRA. One practitioner gave an example of where the family home was held in a company, placing it outside the PRA. Another practitioner described a case where fees were paid to a company, which would otherwise have been received by a partner as income. However as neither partner held a shareholding in the company greater than 25 per cent, the full value of those fees could not be accessed through shareholding interests. Nor could the other partner make a claim under section 44F on the basis the disposition of fees to the company defeated their rights (section 44F only applies to companies in which a partner holds 50 per cent of voting rights).

OPTIONS FOR REFORM

- 6.47 In Chapter 22 of the Issues Paper we presented four possible options for reform:

³⁷⁷ This was also evident from submitter responses to scenario 2 on the consultation website. In scenario 2 (Ana and Brendon) the partners are married and live on Brendon's family farm, which is held on trust settled by Brendon's parents before the relationship began. Brendon and his parents and siblings are beneficiaries, but only Brendon and Ana live on the farm. Ana works on the farm and also does most of the child care for the partners' children. We asked what should happen when partners separate after 18 years of marriage. We received 18 responses to this scenario. Eight submitters thought that Ana should get half the increase in the farm's value during the relationship, because of the improvements the partners made on the farm during the relationship. Four submitters thought that Ana should get a half share of Brendon's interest in the farm. Three submitters thought that Ana should receive some other form of compensation. Only three submitters thought that Ana should not get any share in the farm because it was held on trust for Brendon's family.

- (a) **Option 1: Revise the PRA's definition of "property" to include all beneficial interests in a trust.** The focus of this option is on the partner's beneficial interest under the trust. Any interest through which it is both likely and permissible that the partner will receive a distribution of the trust property would be "property" for the purposes of the PRA, and would be classified as either relationship property or separate property like any other item of property.
- (b) **Option 2: Revise the PRA's definition of "relationship property" to include some property held on trust.** The focus of this option is on the character of the trust property. Trust property which is attributable to the relationship could be classified as relationship property if the court considers it just, having regard to a range of express considerations.
- (c) **Option 3: Broaden section 44C.** Under this option, section 44C would be amended so that any disposition of property that has the effect of defeating the claim or rights of one of the partners would be caught. The court's powers would also be broadened, so that it could have the power to make compensatory orders from the trust's capital.³⁷⁸
- (d) **Option 4: Create a new provision modelled on section 182 of the Family Proceedings Act.** This option would bring an equivalent of section 182 of the Family Proceedings Act into the PRA alongside section 44C. It would apply to de facto relationships as well as marriages and civil unions.

Results of consultation

- 6.48 No clear preference for a particular option for reform emerged from consultation. This highlights the difficulty of devising a test for when property held on trust ought to be shared at the end of a relationship. Several submitters affirmed our comment in the Issues Paper that there is no "silver bullet" solution. Some submitters, including NZLS, Perpetual Guardian, Public Trust and Chapman Tripp, commented that they believed the Issues Paper canvassed all viable options, and agreed that the main avenues for redress should be found solely under the PRA.
- 6.49 No submitter indicated a preference for Option 1. Chapman Tripp commented that it did not support a definition of property for the purposes of the PRA that differs from long standing principles of property law as used and applied in trust law and practice. This was on the basis that a different definition of property would have far-reaching and possibly unintended consequences.
- 6.50 Several organisations and practitioner experts favoured Option 2, including Perpetual Guardian, Public Trust and Chapman Tripp. Chapman Tripp submitted that if Option 2 were favoured, trustees should be able to be parties to contracting out agreements. Public Trust preferred Option 2 over Option 1 because of the difficulty in practice of quantifying a beneficial interest and allocating a value to that interest.
- 6.51 NZLS favoured Option 3, on the basis that it respects the general structures of both the PRA and trusts. NZLS said a revised section 44C should enable a claim under sections 9A, 15 and 18B to be brought where the effect of the disposition has disentitled a partner to a claim under those sections. NZLS also submitted that a liberal interpretation of the

³⁷⁸ This was the Law Commission's recommended reform of s 44C of the Property (Relationships) Act 1976 in its review of the law of trusts: *Law Commission Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 232.

courts' powers should be favoured, and that recourse to the trust capital should be at the courts' discretion, rather than as a last resort. Chapman Tripp did not support Option 3, and strongly supported the jurisdictional criteria for section 44C remaining the same (that the disposition must have the effect of defeating the claim or rights of one of the partners, it must be of relationship property and it must occur after the relationship began).

- 6.52 Chapman Tripp and several practitioners favoured Option 4, but only on the basis that the new provision modelled on section 182 of the Family Proceedings Act underwent significant change. In particular, some said that the new provision should target trusts that contain property which ought to be shared based on the principles of the PRA, and provide more clarity on when the court should exercise its discretion. Vicki Ammundsen Trust Law Ltd also favoured Option 4, but submitted this needed to be coupled with reforms targeted at clarifying the role of trustee and "provisions for a demonstrably transparent approach to situations where trust and relationship property assets (or expectations) intersect". NZLS did not favour Option 4, noting that section 182 is an anomalous provision that has been used (only for marriages) in the absence of an effective remedy in the PRA. It favoured repeal of section 182 of the Family Proceedings Act if section 44C of the PRA were broadened, under Option 3.
- 6.53 Nicola Peart submitted that, regardless of the preferred option, there may still be scope for a provision like section 182 of the Family Proceedings Act to remain. She argued that it could have a wider application than the proposed new section 44C in two respects. First, section 182 applies to all settlements, not only trusts. Second, it is possible that a section 182 claim could be brought by someone other than one of the spouses, such as a child of the relationship.³⁷⁹
- 6.54 Many submitters, including NZLS, favoured increasing the Family Court's powers in respect of trusts. Submitters generally accepted that the Family Court should have the power to make awards from the trust's capital, and in some circumstances vary or even resettlement a trust.
- 6.55 Many submitters also said that partners should be able to contract out of any proposed remedy.

³⁷⁹ The possibility of a child bringing a claim under s 182 of the Family Proceedings Act 1980 was recognised by the High Court in the recent case of *Thakurdas v Wadsworth* [2018] NZHC 1106, [2018] NZFLR 451.

PREFERRED APPROACH

P27

Section 44C of the PRA should be amended to provide a single, comprehensive remedy that will enable a court to grant relief when a trust holds property that was produced, preserved or enhanced by the relationship.

P28

An amended section 44C would apply in three different situations:

- a. where either or both partners have disposed of property to a trust, at a time when the qualifying relationship was reasonably contemplated or since the qualifying relationship began, and that disposition has had the effect of defeating the claim or rights of either or both of the partners under any other provision of the PRA; or
- b. where trust property has been sustained by the application of relationship property or the actions of either or both partners; or
- c. where any increase in the value of trust property, or any income or gains derived from the trust property, is attributable to the application of relationship property or the actions of either or both partners.

P29

The court should have broad powers that include ordering one partner to pay compensation to the other, ordering the trustees to distribute capital from the trust, varying the terms of the trust, and resettling some or all of the trust property on a new trust or trusts.

P30

A court must be satisfied that making an order is "just", having regard to a number of specified considerations. These considerations are designed to ensure the amended section 44C achieves an appropriate balance between protecting partners' entitlements under the PRA and the preservation of trusts.

P31

Partners should be able to agree not to make any claim under section 44C for the purposes of contracting out of the PRA under section 21, and to settle claims for the purposes of section 21A.

P32

Section 182 of the Family Proceedings Act 1980 should be repealed.

P33

Section 44 should remain unchanged and should continue to provide a remedy for other avoidance mechanisms.

6.56 Our preferred approach is to extend section 44C to provide a comprehensive remedy that will give a court broad powers to respond to the various ways in which a trust might hold property that is produced, preserved or enhanced by the relationship, in order to effect a just division of property under the PRA.

- 6.57 To facilitate consideration of our preferred approach to trusts we include at the end of this chapter a draft of new section 44C.³⁸⁰
- 6.58 The objective of this remedy (new section 44C) is to provide relief when a partner's entitlement under the PRA has been frustrated by the operation of a trust structure, or when the trust property was preserved or enhanced by the relationship. It aligns with the general scheme of entitlements under the PRA, subject to a court's overriding discretion to consider factors that might suggest that the trust should be preserved, or that compensation should be less than what a partner's full entitlement would have been, had the trust property been subject to the PRA.
- 6.59 This proposal adopts elements from both Option 2 and Option 3 presented in the Issues Paper. New section 44C will apply when some or all of the trust property is attributable to the relationship, which was the focus of Option 2. However rather than creating a new category of relationship property as Option 2 proposed, a court will instead have the discretion to grant relief. We consider that this strikes a better balance between protecting partners' entitlements under the PRA and the preservation of trusts. New section 44C will also apply to dispositions of property to a trust, similar to current section 44C, but its application will be broadened as proposed under Option 3.
- 6.60 By retaining much of the structure and wording of current section 44C, the established body of case law on the operation of section 44C (such as when a disposition has the effect of defeating a claim) will, subject to our proposed amendments, continue to provide some guidance on when and how new section 44C ought to apply.
- 6.61 We do not prefer Option 1, as we consider that the task of identifying the true nature and value of a partner's interest in a trust would be a complex inquiry, and there remains a significant risk that trust structures could be devised in a way that conceals a partner's real interest in a trust. Nor do we prefer Option 4, as it would not provide relief when the partners' actions have enhanced or sustained trust property when the trust is not a nuptial settlement.
- 6.62 In reaching our preferred approach, we have been guided by the following principles for reform:³⁸¹
- (a) The reform should enhance the PRA's ability to provide a just division of property when property is held on trust;
 - (b) Not all trust property should be subject to the PRA. Any new provision needs to be able to distinguish between trust property that should and should not fall under the PRA;
 - (c) Any provision that makes trust property available to meet relationship property entitlements should interfere with the trust to the least extent possible;
 - (d) Any provision that makes trust property available to meet relationship property entitlements should be simple and lead to predictable outcomes as far as possible, while recognising that discretion may be required to minimise the risk of unintended consequences; and
 - (e) It is preferable that all remedies sit within the PRA.

³⁸⁰ These provisions have been prepared by Parliamentary Counsel Office for this limited purpose.

³⁸¹ See also Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [22.4].

Dispositions to a trust

- 6.63 The application of new section 44C to dispositions to a trust shall be extended in three key respects. It will apply to dispositions:
- (a) of *all property*, whether separate property and relationship property;
 - (b) made *in contemplation of* entering into a qualifying relationship, as well as dispositions made since the qualifying relationship began; and
 - (c) that have the effect of defeating the claim or rights of either or both partners under any other provision of the PRA.
- 6.64 Third party dispositions to a trust will not be captured, even if the trust property is used by the partners during the relationship, for example as the family home. This aligns with our proposals in Chapter 2: Classification, and our recommendation that property one partner receives as a gift or inheritance from a third party should not be shared even if it is used as the family home. Compensation may, however, still be available under new section 44C to the extent that trust property settled by a third party was preserved or enhanced by the relationship (see below).

Dispositions of all property

- 6.65 New section 44C will apply when one partner makes a disposition of relationship property or separate property.
- 6.66 Currently section 44C is restricted to dispositions of relationship property only. This means that no remedy is available for dispositions of separate property that have the effect of defeating an entitlement under the PRA. The most common example is when one partner disposes of their separate property savings to a trust, so that the trust can then acquire a family home for the partners.³⁸² Had the family home been acquired in the partner's own name, rather than through a trust, it would have been classified as relationship property under the PRA. The disposition has therefore had the effect of defeating the other partner's entitlement to an equal share in the home.³⁸³
- 6.67 Extending new section 44C to dispositions of separate property aligns with our proposed approach to classification, under which separate property can become relationship property if it is used to acquire property for the common use or common benefit of the partners.
- 6.68 Whether a disposition of separate property to a trust has the effect of defeating a claim or rights under the PRA is a question of fact. The closer the connection between the disposition and the trust's acquisition of property for the partners' common use or

³⁸² See for example *P v B* [2009] NZFLR 773 (HC). In that case Mr P entered an agreement to purchase the family home during the relationship, but disposed of his interest in the home five days before taking possession by nominating the trust as the purchaser under a Deed of Nomination. The trust funded the purchase by way of loan from Mr P of his separate property. The High Court held at [21] that s 44C of the Property (Relationships) Act 1976 did not apply because, while the Deed of Nomination was a disposition of property to the trust, it was not a disposition of relationship property, because the property had not, at the time of disposition, become the family home.

³⁸³ Under our proposals in Chapter 2: Classification, if the family home was owned by one partner prior to the relationship, then the original net value of the home will remain that partner's separate property. So if the owning partner disposed of the family home to a trust during the relationship, the entitlement that has been defeated by the disposition is the non-owning partner's right to any increase in the value of the family home that occurs during the relationship, rather than an entitlement to an equal share in the family home.

common benefit, the more likely it is that the disposition has had the effect of defeating a claim or rights under the PRA.³⁸⁴

Dispositions made in contemplation of entering a qualifying relationship

- 6.69 New section 44C should extend to capture dispositions made at a time when the qualifying relationship was reasonably contemplated. This might include, for example, dispositions made while the partners were dating, but not before the partners had met. This aligns with our proposed approach to classification, outlined in Chapter 2, and will help to minimise the risk of disputes over when the qualifying relationship began.
- 6.70 This proposal means that a partner can no longer use a trust structure as a means of unilaterally protecting their property from future PRA claims once the qualifying relationship in question is contemplated. Instead the partners will need to enter into a contracting out agreement under section 21 of the PRA.
- 6.71 In the Issues Paper we suggested that section 44C could be extended to capture all dispositions, including those made before the relationship was contemplated (Issues Paper at [22.46]). However, the effect of our proposals in Chapter 2: Classification will be that the PRA would no longer classify property owned by one partner before the relationship was contemplated as relationship property. There would be less need to extend the scope of section 44C further. This means that new section 44C would not apply to acquisitions made by the trust during the relationship, if they are the result of a disposition of property to the trust that was made before the relationship was contemplated. This preserves pre-relationship trust property but still provides a remedy if that trust property has been preserved or enhanced by the relationship (see below).

Dispositions that defeat the entitlements of either or both partners under any other provision of the PRA

- 6.72 New section 44C should apply to dispositions that have the effect of defeating the claim or rights of either or both of the partners, under any other provision of the PRA. This is intended to clarify two aspects of how new section 44C shall operate.
- 6.73 First, it will not be necessary to establish that the disposition has only defeated the claim or rights of one partner. Peart has argued that it is appropriate to limit section 44C to dispositions that only defeat the rights of one partner, given its aim is to redress the inequality in property rights between the partners resulting from the disposition.³⁸⁵ But this limitation has created problems in practice. Often a disposition will be made to a trust where both partners have only discretionary interests in the trust. This enables one partner to argue that section 44C does not apply because the disposition had an equal effect on the partners. While the courts have taken a robust approach to considering the practical effect of the disposition on the partners, in some cases finding that one partner has been disadvantaged because the other has maintained effective control over the

³⁸⁴ For example in *O v S* (2006) 26 FRNZ 459 (FC) the family home was acquired by a trust. The partners made dispositions of relationship property funds and separate property funds to the trust in order to meet the deposit on the home, and continued making dispositions of relationship property to meet the mortgage repayments throughout the relationship. The Court was satisfied (at [109]) that these dispositions had the effect of defeating the applicant's claim under the Property (Relationships) Act 1976, because it enabled the family home to be purchased in the name of the trust, when "[c]learly, had the family home not been purchased in the name of the Trust it would have been relationship property".

³⁸⁵ Nicola Peart "Section 44C of the Property (Relationships) Act 1976: conflicting interpretations" (2003) 4 BFLJ 199.

trust,³⁸⁶ this is a complex inquiry. It also seems at odds with the courts' reluctance to take a strict approach to determining whether a partner's interest in trust property amounts to "property" under the PRA (see paragraph 6.21 above). In any event, the problem remains that trust structures can be devised in a way that conceals a partner's real interest in a trust. We think disputes over whether one partner is more disadvantaged than the other are unnecessary, particularly given the court retains discretion as to the compensation awarded so that a just outcome is reached in the circumstances.

- 6.74 The second clarification we wish to make to the operation of new section 44C is that the claim or rights that are being defeated are not limited to a claim for an equal share in the property that was disposed of to the trust. As NZLS submitted, injustice can arise when the use of a trust has the effect of circumventing other provisions of the PRA, such as the provisions that deal with occupation orders, deferring the sharing of relationship property, occupation rent, compensation for economic disparity and compensation for post-separation contributions. While the courts have, in some cases, awarded compensation under section 44C on the basis that a disposition has frustrated a partner's claim under other provisions of the PRA,³⁸⁷ a recent decision of the Court of Appeal has taken a different approach.
- 6.75 In *R v C* the appellant sought occupation rent in respect of the respondent's occupation of the family home after separation.³⁸⁸ As the family home was held on trust, the appellant could not claim occupation rent under section 18B. The Court of Appeal upheld the High Court's decision that section 44C was equally unavailable because the trust itself had purchased the family home. While the partners had disposed of relationship property to the trust in order for it to acquire the family home, that did not mean that the family home "purchased by the trust somehow itself became relationship property".³⁸⁹ The Court of Appeal also observed that section 44C(1) presented a further obstacle to the appellant's claim, because as the trust funds were eventually distributed equally between the partners, the disposition of relationship property had not defeated the partners' claims "to the relationship property disposed of".³⁹⁰
- 6.76 Our proposal is that the PRA should be capable of providing a remedy when *any* claim or rights under the PRA are frustrated by the use of a trust. By clarifying this in the legislation, we expect that new section 44C will be given a wider interpretation than is currently reflected in *R v C*. A court will still have discretion, when making an order under new section 44C, to consider whether or not compensation should mirror that which a partner would have been entitled to had the disposition of property not occurred.

Trust property that is preserved or enhanced by the relationship

- 6.77 New section 44C should also apply when:
- (a) trust property has been sustained by the application of relationship property or the actions of either or both partners; or

³⁸⁶ *R v R* [2010] NZFLR 82 (HC); and *N v N* [2005] 3 NZLR 46 (CA).

³⁸⁷ See for example *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC) at [95]–[96] where compensation was awarded under s 44C of the Property (Relationships) Act 1976 (PRA) on the basis that a disposition of relationship property to a trust had the effect of defeating a claim under s 17 of the PRA. See also *Cairns v Cairns* (2003) 23 FRNZ 168 (FC).

³⁸⁸ *R v C* [2016] NZCA 393, [2016] NZFLR 672.

³⁸⁹ At [14].

³⁹⁰ At [17].

- (b) any increase in the value of trust property, or any income or gains derived from trust property, is attributable to the application of relationship property or the actions of either or both partners.

- 6.78 This aligns with the entitlements that arise under the PRA when one partner's separate property has been sustained by the relationship (section 17), or the increase in value, or income or gains derived from one partner's separate property is attributable to the relationship (section 9A). The effect of this proposal is that a partner has a claim regardless of whether the property that was preserved or enhanced was the other partner's separate property, or was trust property.
- 6.79 This will apply to trusts settled by third parties or trusts settled before the relationship was contemplated. For example, if the trust was settled well before the relationship, and the trust held the family home, then a partner would have a claim in respect of the increase in value of the home that is attributable to the relationship (see Chapter 2: Classification). Or if the trust property was a family farm, held on a trust that was settled by one partner's parents, the other partner would still have a claim if they can establish that the farm was preserved or enhanced by the relationship. Similarly, there should be a remedy in respect of trusts under a will or other testamentary disposition when the property held on those trusts has been sustained or enhanced in a way attributable to the relationship. We therefore propose the repeal of section 44A.
- 6.80 The expansion of new section 44C in this way is intended to provide a remedy within the PRA for those situations where the partners would otherwise need to make a separate claim based on a constructive trust.³⁹¹ Therefore it is not significantly expanding the remedies available to a partner on separation, rather simplifying and codifying the available remedies within the PRA.
- 6.81 It is possible that the application of relationship property to a trust may also be considered a disposition of property to the trust which defeats that partner's rights under the PRA. There may therefore be some overlap between the circumstances in which the new section 44C would apply. We anticipate that in these cases the court would be able to make the most appropriate orders that are just in the circumstances.

Powers of the court

- 6.82 We propose giving the court broad powers under new section 44C to make one or more orders:
- (a) requiring one partner to pay the other partner a sum of money, or to transfer property to the other partner, whether the sum of money or property is relationship property or separate property;
 - (b) requiring the trustees of the trust to pay a sum of money, or to transfer trust property to either or both partners; or

³⁹¹ Cases in which a partner has attempted to claim an interest under the Property (Relationships) Act 1976 based on contributions made to trust property originally settled on the trust by a third party include *Q v Q* (2005) 24 FRNZ 232 (FC); and *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534. Cases where a partner has relied on a claim of constructive trust over a trust arising from the contributions made to the trust property include *Murrell v Hamilton* [2014] NZCA 377; *Vevoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397. See also *Prime v Hardie* [2003] NZFLR 481 (HC); and *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766.

- (c) varying the terms of the trust, or resettling some or all of the trust property on a new trust or trusts.

6.83 A court already has the power to order one partner to pay the other partner compensation under section 44C, and to vary the terms of a trust under section 33(3)(m) of the PRA. The extension of the court's powers to include ordering a distribution of the trust's capital is consistent with the original recommendations of the Working Group established in 1988 to review the Matrimonial Property Act 1976,³⁹² and with the previous recommendations of the Law Commission in its review of the law of trusts.³⁹³ In the past Parliament has been reluctant to provide the court with such broad powers given that, unlike dispositions under section 44, there has been no intention to defeat a partner's claim.³⁹⁴ However, as Peart points out, in the absence of legislative action the courts have been sympathetic to a range of arguments aimed at accessing trust assets that would have been subject to division between the partners, but for the trust.³⁹⁵ In our view it is preferable that the PRA provides a more effective remedy that is more in line with partners' entitlements under the PRA, and that reflects what is occurring in practice.

Matters the court must have regard to

- 6.84 While new section 44C will have a broader application, and will provide a court with wider remedial powers, a court must still be satisfied that making an order of compensation is "just", having regard to a number of specified considerations.
- 6.85 These considerations are designed to ensure new section 44C achieves an appropriate balance between protecting partners' entitlements under the PRA and the preservation of trusts. We also expect that they will promote consistency in the application of new section 44C and provide a guide to settling claims out of court.
- 6.86 The considerations are:
- (a) If the claim relates to a disposition of property, the extent to which the partner's claim or rights under any other provision of the PRA have been defeated by the disposition;
 - (b) If the claim relates to the preservation or enhancement of trust property, the extent to which the trust property has been sustained or enhanced by the application of relationship property or the actions of either partner;
 - (c) The date or dates on which property was disposed of to the trust, or the trust was preserved or enhanced by the application of relationship property or the actions of either partner;
 - (d) Whether the partners disposed of property to the trust, or preserved or enhanced the trust property with informed consent of both partners;
 - (e) Any benefits the partners received from the trust, including the value of any consideration given for any disposition of property to the trust or for the

³⁹² Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 30.

³⁹³ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 232.

³⁹⁴ Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xii. See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [20.47]–[20.48].

³⁹⁵ Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2017) 47 VUWLR 443 at 443.

preservation or enhancement of trust property by the application of relationship property or the actions of either partner;

(f) Whether the trust is intended to meet the needs of any minor or dependent beneficiaries; and

(g) Any other relevant matter.

6.87 Considerations (a) and (b) reflect the compensatory nature of the remedy, and require the court to look at what the applicant would have been entitled to, had the trust property been subject to the PRA. This should be the starting point for assessing the value of any compensation under new section 44C.

6.88 Considerations (c) to (g) recognise that the use of trusts is varied and can involve competing interests and considerations. Simply awarding compensation that mirrors what a partner would have received, had the trust property been subject to the PRA, may not always achieve the PRA's purpose of a just division of property. This might be the case, for example, where the partners genuinely intended to alienate property by settling it on trust for the benefit of third parties. This could include donations to charitable trusts, but also dispositions to trusts established to meet the future needs of their children. We therefore propose giving the courts a degree of flexibility, even though it is at the cost of greater certainty, in order to weigh the overall fairness of awarding compensation in the circumstances of each particular case.

Contracting out of new section 44C

6.89 Partners should be able to agree not to make any claim under new section 44C for the purposes of contracting out of the PRA under section 21, or to agree not to pursue any existing claims against a trust under section 21A. This will provide the partners and trustees greater certainty, although any such agreement would be subject to the procedural safeguards and remedies in Part 6 of the PRA.

6.90 As we explain in Chapter 8: Contracting out and settlement agreements, partners cannot agree on the division of trust property under a contracting out agreement, because trust property is not owned by either partner. The partners can, however, identify trust property in a contracting out agreement and make that agreement conditional on other arrangements in relation to a trust being completed, which could include trustees agreeing to exercise their discretion in a manner consistent with the agreement.

Section 182 of the Family Proceedings Act to be repealed

6.91 We propose repealing section 182 of the Family Proceedings Act, for two reasons.

(a) First, we are satisfied that new section 44C will eliminate the need for partners to rely on section 182 in order to achieve a just division of property at the end of a relationship. While section 182 could, in theory, have a wider application (see paragraph 6.53 above), in practice this is not how it is being used. Section 182 is a "relic from the past".³⁹⁶ Its resurgence in recent times is due to the PRA's failure to provide an effective remedy for accessing trust property when relationships end. In the absence of any evidence of a need to provide a remedy with wider application than new section 44C, we are not convinced that section 182 needs to be retained.

³⁹⁶ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 203; and Anthony Grant "A new problem for executors and a new risk for trusts" *Law News* (online ed, Auckland, 13 July 2018) at 4.

- (b) Second, the PRA is intended as a code and should therefore operate as a comprehensive regime to govern all property matters when relationships end. This will ensure property disputes are resolved applying the same purpose and principles.³⁹⁷ It will also promote the inexpensive, simple and speedy resolution of property matters, by enabling disputes to be addressed at the same time, in one court and on a global rather than piecemeal basis.

Section 44 to remain a remedy for other avoidance mechanisms

- 6.92 Our proposals do not affect section 44, which should remain unchanged. The law regarding the application of section 44 is now fairly well settled and appears sound.
- 6.93 Section 44 has wider application than new section 44C. It applies to all dispositions that are intentionally aimed at defeating claims or rights under the PRA. It therefore includes dispositions to third party ownership structures other than trusts. The requirement to prove intent to defeat a partner's claim or rights under the PRA is a significant hurdle,³⁹⁸ but this is appropriate given that such a finding enables a court to set the disposition aside.
- 6.94 As Nicola Peart submitted, a possible risk of our preferred approach, which focuses only on the use of trusts, is that people may look to other ownership structures in order to avoid the PRA. We have, therefore, considered whether section 44 should be amended so that it applies to any disposition that has the *effect* of defeating the claim or rights of a partner under the PRA. This would eliminate the need for a specific provision in relation to dispositions to trusts, and would therefore avoid the possible risk of encouraging use of other avoidance mechanisms.
- 6.95 We do not prefer this as an option, however, for three reasons:
- (a) First, our research and submissions received have not revealed evidence of widespread avoidance problems with other ownership structures. Trusts are a unique avoidance mechanism, because interests in a trust are not usually "property" for the purposes of the PRA. But company shares, for example, are. This means that trusts can be used to maintain effective control or exclusive rights of use and enjoyment over property without subjecting it to the PRA. But companies are less easily manipulated, as demonstrated by the fact that the remedies for dispositions to companies in the PRA are seldom used.³⁹⁹ As Atkin explains, this may in part be because shares held in family companies will often fall within the PRA's definition of relationship property in any event.⁴⁰⁰ While other third party ownership structures may be more easily manipulated, without evidence it is difficult to effectively respond to any avoidance problems that may or may not arise in future.
- (b) Second, amending section 44 and making it an effects-based test would represent a significant limitation of the freedom of property owners to dispose of property as

³⁹⁷ The policy of the Property (Relationships) Act 1976 is a just division of property when relationships end, whereas the focus of s 182 of the Family Proceedings Act 1980 is on a partner's reasonable expectations of the benefits they would have received under the trust had the relationship continued.

³⁹⁸ N Peart, M Henaghan and G Kelly "Trusts and relationship property in New Zealand" (2011) 17 *Trusts & Trustees* 866 at 869.

³⁹⁹ We have identified only two cases in which a substantive application under s 44F of the Property (Relationships) Act 1976 was decided: *P v P* [2003] NZFLR 925 (FC); and *RKR v TJH* [2012] NZFC 3779.

⁴⁰⁰ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 215.

they so choose.⁴⁰¹ In the absence of evidence of a problem, such a limitation is difficult to justify. It was for this reason that section 44C, which already has a lower effects-based threshold, did not give the court more radical powers to unwind dispositions of property.⁴⁰²

- (c) Third, we anticipate that our proposals to change the underpinning rules of classification set out in Chapter 2 will alleviate the sense of unfairness many people have with the way the PRA classifies and divides property, and will therefore reduce the incentives for avoiding the PRA in the first place.

6.96 While we are satisfied that there is a strong case for a more flexible remedy in relation to trusts, we are not satisfied that there is an equally compelling case for reform in respect of other dispositions.

⁴⁰¹ Jessica Palmer "What to Do about Trusts?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 177 at 194.

⁴⁰² See discussion in *Simon v Wright* [2013] NZHC 1809 at [36].

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44C Remedies when property held on trust

- (1) This section applies if the court is satisfied that—
 - (a) either or both of the partners to a relationship have, at any time when the relationship was reasonably contemplated, or at any subsequent time during or after the relationship, disposed of separate property or relationship property to a trust, and that disposition has the effect of defeating a claim or right of either or both of the partners under this Act; or
 - (b) trust property has been sustained by either or both of the following:
 - (i) the application of relationship property:
 - (ii) the actions of either or both of the partners during the relationship; or
 - (c) any enhancement of trust property (being an increase in the value of the property, or any income or gains derived from the property) is attributable to either or both of the following:
 - (i) the application of relationship property:
 - (ii) the actions of either or both of the partners during the relationship.
- (2) If the court considers it just in the circumstances, having regard to all relevant matters, including the matters in **subsection (3)**, the court may make 1 or more of the following orders:
 - (a) an order requiring one of the partners to the relationship (**A**) to pay to the other partner (**B**) a sum of money out of relationship property or separate property:
 - (b) an order requiring A to transfer to B any relationship property or separate property:
 - (c) an order requiring the trustees of the trust to pay to A or B, or both A and B, a sum of money:
 - (d) an order requiring the trustees of the trust to transfer to A or B, or both A and B, any trust property:
 - (e) an order varying the terms of the trust:
 - (f) an order resettling some or all of the trust property on 1 or more new trusts.
- (3) The matters referred to in **subsection (2)** are,—
 - (a) if this section applies because of **subsection (1)(a)**,—
 - (i) the extent to which a claim or right of either or both of the partners under this Act has been defeated by the disposition of the property to the trust; and
 - (ii) the date of the disposition of the property to the trust; and

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- (iii) any benefits the partners have received from the trust, including the value of any consideration given for the disposition of the property to the trust; and
 - (iv) whether the disposition of the property to the trust was made with the informed consent of both partners; and
 - (v) whether the trust is intended to meet the needs of any minor or dependent beneficiaries; or
- (b) if this section applies because of **subsection (1)(b) or (c)**,—
- (i) the extent to which the trust property has been sustained or enhanced by the application of relationship property or the actions of either or both of the partners; and
 - (ii) the date or dates on which the trust property was sustained or enhanced by the application of relationship property, or the actions of either or both of the partners; and
 - (iii) any benefits the partners have received from the trust property, including the value of any consideration given for sustaining or enhancing the trust property; and
 - (iv) whether the trust property was sustained or enhanced with the informed consent of both partners; and
 - (v) whether the trust property is intended to meet the needs of any minor or dependent beneficiaries.

CHAPTER 7

Children's interests

IN THIS CHAPTER:

We consider how the PRA should recognise children's interests following parental separation.

CURRENT LAW

- 7.1 While the PRA is "mainly" about how partners' property is to be divided when relationships end,⁴⁰³ the PRA has always recognised that children have an indirect but nonetheless important interest in the division of relationship property.⁴⁰⁴ This is reflected in section 1M(c), which states that one purpose of the PRA is to provide for a just division of relationship property, "while taking account of" the interests of any children of the relationship.
- 7.2 The PRA has separate definitions for "child of the marriage", "child of the civil union" and "child of the de facto relationship" (section 2). These definitions largely mirror each other to mean:
- (a) any child of both partners; and
 - (b) any other child (whether or not a child of either partner) who was a member of the partners' family at the relevant time.⁴⁰⁵
- 7.3 In this paper we use the single term "child of the relationship" to mean a child of a marriage, civil union or de facto relationship.⁴⁰⁶

⁴⁰³ Property (Relationships) Act 1976, s 1C. This chapter does not specifically consider children's interests following the death of a parent. Children have different property rights when a parent dies (including possible claims under succession law), and different issues may arise for children, including adult children, under the legislation when a relationship ends on death.

⁴⁰⁴ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

⁴⁰⁵ In *GM v JL* (2005) 24 FRNZ 835 (FC) the Family Court said at [33]–[34] that the second category of this definition captures children who are "wholly or partially dependent on at least one of the parties for physical, material, emotional or social support", and who have "some presence in or belonging to the particular household". This might include stepchildren and children who are also members of another household, where care is shared. See also *A v A* [2012] NZFC 10192 at [26]–[34].

⁴⁰⁶ As we observed at [28.26] of the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017)), there is a small inconsistency in how the definitions treat

- 7.4 Section 26 gives effect to the PRA's purpose in relation to children's interests. It directs a court to have regard to the interests of any minor or dependent children of the relationship in any PRA proceedings.⁴⁰⁷ This direction is not confined to any specific provisions of the PRA, and can influence a court's decision on a wide range of matters.⁴⁰⁸
- 7.5 Children's interests do not constitute a discrete exception to equal sharing of relationship property, although it is possible that a child's needs or interests could be relevant to a claim under section 13 that there are extraordinary circumstances that would make equal sharing repugnant to justice.⁴⁰⁹
- 7.6 The PRA also provides a range of tools that can be used to directly or indirectly meet children's needs following parental separation:
- (a) Section 26 gives a court the power, if it considers it just, to settle relationship property for the benefit of children.⁴¹⁰ The High Court has clarified that:⁴¹¹

The inquiry is directed to whether there is a need for a s 26 order on the facts of a particular case to provide for the interests of the minor or dependent child or children. Such an order will not usually be required if the Court is satisfied that the parents intend to fulfil their roles as such responsibly.
 - (b) Section 26A gives a court the power to postpone the vesting of any share in the relationship property (wholly or in part) if immediate vesting would cause undue hardship for the principal provider of ongoing daily care for minor or dependent children of the relationship.⁴¹² Postponement orders are typically made in order to postpone the sale of the family home.⁴¹³
 - (c) A court can make orders granting either partner the right to occupy the family home (section 27). It can also vest a residential tenancy in either partner (section 28).⁴¹⁴ When considering an application for an occupation or tenancy order, section 28A requires a court to have "particular regard" to the need to provide a home for any minor or dependent child of the relationship. Occupation orders are generally

children of immediately preceding relationships, but this issue would be resolved if the new statute proposed in Chapter 1: Introduction were to adopt relationship neutral terminology.

⁴⁰⁷ A minor is a person under the age of 20: Age of Majority Act 1970, s 4(1). See also *B v B* (2009) 27 FRNZ 622 (HC) at [80]. Whether a child is "dependent" for the purposes of the Property (Relationships) Act 1976 is a question of fact; adult children may be dependent if they are physically or intellectually disabled: *B v B* at [80]–[81].

⁴⁰⁸ Peart notes that children's interests can be relevant to decisions made about the classification, valuation and division of property, even if children have no beneficial interest in the property: Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 43. For example children's interests have been relevant in proceedings to set aside a contracting out agreement (*A v W* [2012] NZFC 8640) and in a decision to decline to order compensation for post-separation contributions (*R v D* [2015] NZFC 9450, [2016] NZFLR 37 at [60]).

⁴⁰⁹ *WMM v SJM* [2012] NZFC 5091, discussed in Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 45–46.

⁴¹⁰ Section 26 orders are discussed in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.27]–[29.41].

⁴¹¹ *B v B* (2009) 27 FRNZ 622 (HC) at [83(b)].

⁴¹² Section 26A orders are discussed in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.42]–[29.53].

⁴¹³ See *H v D* FC Gisborne FAM-2004-016-140, 21 December 2005; and *E v W* (2006) 26 FRNZ 38 (FC). Peart notes they could also be used to allow the primary caregiver to retain the use of the other partner's share of relationship property for a time to help them establish a new home for the children, although we are not aware of any cases where this has occurred. See Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.01].

⁴¹⁴ Occupation and tenancy orders are discussed in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.54]–[29.61].

granted for a relatively short period of time, or made on an interim basis pending sale or division of relationship property.⁴¹⁵

- (d) A court can make furniture orders ancillary to an occupation or tenancy order (section 28B) or independent of any other order, granting the possession and use of furniture to either partner (section 28C). When considering an application under section 28C, a court must have particular regard to any need of the applicant to have suitable furniture, household appliances and household effects to provide for the needs of any children of the relationship who live, or will be living with, the applicant (section 28C(4)).
- (e) Finally, section 32 of the PRA gives a court the power to make orders under specific provisions of the Child Support Act 1991, such as orders that depart from a formula-assessed amount of child support, or orders that provide for child support to be paid in a lump sum.

7.7 The PRA provides for the appointment of a lawyer to represent any minor or dependent child in PRA proceedings if it considers there are "special circumstances" that make the appointment "necessary or desirable".⁴¹⁶ It has been suggested that special circumstances are likely to exist where children are particularly likely to be affected and the assets at stake are unusually high, or where property might be settled on children.⁴¹⁷ The appointment of a lawyer for child is the primary way in which minor or dependent children can independently participate in PRA proceedings. The role of lawyer for child includes ascertaining, if appropriate, the child's views on matters affecting them relevant to the proceedings, and communicating those views to the court.⁴¹⁸

ISSUES

The impact of parental separation on children

7.8 Parental separation can have significant and wide-ranging impacts on children.⁴¹⁹ Children may experience new care arrangements. They might be dealing with inter-parental conflict. The family home may be sold as one household splits into two, and children might have to move to a new house, neighbourhood or region. They may lose important

⁴¹⁵ Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 356.

⁴¹⁶ Property (Relationships) Act 1976, s 37A. Section 37 is also relevant. It provides that a court may direct that notice be given to any person "having an interest in the property" that would be affected by an order, and any such person shall be entitled to appear and be heard in the matter as a party to the application. However s 37 notices are rarely issued in respect of children.

⁴¹⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.82] citing *Maw v Maw* [1981] 1 NZLR 25 (CA) and *Rhodes v Rhodes (No 1)* (1978) 2 MPC 159 at 160. See also *L v P*, where a lawyer was appointed to represent a child whose substantial inheritance had been partly intermingled with relationship property: *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011.

⁴¹⁸ Family Court Act 1980, s 9B(1)–(2).

⁴¹⁹ In its submission on the Issues Paper, Barnardos New Zealand (Barnardos) said that "[e]xternal independent research indicates that across the Western world, although the majority of children do not suffer adverse outcomes resulting from parental separation, children who experience parental separation are on average at twice the risk of adverse outcomes" citing Jan Pryor "Separation from children's perspectives: Recent research and some food for thought" (presentation for the Auckland Family Courts Association Conference, April 2006); and P Parkinson, J Cashmore and J Single "Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation" (2005) 43(3) Family Court Review 429. See also Rae Kaspiw and Lixia Qu "Property Division after Separation: Recent Research" (2016) 30 AJFL 1; and M Gollop, M Henaghan and N Taylor *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (Centre for Research on Children and Families, Faculty of Law, University of Otago, June 2010).

connections to family, whānau and friends as well as peer and community support networks, especially if a change of school is required. A geographic move following parental separation may also impact on a child's ongoing relationship with their non-primary caregiver parent. Barnardos New Zealand (Barnardos) observes on a daily basis the impact of parental separation on children. In its submission on the Issues Paper Barnardos noted that parental separation and subsequent repartnering can cause wider social dislocation and isolation, and a period of high mobility and relocation can be a common experience for children who experience parental separation.

- 7.9 For some children, parental separation is associated with a prolonged period of low living standards.⁴²⁰ In the Issues Paper and Study Paper we explored the recent research of Dr Michael Fletcher, which identified that separation substantially increases poverty rates among separated parents, and that these negative impacts persist for at least three years following separation.⁴²¹ Fletcher also identified that responsibility for the care of children after separation plays a dominating role in influencing financial outcomes,⁴²² and that child support payments provide little assistance to many primary caregivers.⁴²³ The level of assistance provided through State benefits is "often insufficient to ensure individuals are not below the poverty threshold, especially if they have children living with them".⁴²⁴
- 7.10 Decisions made under the PRA can directly affect children's wellbeing following parental separation. Decisions about how the partners' property is to be used or ultimately divided following separation can affect where children live, their standard of living, and their ability to maintain relationships with family, whānau, friends and community. As Peart notes, section 26 is an acknowledgment of the adverse effect that a division of relationship property may have on children.⁴²⁵

Children's interests have a low priority in decisions under the PRA

- 7.11 Children's interests do not play a prominent role in PRA proceedings.⁴²⁶ The courts make "little use" of the obligation to take account of children's interests in sections 1M(c) and 26,⁴²⁷ the tools available to benefit children under the PRA are rarely used,⁴²⁸ and it is

⁴²⁰ Michael Fletcher "An Investigation Into Aspects of the Economic Consequences of Marital Separation Among New Zealand Parents" (PhD Thesis, Auckland University of Technology, 2017) at 187.

⁴²¹ At 185–186.

⁴²² At 151.

⁴²³ Of those partners receiving child support, average receipts in the year following separation were \$2,367 for women (6.9 per cent of women's average total family income) and \$709 for men (1.9 per cent of men's average total family income): Michael Fletcher "An Investigation Into Aspects of the Economic Consequences of Marital Separation Among New Zealand Parents" (PhD Thesis, Auckland University of Technology, 2017) at 188.

⁴²⁴ At 187.

⁴²⁵ Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 28. See also *Wheeler v Wheeler* (1984) 2 NZFLR 385 (FC) where the Court noted that the division of property may affect each partner's ability to meet their responsibilities to maintain and provide a home for their children.

⁴²⁶ See Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27; and Bill Atkin "Children and financial aspects of family breakdown" (2002) 4 BFLJ 85.

⁴²⁷ Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 67.

⁴²⁸ Peart's review of s 26 applications available on Briefcase and LexisNexis databases identified that a s 26 order was made in only 14 out of 45 cases: Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 50. Peart observed at 53 that successful applications under s 26A were also rare, identifying only four successful applications out of a total of 13 applications. In relation to occupation, tenancy and

unusual for children to participate in PRA proceedings or for a lawyer for child to be appointed.⁴²⁹ Instead, the focus of PRA proceedings is on the property entitlements that the adult partners have acquired during their relationship, consistent with the primary purpose of the PRA.⁴³⁰

- 7.12 Children's interests in PRA matters are also not generally viewed as significant by practitioners. A survey of New Zealand family lawyers carried out by Grant Thornton and the New Zealand Law Society (NZLS) in October 2017 found that only 12 per cent of practitioners felt that consideration of children's interests was of significant importance in managing relationship property cases.⁴³¹ This was consistent with another survey finding, that 78 per cent of practitioners felt that children were rarely (72 per cent) or never (6 per cent) a focus of PRA proceedings.⁴³² The survey observed that:⁴³³

Practitioners' views on the rights of any children of the relationship might be seen as surprising, given that the Property (Relationships) Act explicitly directs the courts to consider the interests of any children of the relationship.

It suggests children's rights under relationship property proceedings, both property rights (including any beneficial interests) and other rights, may not be adequately addressed in current practice.

- 7.13 There may be valid reasons why children's interests are not explicitly referred to when making decisions under the PRA. Partners might have separately agreed between themselves on how their children are to be cared for and financially supported after separation. For example, partners might agree that the children should remain in the family home for a period of time, and make financial provision to support such an arrangement. Recourse under the PRA may therefore be unnecessary in order to recognise children's interests and meet their post-separation needs.
- 7.14 But separation can be a time of high interpersonal conflict. Partners may find it difficult to focus on what is best for their children, or they may prioritise their own interests, for example their desire for a clean break. While we lack empirical evidence, it is reasonable to assume that in some cases partners will negotiate and reach agreements under the PRA without giving their children's interests adequate consideration, or will fail to pursue children's interests before the courts.

furniture orders, data provided by the Ministry of Justice revealed that, in 2016, there were 59 applications for an occupation order, one application for a tenancy order and 12 applications for furniture orders: Email from Ministry of Justice to the Law Commission regarding applications filed in the Family Court (5 May 2017). We do not know how many of those applications were successful, or how many involved minor or dependent children. We note that Peart estimates children's needs were the principal reason for granting occupation orders in around half of the applications for occupation orders decided between 2002 and 2013: Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 53.

⁴²⁹ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 21 and 50. See also Pauline Tapp, Nicola Taylor and Mark Henaghan "Agents or Dependents: Children and the Family Law System" in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303 at 310–311. Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 states at 54 that the power to appoint lawyer for child is "seldom utilised". For example, in *M v M* [2004] NZFLR 72 (HC) no lawyer for the child was appointed in an application for an order to settle property on a child with special needs.

⁴³⁰ Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 67.

⁴³¹ Grant Thornton New Zealand Ltd and NZLS *New Zealand Relationship Property Survey 2017* (October 2017) at 19.

⁴³² At 19.

⁴³³ At 19.

A failure to strike the right balance between partners' entitlements and children's interests

- 7.15 The low priority given to children's interests in practice reflects a failure to strike the right balance between partners' property entitlements and children's interests following parental separation.

The PRA uses outdated language to promote children's interests

- 7.16 The language used in the PRA to promote children's interests is outdated by modern standards. The United Nations Convention on the Rights of the Child (UNCROC), to which New Zealand is a signatory, sets out the basic rights of children, including the right to have their "best interests" treated as a "primary consideration" in actions concerning them.⁴³⁴
- 7.17 However section 1M(c) of the PRA provides only that property division should "take account" of children's interests. This suggests that children's interests are something of an "addendum to the adult considerations".⁴³⁵ Children's interests do not appear at all in the principles provision of the PRA (section 1N). This has significant implications for how the PRA is applied in practice, given the important role of purpose and principle provisions in statutory interpretation.⁴³⁶ Skellern writes that:⁴³⁷

When [sections 1M and 1N] are considered against the backdrop of [UNCROC], the fact that children's needs are mentioned only in passing at s 1M suggests a lack of attention to increasing the focus on their needs in compliance with the spirit of [UNCROC].

- 7.18 Further, while the obligation in section 26 is mandatory, it refers only to the interests of children, not to their "best interests". Section 26A fails to refer to children's interests directly at all in the context of a postponement order. Section 28A requires a court to have "particular regard" to the need to provide a home for children when considering an application for an occupation or tenancy order, but it is unclear whether children's needs are particularly relevant to the court's discretion under section 28B to make an ancillary furniture order.⁴³⁸
- 7.19 By failing to reflect the language of UNCROC in the PRA, New Zealand may be failing to meet its international obligations as a party to UNCROC.⁴³⁹

Restrictive judicial approach to prioritising children's interests

- 7.20 In the rare situations where the court is asked to take children's interests into account, the courts typically take a restrictive approach when considering whether to give

⁴³⁴ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).

⁴³⁵ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 33.

⁴³⁶ See Interpretation Act 1999, s 5(1). For a discussion on the importance of principles provisions in statutory interpretation see Law Commission *Review of the Search and Surveillance Act 2012 – Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2018) at ch 3.

⁴³⁷ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 33.

⁴³⁸ This is because s 28B of the Property (Relationships) Act 1976 does not incorporate an equivalent to s 28C(4), and it is unclear whether the direction in s 28A(1) is relevant to an ancillary order under s 28B.

⁴³⁹ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012).

children's interests priority over partners' property entitlements. As Peart observes, to the extent that children's needs and interests require protection, the courts have generally taken a minimalist approach to depriving the partners of their property entitlements.⁴⁴⁰

- 7.21 The court's restrictive approach is most noticeable in relation to applications under section 26 for the settlement of property for the benefit of children. While the High Court has said that exceptional circumstances are not necessary,⁴⁴¹ in practice successful applications under section 26 have been typically limited to extreme cases involving criminal offending within the family or severe parental neglect.⁴⁴² The courts' current approach is illustrated in the recent case of *E v E*, where the High Court upheld a decision declining to make a section 26 order in respect of a 20 year old dependent child who suffered from intellectual disabilities.⁴⁴³ The application was declined on the basis that the relationship property pool available for division (\$237,000) was too small to support a section 26 order, even though the original relationship property pool, before interim distributions had been made, was around \$1.4m.⁴⁴⁴ The Court also observed that the child will receive State assistance in his own right and that, should he find himself in difficulty, his mother was "well provided for" (presumably as a result of the interim distribution of relationship property) and could assist him, and that there was no evidence to suggest the husband would not help the child, "should a real need for such assistance arise".⁴⁴⁵
- 7.22 The court's restrictive approach to settling property for the benefit of children is perhaps unsurprising given the lack of direction in section 26 and the limited grounds for departing from equal sharing under the PRA.⁴⁴⁶ But Peart argues the restrictive approach severely limits the court's discretion and does not sit well with the direction to have regard to children's interests in section 26, or with UNCROC.⁴⁴⁷
- 7.23 We also note that the courts typically take a restrictive approach to other tools that do not affect the partners' ultimate property entitlements, but do affect their use and enjoyment of that property. Occupation orders tend to be for short periods only, and while the need to provide a home for children was initially treated as the first and most important consideration,⁴⁴⁸ recent cases tend to take a more restrictive approach that

⁴⁴⁰ Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 27–28.

⁴⁴¹ *B v B* (2009) 27 FRNZ 622 (HC) at [83(b)].

⁴⁴² See *X v X* [1977] 2 NZLR 423 (SC); *N v N* (1985) 3 NZFLR 694 (FC); *S v C* (1998) 17 FRNZ 176 (FC); and *R v R* [1998] NZFLR 611 (FC).

⁴⁴³ *E v E* [2018] NZHC 1469.

⁴⁴⁴ At [44]. The modest size of the relationship property pool available for division was also grounds for refusing to make a s 26 order in *WWM v SJM* [2012] NZFC 5019; and *BGR v MR* [2007] NZFLR 177 (FC).

⁴⁴⁵ *E v E* [2018] NZHC 1469 at [45]–[46].

⁴⁴⁶ Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 80.

⁴⁴⁷ Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 52.

⁴⁴⁸ See *W v W* (1984) 2 NZFLR 385 (FC) at 389–390; and *N v N* (1985) 3 NZFLR 766 (HC) at 769.

prioritises partners' property entitlements over children's interests.⁴⁴⁹ In *L v B* the High Court said that:⁴⁵⁰

While the accommodation needs of minor or dependent children must always be taken into account, these should be balanced against all other relevant considerations in the particular case, including the desirability of providing the parties with a clean break in their financial affairs so that they can re-establish themselves.

- 7.24 The courts have also used their power to revisit child support arrangements under section 32 in a "conservative fashion".⁴⁵¹ In *H v H* the High Court observed that lump sum awards were limited, in all but the "most unusual circumstances", to a capitalisation of the formula assessment in any given financial year.⁴⁵²

The financial risks associated with the tools

- 7.25 The effectiveness of the tools is limited by the financial risks they pose to the partner who is the primary caregiver. In particular, the primary caregiver may be deterred from applying for a postponement or occupation order because of the risk of a claim for occupation rent by the other partner.⁴⁵³ Such a claim might have the effect of diminishing the primary caregiver's ultimate share in the relationship property pool.
- 7.26 The use of one of the tools might also risk diminishing the amount of child support payable under the Child Support Act.⁴⁵⁴ Under that Act, a liable parent paying child support can apply for a departure from a formula-assessed amount of child support if that amount would be unjust and inequitable because of any payments, transfer or settlement of property made under the PRA, or because the recipient is entitled to occupy a property in which either of them has a financial interest.⁴⁵⁵

Narrow provision for the appointment of lawyer for child

- 7.27 As noted above, it is unusual for children to participate in PRA proceedings or for a lawyer for child to be appointed. This may be in part due to the high threshold for appointing a lawyer for child under section 37A the PRA (there must be "special circumstances" that make the appointment "necessary or desirable"). It might also be due to the fact that the fees payable to the lawyer for child must be paid by one or both of the parties (section 37A(2)). Peart and Henaghan argue that children's interests are rarely pleaded by partners as "there is no incentive on the parties to put their children's

⁴⁴⁹ See for example *G v G* (1988) 3 FRNZ 665 (HC) at 677; and *W v W* [1997] NZFLR 543 (HC) at 547. In *S v W* HC Auckland CIV 2008-404-4494, 27 February 2009 Allan J said at [99] that "[i]n the general run of cases" occupation orders extending over several years will be regarded as "offending against the clean break principle" and will not be appropriate.

⁴⁵⁰ *L v B* [2013] NZHC 2378 at [8].

⁴⁵¹ *F v M* [2012] NZFC 7705 at [110].

⁴⁵² *H v H* [2007] NZFLR 910 (HC) at [104].

⁴⁵³ Where one partner occupies the family home after separation, the other partner might be compensated for their loss of enjoyment of that property or delayed access to the capital he or she is entitled to under the Property (Relationships) Act 1976 through ss 18B and 33.

⁴⁵⁴ See *W v W* [1997] NZFLR 543 (HC) where Robertson J declined to order occupation rent for the period during which the children and one partner lived in the family home pursuant to an occupation order, but acknowledged that the other partner was not precluded from applying for a departure order under the Child Support Act 1991.

⁴⁵⁵ Child Support Act 1991, ss 105(2)(c)(ii)–(iii).

interests ahead of their own".⁴⁵⁶ Without independent representation, the interests of children can be easily overlooked or side-lined,⁴⁵⁷ inconsistent with the rights affirmed in UNCROC, including the right to express their views in matters affecting them, and for those views to be given appropriate weight (article 12(1)), and the opportunity to be heard in any judicial proceeding affecting them, either directly or through a representative (article 12(2)).⁴⁵⁸

Results of consultation

- 7.28 We received 49 submissions that addressed children's interests, being 35 submissions from members of the public, 8 submissions from organisations and 6 submissions from individual practitioner and academic experts.
- 7.29 Submissions reflected a diverse range of views. Most submitters agreed that the PRA does not give adequate priority to children's interests. Some, however, felt that while children's needs must be provided for after separation, this is not the role of the PRA but of other, more child-centred legislation such as the Child Support Act and the Care of Children Act 2004.
- 7.30 The Office of the Children's Commissioner (Children's Commissioner), Barnardos, the Human Rights Commission (HRC), the National Council of Women of New Zealand and the New Zealand Federation of Business and Professional Women (BPWNZ) all agreed that children's interests are not given adequate priority in PRA matters. As a result, Barnardos submitted, children's interests often remain invisible. BPWNZ noted that children's interests are rarely considered by the court, given that decisions around living arrangements are by necessity normally resolved before the courts are involved. HRC said that the low priority given to children's interests is partly because the PRA is not currently aligned with New Zealand's obligations under UNCROC.
- 7.31 NZLS, however, submitted the PRA gave children's interests adequate attention. It submitted that the PRA is about partners' property entitlements, and the current provisions of the PRA adequately recognise children's interests in that context. While orders for the benefit of children are not common, NZLS observed that this may be due to the courts' focus on the purpose of the PRA and the "clean break principle", that property matters should be resolved as soon as practicable at the end of the relationship to enable the parties to live their lives independent of each other.

Children's interests in comparable jurisdictions

- 7.32 Children's interests play a part in property regimes in comparable jurisdictions. The PRA's tools are broadly consistent with those that exist in the Canadian provinces which, like New Zealand, adopt rules-based statutory property regimes and have separate statutory regimes for spousal maintenance and child support.⁴⁵⁹

⁴⁵⁶ Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 91.

⁴⁵⁷ At 91.

⁴⁵⁸ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

⁴⁵⁹ Several Canadian provinces have statutory provisions that allow a court to make an order setting property aside for a child (for example British Columbia, Nova Scotia, New Brunswick, Newfoundland and Labrador, and Yukon). Many provinces also recognise children's interests or needs as relevant to decisions on occupation orders (for example

- 7.33 Children's interests tend to play a greater role in the discretionary property regimes in Australia and England and Wales. Property division in these jurisdictions is based not only on entitlements to property arising from the relationship, but also on future needs, expressly including children's needs.⁴⁶⁰ This enables a court to consider the needs of the family as a whole, with the aim of achieving a fair or just outcome for the parties.⁴⁶¹ The relevant statutes in these jurisdictions deal not only with property division, but also with spousal maintenance, child support and the care of children after separation, which can also facilitate a holistic approach to the consequences of parental separation.⁴⁶² However, for the reasons discussed in Chapter 1: Introduction, we do not propose that New Zealand shifts to a discretionary property regime.

Alberta, Ontario, Nova Scotia, New Brunswick, Saskatchewan, Quebec, Northern Territories, Yukon and Prince Edward Island). Several Canadian provinces also have statutory provisions allowing a court to direct that the contents of the family home be removed for the use of a child (for example Nunavut and Prince Edward Island). See Family Law Act SBC 2011 c 25, s 97(2)(e); Matrimonial Property Act RSNS 1989 c 275, ss 11(4)(b) and 15(d); Marital Property Act RSNB 2012 c 107, ss 10 and 23; Family Law Act RSNL 1990 c F-2, s 26(d); Family Property and Support Act RSY 2002 c 83, ss 12(2)(d) and 27(4); Matrimonial Property Act RSA 2000 c M-8, s 20(b); Family Property Act SS 1997 c F-6.3, s 7(a); Civil Code of Quebec, arts 409 and 410; Family Law Act SNWT 1997 c 18, s 55; Family Law Act RSO 1990 c F-3, ss 24(3)(a) and (4); and Family Law Act RSPEI 1988 c F-2.1, s 25.

⁴⁶⁰ The Family Law Act 1975 (Cth) requires a court to take a range of prospective factors into account in the exercise of discretion, including parenting responsibilities and any child support payable through ss 75(2)(c) and 79(4)(e). The Matrimonial Causes Act 1973 (UK) provides in ss 25(1), 27(3) and 27(3A) that it is a court's duty to give first consideration, when granting financial relief, to the welfare of minor children. Both statutory property regimes also contain provisions that enable a court to set property aside for the children's benefit: see Family Law Act 1975 (Cth), ss 79(1)(d) and 90SM(1)(d); and Matrimonial Causes Act 1973 (UK), s 23(1).

⁴⁶¹ Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 66.

⁴⁶² At 66.

PREFERRED APPROACH

P34

Children's best interests should be a primary consideration under the PRA. This should be given effect through:

- a. a statutory principle, to guide the achievement of the purpose of the PRA;
- b. an overarching obligation on the courts to have regard to the best interests of any minor or dependent children of the relationship (replacing the existing obligation in section 26); and
- c. procedural rules, to ensure a court is provided with the information it needs in order to effectively perform its obligation at (b) above, and to promote to parents, practitioners and the court the importance of considering children's best interests and the tools available for meeting children's needs.

P35

A court should have the power to set relationship property aside for the benefit of any minor or dependent children of the relationship, if it considers it just (replacing the existing power in section 26). The court should be directed to have particular regard to any unmet needs of the child or children during minority or dependency.

P36

There should be a presumption in favour of granting a temporary or interim occupation or tenancy order on application by the primary caregiver of any minor or dependent children of the relationship. A court may decline to make an order if the respondent partner satisfies the court that an application is not in the child's best interests, or would otherwise result in serious injustice.

P37

The other tools available to meet children's needs should be improved by:

- a. broadening the jurisdiction of furniture orders to include family chattels as defined in section 2, and clarifying that a court must have particular regard to children's needs when making furniture orders;
- b. requiring a court to postpone vesting, if immediate vesting would cause undue hardship for any minor or dependent child of the relationship; and
- c. clarifying that an order made to benefit children under current sections 26, 27 or 28A is not grounds for departure from formula-assessed child support obligations under the Child Support Act 1991.

P38

Children's participation in proceedings should be strengthened by lowering the threshold for appointing a lawyer for child to "necessary or desirable", consistent with the Family Proceedings Act 1980.

P39

There is a need to review the effectiveness of the Child Support Act 1991 in meeting children's needs and setting the level of financial support to be provided by parents for their children.

- 7.34 Our preferred approach will give greater priority to children's interests. This will achieve a better balance between partners' property entitlements and children's interests following parental separation.

Elevating children's interests

- 7.35 We propose elevating children's "best interests" to a "primary consideration". We consider that this strikes the appropriate balance in the context of legislation that is primarily about the property entitlements of adult partners, arising as a result of their relationship, but which has the potential to impact significantly on children's interests. It rejects the concept of a "clean break" when there are children, and sends a strong signal that a child's best interests may be given greater weight than other competing considerations when a court is exercising discretion. Our proposal is consistent with the rights affirmed in UNCROC (see paragraph 7.16 above), and with New Zealand's obligations as a party to UNCROC to uphold those rights. It also reflects the general responsibility parents have for the care, development and upbringing of their children, and their duty to provide necessities.⁴⁶³
- 7.36 We propose giving effect to the higher priority accorded to children's interests in three ways:
- (a) First, the best interests of any child of the relationship⁴⁶⁴ as a primary consideration will be a statutory principle, to guide the achievement of the purpose of the PRA;
 - (b) Second, a court will be directed to have regard to the best interests of any minor or dependent⁴⁶⁵ children of the relationship in any proceeding under the PRA (replacing the existing obligation in section 26).
 - (c) Third, procedural rules should require that:
 - (i) lawyers provide information to their clients about how children's interests are relevant to property division, and the tools that can be used to benefit children;
 - (ii) partners provide the court with basic information about any children of the relationship, including their age, any special needs, likely duration of

⁴⁶³ See Care of Children Act 2004, s 5(b); Crimes Act 1961, s 152; and Child Support Act 1991, s 4(b).

⁴⁶⁴ In the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.24]–[28.47]) we explored the definition of "child of the relationship". We consider the definition remains appropriate and do not propose reform. While some submitters, including the Human Rights Commission, supported a more flexible definition, we are satisfied that the current definition is broad enough to accommodate diverse family structures and increasingly broad concepts of family, including stepchildren, whāngai and other, more culturally diverse family structures. We also think it is appropriate that there be some connection or dependency on the partners in order for children's interests to impact on partners' entitlements under the Property (Relationships) Act 1976 (PRA). While some submitters favoured a narrower definition of child of relationship that only captured biological or adopted children of both partners, these submitters tended to be concerned primarily with how the presence of one partner's children from a previous relationship could result in that relationship "qualifying" for property entitlements under the PRA. This is primarily a question of whether the presence of children should affect eligibility under the PRA. We address this issue in Chapter 4: Qualifying relationships.

⁴⁶⁵ In the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.52]–[28.56]) we explored whether the terms "minor" and "dependent" required definition. Few submissions were received on this issue, although NZLS submitted that the age limit for a minor should be 18 (rather than the current limit of 20), and supported a definition of "dependent". We are, however, satisfied that no reform is required. The low number of submissions on this issue suggests the current law is not creating problems in practice. We also consider the current approach provides the courts with more flexibility than what would be possible with defined terms.

dependency, care arrangements and financial provision (including any child support arrangements); and

- (iii) the court asks each partner whether any of the tools could be used to address any unmet needs the children may have, and, if so, invite them to apply for relevant orders.

- 7.37 Submitters generally supported making children's best interests a primary consideration in the PRA. Barnardos submitted that this strikes the appropriate balance in the context of the PRA to ensure that children's best interests are treated with the level of attention they deserve and require on parental separation. HRC also supported this proposal, on the basis that it would adopt the UNCROC criteria and would elevate the level of consideration given to children's interests in decision-making under the PRA. NZLS, however, submitted strongly in favour of the status quo.
- 7.38 In the Issues Paper we proposed, as an alternative option, elevating children's best interests to the "first and paramount consideration" under the legislation (Issues Paper at [29.8]–[29.9]).⁴⁶⁶ The Children's Commissioner preferred this option on the basis that the division of property directly impacts children's needs and interests. BPWNZ also supported this option. However this would give children's best interests the highest priority in the PRA, which we do not think is an appropriate priority in a statute that is not primarily focused on children.⁴⁶⁷
- 7.39 Our proposal in respect of procedural rules at paragraph 7.36(c) above is designed to address the practical difficulties in equipping a court with the information it needs in order to effectively perform its obligation to have regard to children's best interests. The procedural rules should also promote to parents, practitioners and the court the importance of considering children's best interests and the tools available under the PRA for meeting children's needs.
- 7.40 Atkin proposes a similar, but more "interventionist" approach, under which the Judge would be obliged to "check" the financial arrangements for children, and invite the partners to consider setting relationship property aside to meet the children's needs, such as education, medical, dental or travel costs. If the parties cannot agree, the Judge should, if practicable, order a settlement in the child's interests.⁴⁶⁸ Alternatively, Peart and Henaghan propose imposing a requirement on a court to be satisfied that children's needs are met before making an order for division, similar to the current requirement under section 45 of the Family Proceedings Act.⁴⁶⁹ This option was favoured by HRC. We do not favour either of these options, because they undermine the proper role of the child support regime (see paragraph 7.43(b) below), may increase the risk of parental conflict and delay resolution of PRA disputes. We also note that section 45 of the Family

⁴⁶⁶ The Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017)) also suggested another option at [29.10], to recognise children's best interests as a relevant consideration only in the implementation of relationship property division (Option 3). This option was not preferred by any submitters, and we have not pursued this option as we prefer to preserve the broad application of the duty currently in s 26 of the Property (Relationships) Act 1976.

⁴⁶⁷ Compare Care of Children Act 2004, s 4 and Oranga Tamariki Act 1989, pt 2.

⁴⁶⁸ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 267–268.

⁴⁶⁹ Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 92–93.

Proceedings Act does not appear to have been a particularly effective mechanism in practice.⁴⁷⁰

No new exception to the general rule of equal sharing

7.41 We do not propose a new exception to the general rule of equal sharing of relationship property in order to give children's interests a higher priority under the PRA.⁴⁷¹ Rather, elevating the "best interests" of children to a "primary consideration" is intended to promote a more focused judicial approach when exercising discretion under the PRA, which may well lead in practice to unequal sharing in favour of the primary caregiver, including when considering orders to:

- (a) depart from equal sharing under section 13, where there are extraordinary circumstances that would make equal sharing repugnant to justice; or
- (b) set relationship property aside for the benefit of children under section 26 (see discussion below).⁴⁷²

7.42 Children will also benefit indirectly from our proposals in Chapter 5: Section 15 to provide for the sharing of the partners' future income for a period of time after separation in certain circumstances, including where the partners have children together.

7.43 We have not proposed a new exception to equal sharing, having regard to:

- (a) The primary purpose of the PRA, which is the just division of property between the partners.
- (b) The role of other more child-centred legislation in protecting children's interests, including the Child Support Act and the Care of Children Act. In particular, the PRA should respect and complement the role of the child support regime, which is to ensure that parents take financial responsibility for their children.⁴⁷³ Issues about how parents take financial responsibility for their children ought to be addressed through a review of the child support regime (see paragraph 7.63 below), rather than through reform to the PRA.⁴⁷⁴
- (c) The role of other tools within the PRA to respond to children's needs, such as orders to postpone sharing or setting property aside for the benefit of children, and the improvements we propose to other tools below (at paragraphs 7.52–7.57).
- (d) The risk that giving children's interests greater priority in property division might have negative consequences for some children. This might include increasing

⁴⁷⁰ It is rare for dissolution proceedings to be defended on the grounds that inadequate arrangements have been made for a child's welfare under s 45 of the Family Proceedings Act 1980 (FPA). For example, in *G v M* [2003] NZFLR 97 (FC) the Family Court said at [8] that it is not appropriate to use s 45 of the FPA to require a liable parent to pay more than is required under the Child Support Act 1991.

⁴⁷¹ As indicated in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatohā rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.20]–[28.23].

⁴⁷² As Peart notes, the current restrictive view to s 26 of the Property (Relationships) Act 1976 is not mandated in the legislation and, even under the current wording, "there is scope for a more liberal approach that provides better protection for minor or dependent children of the relationship whilst not losing sight of the parties' rights to a just division": Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 51–52.

⁴⁷³ Child Support Act 1991, s 4.

⁴⁷⁴ We note, however, Atkin's argument that "we should not be embarrassed to make settlements for children [under the Property (Relationships) Act 1976] because of the dubious interests of the child support scheme": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 268.

parental conflict, distorting care arrangements and encouraging strategic behaviour by the partners in order to achieve more favourable outcomes for themselves.

- (e) The practical difficulties with giving children's interests greater priority in property division, including the reality of ongoing changes to care arrangements and parental income,⁴⁷⁵ and the fact that a partner's share of relationship property may need to sustain the partner over a much longer period of time than a partner, as a parent, is financially responsible to maintain their children.
- (f) The advantages for children of a clear and certain rule of equal sharing (minimising parental conflict and promoting speedy resolution consistent with justice),⁴⁷⁶ which in our view outweigh the advantages of discretionary decision-making that would allow a court to treat each child as an individual with their own risk factors and interests.
- (g) The need to balance parental autonomy and State direction.⁴⁷⁷ Parents may highly value their autonomy to make decisions about the care and support of their children. While the State has an important role in protecting children and promoting their welfare and best interests, we do not think it should extend to mandating an unequal division of relationship property when there are children of the relationship.
- (h) Submitters' mixed views on this issue. NZLS did not favour any change to the current law. Barnardos agreed that changing the equal sharing law was not necessary in order to ensure the PRA takes a more child-centred approach. The Children's Commissioner, in contrast, submitted that the presumption of equal sharing should be altered where children are involved, on a case-by-case basis.

Setting property aside for the benefit of children

- 7.44 We propose that the power to settle property for the benefit of any children of the relationship should remain, but that it should require a court to have particular regard to any unmet needs of the children.⁴⁷⁸ This would involve identifying the child's needs (for example, any special needs arising from intellectual or physical disability), assessing what provision has been made to meet those needs and considering whether any unmet needs could be met by setting aside a portion of relationship property for the benefit of that child.
- 7.45 Submissions on this issue were mixed. NZLS submitted that the power to settle property should be retained in its current form, as an amendment to signal that orders can be made to meet children's specific needs would be inconsistent with the PRA's main focus on partners' property entitlements and would undermine parental autonomy. NZLS submitted that it is not the PRA's role to address actual or perceived shortcomings with the child support regime. Barnardos, in contrast, was of the view that the court should be

⁴⁷⁵ See for example Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014).

⁴⁷⁶ While our preferred approach rejects the concept of a "clean break" when children are involved, this does not mean that resolution of property disputes should be delayed unnecessarily. At [27.31] of the Issues Paper we cite research that indicates prolonged exposure to frequent, intense and poorly resolved parental conflict is associated with a range of psychological risks for children: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) citing Ministry of Justice *Reviewing the Family Court: A Summary* (September 2011) at 2.

⁴⁷⁷ See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [27.30].

⁴⁷⁸ See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.35]–[29.37].

putting specific items of property aside for children in more cases than currently happens.

- 7.46 We also propose to clarify in the PRA that the power to settle property for the benefit of children applies only in relation to minor or dependent children, affirming the position taken in case law. While this would exclude independent adult children who may have a need arising from parental conduct (such as criminal offending or severe neglect) which occurred during minority or dependency,⁴⁷⁹ this group is less vulnerable due to age and independence, and may have other avenues of recourse or support, such as State benefits.

New provision for temporary occupation and tenancy orders

- 7.47 We propose a new presumption in favour of a temporary or interim occupation or tenancy order for the benefit of any minor or dependent child of the relationship. This would require a court to grant temporary occupation to the primary caregiver unless the other partner satisfies the court that an order would not be in the best interests of the child, or that making such an order would result in serious injustice. In determining the best interests of a child, the court should be directed to consider:
- (a) the need to provide a home for the child;
 - (b) the disruptive effects on the child of a move to other accommodation; and
 - (c) the child's views and preferences, if they can be reasonably ascertained.⁴⁸⁰
- 7.48 Occupation and tenancy orders can provide children with stability during the upheaval of parental separation by maintaining continuity of housing, schooling, social and sporting activities while children adjust to new care arrangements. They can also ensure that children's needs for adequate housing are met, and provide the primary caregiver with a temporary reprieve in order to plan an orderly transition from one household to two.
- 7.49 This proposal responds to submissions highlighting the significance of the family home to children's wellbeing. Barnardos submitted that the family home may be associated with the formation and preservation of the child's identity, as well as being a physical place of safety and belonging. When children have to move following parental separation, they not only lose that place of safety and sanctuary, they may also lose important connections to their friends, peer and community support networks if they are required to move schools or neighbourhoods. Barnardos submitted in favour of the courts routinely assessing, on a case-by-case basis, whether making specific orders concerning the child's family home is appropriate. However some submitters disagreed that children's interests should be given greater priority in relation to occupation and tenancy orders, including NZLS. One practitioner argued that a clean break is preferable for children, and that, in his experience, partners' motivations for wanting to remain in the family home were seldom child-focused.
- 7.50 For most separating couples, the long-term occupation of the family home by one partner will simply be unachievable, as the income that was previously supporting one household must now support two. But in light of the conservative approach taken to occupation and tenancy orders in recent years (discussed at paragraph 7.23 above), and

⁴⁷⁹ See for example *R v R* [1998] NZFLR 611 (FC).

⁴⁸⁰ This proposal is modelled on provisions in the Canadian provinces of Ontario (Family Law Act RSO 1990 c F-3, s 24) and Prince Edward Island (Family Law Act RSPEI 1988 c F-2.1, s 25(3)).

submissions and evidence on the significance of the family home to children, we consider that children's interests in staying in the family home on a temporary or interim basis should have greater priority under the PRA. While this may disadvantage the partner who is not the primary caregiver following separation, we note that the extent of the disadvantage is limited to an inability to use and enjoy their property for a specified period of time, does not affect underlying property rights, and is rebuttable in situations where it would cause serious injustice. We also note that compensation in the form of occupation rent may also be available.

- 7.51 As noted at paragraph 7.25 above, the risk of a claim for occupation rent can deter primary caregivers from applying for an occupation order, as it can diminish their ultimate share of relationship property. Our proposal, outlined in Chapter 5: Section 15, to require partners with children to share their income for a specified period of time following separation, will go some way to responding to this risk. It will provide primary caregivers who are not the main income earner with an additional source of income, against which a claim of occupation rent could be offset. This will provide couples with more tools to negotiate an arrangement that best meets the children's needs in the period immediately following separation.

Improving other tools under the PRA

- 7.52 We propose a range of improvements to the other tools available under the PRA in order to better respond to children's needs in the period immediately following separation. We consider this is an area where the PRA can perform a role that respects and complements the role of other, more child-centred legislation such as the Child Support Act and the Care of Children Act.

Broadening the scope of furniture orders

- 7.53 We propose extending the scope of furniture orders to include other types of property that come within the definition of family chattels. We also propose clarifying that, when considering any application for a furniture order, a court must have particular regard to children's needs.
- 7.54 Currently, furniture orders are available only in respect of "furniture, household appliances, and household effects". However, Barnardos submitted that there are other types of property that are particularly relevant to children's interests. Barnardos pointed specifically to the need for children to have access to transport property. Children can be disadvantaged if the family vehicle goes to the parent who is not the primary caregiver when the partners separate. Leaving the primary caregiver and children without a vehicle can have a significant impact on children on a day-to-day basis, such as missing out on education and activities, visiting family and friends, or having to walk long distances to access public transport and services. Barnardos said it is currently seeing this as a particular issue impacting separated families and children in South Auckland. Barnardos also pointed to children's interests in respect of family pets. Children are often closely bonded and attached to family pets, and no longer living with or not seeing the family pet can have negative impacts on a child's wellbeing, which can manifest itself as another significant loss for a child.
- 7.55 We see merit in extending the scope of furniture orders to other family chattels, which are already defined in section 2 the PRA. We agree with Barnardos that the use of other types of chattels may benefit children, pending final resolution of property division.

Improving the focus on children's interests in postponement orders

- 7.56 We propose amendment to the provisions relating to postponement orders to require a court to grant an order if the effect of immediate vesting would cause undue hardship for any minor or dependent child of the relationship. This recognises that the effect of immediate vesting on the child may be different to the effect on the primary caregiver. We consider this will make the law more child-centred, while retaining the existing framework which enhances certainty.⁴⁸¹

Clarifying that child support obligations are not affected

- 7.57 We propose amendment to section 32 of the PRA to clarify that an order made pursuant to sections 26, 27 or 28A is not grounds for departure from formula-assessed child support obligations under the Child Support Act. A consequential amendment will also be required to section 105 of the Child Support Act. This proposal would ensure that child support is not affected by the use of one of the tools under the PRA,⁴⁸² although a court will still have an obligation under section 32 to have regard to any child support payable when considering whether to utilise those tools.

Strengthening child participation in PRA proceedings

- 7.58 We propose strengthening child participation in PRA proceedings by lowering the threshold for appointing a lawyer to represent any minor or dependent child of the relationship to the simple "necessary or desirable" threshold used in section 162(2) of the Family Proceedings Act. This proposal recognises the importance of giving children a voice in matters that directly affect them, consistent with the rights affirmed under UNCROC (see paragraph 7.27 above).
- 7.59 Submitters generally agreed that children's views should be heard more often in PRA proceedings, and that section 37A should be amended to lower the threshold for appointment of lawyer for child. The Children's Commissioner submitted that a lawyer for child should always be appointed when children are involved. However NZLS submitted that section 37A should be retained in its current form, as more frequent appointment of lawyer for child could turn proceedings into a three-way contest between partners and children.
- 7.60 Barnardos, HRC and the Children's Commissioner all submitted in favour of giving children greater participation rights. The Children's Commissioner submitted that the PRA should direct that children's views should always be taken into account, whether a claim is heard in court or otherwise. Barnardos and HRC submitted that children should be given the opportunity to express their views in all matters affecting them, either directly or through a representative. Barnardos submitted that:

⁴⁸¹ In the Issues Paper we explored whether the undue hardship test should be replaced with a lower threshold: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.50]–[29.53]. We are satisfied that reform is not required. An order postponing vesting has potentially significant consequences for the partners. It could mean that a partner cannot re-establish themselves in new accommodation that allows the children to visit for overnight stays. We are not convinced that there is a significant need to lower the threshold for postponement orders if accessibility of occupation and tenancy orders is improved as proposed above.

⁴⁸² See discussion in Sanne Berkman "Children in Relationship Property Proceedings: Are they getting a fair share?" (LLB(Hons) Dissertation, University of Otago, 2017) at 35–36.

Unfortunately, when relationships breakdown and proceedings under the PRA occur, parents do not always discharge [their responsibility under UNCROC to treat the best interests of their children as their basic concern] and in some instances children are – whether intentionally or not – treated in ways that amounts to them being treated as property to be divided or retained.

- 7.61 Lowering the threshold for appointing a lawyer for child, along with our proposal at paragraph 7.47(c) above, will strengthen child participation in PRA proceedings. But we do not propose wider rights of participation for children. The PRA, as legislation that is primarily about partners' property entitlements, will not always have a significant impact on children. Providing greater rights of participation also runs the risk that parents may manipulate their children to support their own position, which would not be in the children's best interests. For these reasons we consider it is appropriate that a court have discretion to decide whether, in all the circumstances, it is necessary or desirable for a child to be represented by a lawyer in PRA proceedings, and to manage that process accordingly. Our proposal in respect of procedural rules at paragraph 7.36(c) above should ensure that a court is, in every case, given the basic information that will enable it to identify, and further inquire into, the need to appoint a lawyer for child on a case-by-case basis.
- 7.62 We also note the concerns raised by Peart regarding the decision in 2013 to repeal the court's power to order the lawyer for child's fees be paid out of public money rather than by the partners themselves.⁴⁸³ We will address this issue in our final report.

Review of the child support regime is necessary

- 7.63 The role of the child support regime is to ensure that parents take financial responsibility for their children. However Fletcher's research identifies that child support payments are inadequate for many primary caregivers following separation (see paragraph 7.9 above). During consultation we heard from many submitters who also pointed to the inadequacies of child support payments in meeting children's needs. We propose a review of the Child Support Act to address the issues with the child support regime highlighted by Fletcher's research and our review.

⁴⁸³ Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 54.

CHAPTER 8

Contracting out and settlement agreements

IN THIS CHAPTER, WE CONSIDER:

the ability of partners to make their own agreements under Part 6 of the PRA, and whether reform is required in relation to:

- the general scheme of Part 6 of the PRA;
- whether an agreement can govern trust property;
- the practical requirements for making valid agreements under Part 6; and
- the powers of a court to give effect to non-complying agreements, and to set aside complying agreements.

THE GENERAL SCHEME OF PART 6

Current law

- 8.1 The PRA has always allowed couples to "opt out" of the PRA by making an agreement which will govern the status, ownership and division of their property, instead of the PRA's rules.⁴⁸⁴
- 8.2 The PRA contemplates two types of agreements. Section 21 allows partners in a relationship or contemplating entering a relationship to make an agreement with respect to the status, ownership, and division of their property (a contracting out agreement). Section 21A provides that partners may enter an agreement for the purpose of settling any differences that have arisen between them with respect to the status, ownership and division of their property (a settlement agreement).⁴⁸⁵

⁴⁸⁴ In a White Paper published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice explained it was not the Government's policy to "force married people within the straight-jacket of a fixed and unalterable regime of matrimonial property": AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

⁴⁸⁵ Section 21D of the Property (Relationships) Act 1976 provides with more specificity the matters contracting out and settlement agreements may deal with without limiting the generality of ss 21-21A.

- 8.3 The PRA's provisions regarding contracting out and settlement agreements attempt to strike a balance. They promote partners' autonomy by granting them freedom to choose the property consequences of their separation. The PRA is, however, social legislation aimed at ensuring a just division of property between partners who may be of unequal bargaining positions. The provisions in Part 6 of the PRA therefore prevent a partner from signing away their rights without appreciating the implications of the agreement and their entitlements under the PRA. Part 6 also attempts to prevent a partner from entering an agreement when the partner is under improper pressure (Issues Paper at [30.14]). The provisions of Part 6 were discussed in detail in the Issues Paper, and are summarised below (Issues Paper at [30.15]–[30.45]).
- 8.4 Section 21F is the principal mechanism through which Part 6 of the PRA attempts to safeguard partners from bad or oppressive bargains. It provides that a contracting out or settlement agreement is void unless several requirements are met. They are:
- (a) the agreement must be in writing;
 - (b) each party to the agreement must have independent legal advice before signing the agreement;
 - (c) the signature of each party to the agreement must be witnessed by a lawyer;⁴⁸⁶ and
 - (d) the lawyer who witnesses the signature must certify that, before the party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.
- 8.5 A court can, however, give effect to a void agreement, wholly or in part or for any particular purpose, if it is satisfied that the non-compliance with section 21F has not materially prejudiced the interests of any party to the agreement (section 21H).
- 8.6 Section 21J provides that, even if an agreement satisfies the requirements in section 21F, a court may still set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice. In deciding whether giving effect to the agreement would cause serious injustice, a court must have regard to the following matters (section 21J(4)):
- (a) the provisions of the agreement;
 - (b) the length of time since the agreement was made;
 - (c) whether the agreement was unfair or unreasonable in light of all the circumstances at the time it was made;
 - (d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);
 - (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering the agreement;
 - (f) any other matters that the court considers relevant.
- 8.7 If a contracting out agreement is set aside under section 21J, the PRA has effect as if the agreement had never been made (section 21M).

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In respect of agreements entered into in New Zealand, the lawyer who witnesses the agreement must be the same lawyer that gave the independent legal advice: *Williamson v Williamson* (1980) 3 MPC 200 (HC) at 201.

Issues

- 8.8 In the Issues Paper our preliminary view was that the overall approach to contracting out and settlement agreements appears sound, and that the provisions in Part 6 generally strike the right balance between the interests of autonomy and protection (Issues Paper at [30.51]).
- 8.9 We recognised, however, that some partners may resolve PRA matters informally, without complying with the requirements under section 21F (Issues Paper at [30.43]–[30.44]). This might be because they do not know they have property rights under the PRA, or because they do not know they have to comply with the section 21F requirements when making an agreement. Or the partners might encounter practical challenges which make entering an agreement difficult, such as the need to have the resources to obtain independent legal advice. In relation to contracting out agreements, many partners will find it difficult to have conversations about protecting their financial interests should they separate in future. We noted that there may be a need for more public education about the opportunity to contract out of, or resolve PRA matters, by agreement (Issues Paper at [30.53]).

Results of consultation

- 8.10 We received many submissions that commented on the general ability of partners to make their own agreements, with most submissions focused on contracting out agreements. We received submissions from members of the public, practitioners, law firms and other organisations.
- 8.11 The New Zealand Law Society (NZLS) submitted that the PRA strikes the right balance in respect of offering partners the freedom to arrange their own property affairs and ensuring each partner contracts with informed consent. McWilliam Rennie Lawyers (McWilliam Rennie) also considered that the PRA strikes the right balance. It observed that contracting out agreements have become increasingly common, and increasingly normalised, in that clients generally seem to view them as more of a pragmatic necessity and less of a representation of lack of trust or expectation of failure in the relationship.
- 8.12 Submissions identified that people often consider or enter into contracting out agreements in situations where one or both partners bring property into the relationship. NZLS observed that partners entering contracting out agreements generally fall into three categories:
- (a) partners who want to protect property for their children and do not want the equal sharing regime to apply without some modification;
 - (b) partners entering first relationships where there is a significant difference in the value of property each partner owns; and
 - (c) partners entering into second or subsequent relationships.
- 8.13 Submissions from members of the public suggest that the biggest reason for entering into contracting out agreements is to protect the family home from equal sharing when it was owned by one partner before the relationship began. This was also reflected in submissions from practitioners and law firms. McWilliam Rennie observed that contracting out agreements are also common when the partners are financially assisted into the family home by way of gifts or loans from family members. But a clear theme was that contracting out is not considered an adequate substitute for fair rules relating to

the division of relationship property. We discuss this theme further in Chapter 2: Classification.

- 8.14 Many members of the public told us of their own unsatisfactory experiences with contracting out agreements. Some were unaware of the ability to contract out of the PRA until after separation. Others said that their partner would not agree to a contracting out agreement, or that it created awkwardness and conflict in the early stages of a relationship, in some cases leading to a breakdown in the relationship. For others, the need for legal advice was seen as making contracting agreements too expensive. Some noted that as most people believe their relationship will not break down, the cost of legal advice is difficult to justify. It was also a common source of frustration to submitters that, because a court can set aside an agreement, it does not provide a guarantee that what they perceive as their separate assets are protected if the relationship ends.
- 8.15 Many submitters commented on the need to make contracting out easier and cheaper, including Community Law Wellington and Hutt Valley, Citizens Advice Bureaux New Zealand (CABNZ) and members of the public. CABNZ suggested that agreements should not need independent legal advice and should instead be able to be lodged with the Family Court, with the lack of legal advice being considered only in the event of a dispute. Some members of the public expressed the view that there should be an easier way for partners to enter into an agreement themselves.
- 8.16 Many submitted that there was a need for greater public education and information around contracting out and settlement agreements, including NZLS, McWilliam Rennie, the National Council of Women of New Zealand, the New Zealand Federation of Business and Professional Women, CABNZ, practitioners and members of the public. McWilliam Rennie noted this education needed to cover the complexity of agreements, the best time to make an agreement, why legal agreements are necessary and the time and cost to create agreements.

Results of the Borrin Survey

- 8.17 Results of the Borrin Survey provide, for the first time, a statistically representative picture of contracting out in New Zealand.⁴⁸⁷ The Borrin Survey made several key findings:
 - (a) Seven per cent of all respondents said they made an agreement that was certified by a lawyer, while six per cent of all respondents said they had reached an informal agreement with a partner in the past, but did *not* get that agreement certified by a lawyer.⁴⁸⁸
 - (b) Twenty five of all respondents said they had considered making a contracting out agreement at some point in their life, but only 15 per cent said they had discussed it with a partner.⁴⁸⁹

⁴⁸⁷ The Borrin Survey asked respondents about "making an agreement about how you and your partner would divide your relationship property or debts if you separated", which was then referred to as a "pre-nuptial agreement" that could be made before or during a relationship. See I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [194].

⁴⁸⁸ At [195]–[196]. This was often based on a verbal agreement with the other partner.

⁴⁸⁹ At [195].

- (c) Respondents were more likely to have considered making a contracting out agreement if they were living with a partner they were not married to (45 per cent), had experienced a previous relationship breakup after living with their partner for three years or longer (44 per cent, or 47 per cent of those who said there was relationship property to divide on separation), and those who had a dependent child in their household (31 per cent).⁴⁹⁰
- (d) Respondents were less likely to have considered making a contracting out agreement if they were unaware of the general rule of equal sharing under the PRA (15 per cent), were Asian (17 per cent), were born outside New Zealand (18 per cent), were married (21 per cent), or rented rather than owned their own home (21 per cent).⁴⁹¹
- (e) Of the respondents who discussed making a contracting out agreement with their partner (15 per cent of all respondents), 47 per cent said that they certified the agreement with a lawyer, 30 per cent made a verbal agreement without involving a lawyer, and 12 per cent discussed it without reaching an agreement.⁴⁹²
- (f) Of the respondents who considered, but did not discuss making a contracting out agreement with their partner (10 per cent of all respondents), reasons given for not discussing it included that they felt the relationship was not serious enough (16 per cent), there was no need to contract out (11 per cent), there was not sufficient property to divide (10 per cent), or the opportunity to discuss it never came up (10 per cent).⁴⁹³ Overall, 39 per cent provided an answer suggesting they did not perceive the need for a contracting out agreement, while 30 per cent provided an answer suggesting concern that the discussion could have a negative effect on the quality of their relationship.⁴⁹⁴

Preferred approach

P40

The PRA should continue to enable partners to make their own agreement about how to divide their property during or in anticipation of entering into a relationship, and in order to settle any differences that arise between them. The procedural requirements in section 21F should continue to apply.

- 8.18 We are satisfied that the general scheme of Part 6 of the PRA remains sound. It strikes the right balance between allowing partners the freedom to make their own agreements about how their property should be divided on separation, while protecting vulnerable partners by ensuring that they enter such agreements with informed consent.
- 8.19 There is, however, a need for more public education including about the ability to contract out of or resolve PRA matters by agreement, and the procedural requirements for making those agreements valid and enforceable under the PRA. In Chapter 10: Resolution we recommend the publication of an information guide for separating

⁴⁹⁰ At [197].

⁴⁹¹ At [198].

⁴⁹² At [210].

⁴⁹³ At 47 (Figure Eleven).

⁴⁹⁴ At 47 (Figure Eleven).

partners, and that should also include information about contracting out and settlement agreements under the PRA. We also make recommendations in Chapter 10 that are directed to ensuring appropriate access to affordable legal advice when resolving PRA matters out of court.

- 8.20 The rest of this chapter considers specific issues with the provisions relating to contracting out and settlement agreements in Part 6 of the PRA.

AGREEMENTS AND TRUST PROPERTY

Current Law

- 8.21 Partners can only make contracting out or settlement agreements with respect to property they own.⁴⁹⁵ As a general rule, trust property is not "owned" by the partners for the purposes of the PRA.⁴⁹⁶ Even if a partner is a trustee of the trust property themselves, they legally own that property in their capacity as trustee, rather than in their personal capacity.⁴⁹⁷ As a result, partners cannot agree in a contracting out agreement what will happen to trust property in the event they separate. Nor can they agree, in a settlement agreement, how trust property is to be divided.⁴⁹⁸
- 8.22 When a relationship ends, a partner may have a claim against a trust, under section 44 or 44C of the PRA, section 182 of the Family Proceedings Act 1980, or under the law of constructive trusts. Under the current law, trustees cannot be bound, through a settlement agreement, to use trust property to settle a partner's claim.

Issues

- 8.23 The widespread use of trusts in New Zealand means it is common for trust property to be bound up with PRA matters (Issues Paper at [30.58]). The inability to deal with trust property through a contracting out or settlement agreement raises several issues.

Agreements purporting to deal with trust property

- 8.24 In the Issues Paper we observed that, regardless of the strict legal position, in practice partners may agree to a division of trust property between themselves as if the property was their own and the trust did not exist (Issues Paper at [30.65]). The partners often record their agreement in a contracting out or settlement agreement, and the trustees will simply accept and apply the agreement.

⁴⁹⁵ Section 21 of the Property (Relationships) Act 1976 (PRA) provides that partners can, for the purposes of contracting out of the PRA, make any agreement they think fit "with respect to the status, ownership, and division of *their* property". Similarly, s 21A provides that partners can, for the purpose of settling any differences that have arisen between them "concerning property *owned* by either or both of them, make any agreement they think fit with respect to the status, ownership and division of *that* property".

⁴⁹⁶ However some beneficial interests under a trust may constitute "property" within the meaning of the Property (Relationships) Act 1976, as may some powers to control a trust: see Chapter 6: Trusts for further discussion.

⁴⁹⁷ The law in relation to trustees is preserved where either partner is acting as trustee by s 4B of the Property (Relationships) Act 1976.

⁴⁹⁸ *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554. However we note that in some cases the courts have been prepared to take a more flexible approach: *M v S* [2012] NZFLR 594 (HC). See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.62]–[30.64].

- 8.25 This practice is undesirable for several reasons. First, purporting to deal with trust property in a contracting out or settlement agreement may invalidate the agreement if it is challenged in future. Second, trustees have a duty to deal with the property in accordance with the terms of the trust. If they simply accept and apply the terms of the agreement, they may risk breaching their duties as trustees. Third, if the trustees are third parties, the partners cannot purport to bind them through their own contracting out or settlement agreement.⁴⁹⁹
- 8.26 In the Issues Paper we noted that there are ways to resolve questions about trust property in a contracting out or settlement agreement, without invalidating the agreement (Issues Paper at [30.66]).⁵⁰⁰ A contracting out or settlement agreement can record the details of the trust and the arrangements in respect of the trust property. The agreement may then be made conditional upon the trust arrangements being completed. The trustees are then recommended to execute separate documents, such as a deed of ratification, linking the arrangements set out in the agreement to the trustees.

Settlement agreements resolving claims against a trust

- 8.27 Because trustees cannot be bound through a settlement agreement to use trust property to settle a partner's claim against a trust, sometimes the trustees may enter an agreement directly with the partners to settle the claim. Such an agreement would not be a settlement agreement under section 21A of the PRA. Rather, it would be a separate agreement exercised pursuant to the trustees' power under section 20(g) of the Trustee Act 1956 or under the trust instrument to settle claims relating to the trust.⁵⁰¹
- 8.28 The need for a separate agreement settling claims against a trust is likely to become increasingly common, given our proposal in Chapter 6: Trusts to amend section 44C of the PRA to provide a comprehensive remedy to respond to the various ways in which a trust might hold property that is produced, preserved or enhanced by the relationship. We anticipate that amended section 44C will become the primary mechanism through which partners seek relief in respect of trust property at the end of a relationship. This may increase the number of potential claims under the PRA in relation to trust property.

Is reform required?

- 8.29 The limitations on dealing with trust property in contracting out and settlement agreements means that partners often have to contract with trustees outside the PRA framework. This might create additional and unnecessary costs and complexity, especially where the trust is a simple one, and the partners are the trustees and beneficiaries themselves. It may also be undesirable if the contracting out or settlement agreement is incomplete (in the sense that it depends on a separate ratification by the trustees, or the trustees to enter a separate settlement agreement with the partners), or

⁴⁹⁹ Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21A.11]; and Vanessa Bruton and Isaac Hikaka "Trusts and Relationship Property for Family Lawyers" (paper presented to the New Zealand Law Society Trusts and Relationship Property for Family Lawyers Conference, 2013) at 70.

⁵⁰⁰ See discussion in Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21A.11]; and Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 19.

⁵⁰¹ For trustees' powers to engage in dispute resolution, see Robert Fisher "Including Trusts in Relationship Property Arbitrations" (2014) 8 NZFLJ 76; and Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at ch 5.

does not record the partners' overall bargain, especially if key assets, such as the family home, are trust property (Issues Paper at [30.70]).

- 8.30 In light of these issues, in the Issues Paper we asked whether Part 6 of the PRA should be expanded to enable partners and trustees to resolve matters regarding trusts, and if so, what the appropriate amendments would be (Issues Paper at [30.72]).

Results of consultation

- 8.31 NZLS recognised that the proposal to enable partners to contract out and settle the division of trust assets under Part 6 of the PRA has merit, given the widespread use of trusts to hold family assets and the frequent disregard by partners of the legal requirements of trust law. It did not, however, support such a proposal. It submitted that the distinction between trust property and property owned by the partners should be emphasised, not blurred. It pointed to the risk of litigation by disaffected beneficiaries against trustees who implement settlements without reference to the beneficiaries of the trust. NZLS preferred continuing the developing practice of having two separate agreements, one to deal with the partners' property under the PRA and another property sharing agreement to deal with trust property.
- 8.32 McWilliam Rennie made a similar submission. It said that enabling partners and trustees to resolve matters regarding trust property under Part 6 of the PRA may appear attractive at first blush, particularly in simple cases where both partners are the only trustees and beneficiaries. However, it noted a number of issues arise where more complex trusts are involved, with numerous trustees and beneficiaries. For example, every trustee would have the right to peruse the agreement, raising privacy issues, and would be required to sign the agreement, raising cost issues. The trust, and perhaps individual trustees, would be required to obtain independent legal advice. McWilliam Rennie also raised an issue as to what extent the partners' respective lawyers would be required to provide advice about the trust to the partners. It considered that the current system seems to work well, with partners recording information in respect of the distribution of trust assets in their agreement as 'background', and recording that the division as set out in the agreement is conditional upon the trustees' consent and signature of the necessary trust resolutions. In tandem with the agreement, the trust lawyer prepares appropriate documentation to ensure the proper management of the trusts. This, McWilliam Rennie said, maintains the integrity of the trust and does not run the risk of privacy issues and of multiple lawyers having to advise trustees.
- 8.33 Few members of the public commented on this issue, and their views were mixed. Professor Nicola Peart shared anecdotal evidence that trusts settled by the partners during the relationship tend to be ignored for the purposes of settlement agreements, and the assets are treated as if they were relationship property owned by the partners. She questioned whether lawyers advising the partners check the trust deed to ensure it permits the property to be dealt with as envisaged in the settlement agreement.

Preferred approach

- 8.34 Our preferred approach is that the law governing contracting out and settlement agreements should retain the current distinction between trust property and the partners' personal property. While we recognise there would be advantages in enabling partners to make arrangements regarding trust property through contracting out and settlement agreements, we also recognise the disadvantages identified by submitters in

consultation. On balance, we are satisfied that the current approach, whereby arrangements in relation to trust property can be recorded in an agreement, and be given effect through separate documentation, achieves an appropriate balance between protecting partners' entitlements under the PRA and the preservation of trusts.

- 8.35 We are giving further consideration to whether trustees should be able to be a party to a settlement agreement, for the purposes of settling any claim against the trust. Our proposal in Chapter 6: Trusts to amend section 44C will, we anticipate, increase the number of potential claims against a trust arising in the context of PRA matters. There may, therefore, be a stronger case for enabling trustees to enter a settlement agreement for the purposes of settling any claims against a trust. This matter will be addressed in our final report.

WITNESSING CONTRACTING OUT AGREEMENTS THROUGH AUDIO-VISUAL COMMUNICATIONS

Current law

- 8.36 Section 21F sets out the procedural requirements for making valid agreements (see paragraph 8.4 above). One of these requirements is that the signature of each partner to a contracting out or settlement agreement must be witnessed by a lawyer (section 21F(4)). That lawyer must also certify that he or she has explained to the partner the effect and implications of the agreement (section 21F(5)).
- 8.37 It is unclear from section 21F whether a lawyer can witness the signature of a partner to the agreement via an audio-visual communication, like Skype or similar programmes.⁵⁰² To date there has been no case law on this issue. The Relationship Property Standing Committee of the NZLS Family Law Section has said that section 21F(4) implies that the witnessing and certifying lawyer is to be in the physical presence of the party signing the agreement.⁵⁰³

Issues

- 8.38 We understand that a question often arises as to whether a lawyer can witness a partner signing a contracting out or settlement agreement via an audio-visual communication (Issues Paper at [30.83]). The current uncertainty in the law is undesirable. If an agreement is witnessed via an audio-visual communication, there is a risk that the agreement could be set aside and the lawyer sued for negligence if the agreement was voided for lack of compliance with section 21F.

⁵⁰² The Contract and Commercial Law Act 2017 sets out some default rules regarding the use of electronic communication, for the purpose of clarifying that certain paper-based legal requirements may be met by using electronic technology that is functionally equivalent to those legal requirements (s 207). However while that Act addresses the use of electronic signatures, including electronic signatures of witnesses (ss 226–227), it does not address whether a signature, electronic or otherwise, can be witnessed via audio-visual communication.

⁵⁰³ Relationship Property Standing Committee of the New Zealand Law Society Family Law Section cited in Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21F.07].

- 8.39 There are clear advantages to allowing an agreement to be witnessed via audio-visual communication. For example, if a client and lawyer are in distant locations, there are obvious savings in travel time and costs.⁵⁰⁴ But there are also risks. In particular:⁵⁰⁵
- (a) the lawyer cannot be certain the document the partner signs and the document the lawyer is to sign are the same agreement;
 - (b) the lawyer cannot know whether the partner is affected by off-screen influences;⁵⁰⁶
 - (c) the lawyer may have difficulties verifying the identity of the person who signs the document; and
 - (d) there may be issues with the quality of the communication which may compromise the quality of the advice required by the PRA.
- 8.40 In the Issues Paper we asked whether the PRA should allow the signature of a partner to an agreement to be witnessed by a lawyer through audio-visual communication, and if so, what safeguards should be put in place to ensure the reliability of the witnessing process.

Results of Consultation

- 8.41 NZLS supported amending the PRA to allow for the signature of a party to a contracting out or settlement agreement to be witnessed using audio-visual technology. In its view, the issue was not so much about the reliability of the witnessing process but more about the reliability of the lawyer's certification that they have explained the effect and implications of the agreement. It also noted that it would be rare for a lawyer to witness an agreement without having first established a relationship with a client and being confident that when the client executes the agreement, they do so of their own free will. NZLS submitted that any safeguards should address issues identified at 8.39(a) and 8.39(b) above as well as any language issues, and ensure the process for witnessing the advice has been agreed to.
- 8.42 McWilliam Rennie agreed that witnessing via audio-visual communication should be permitted under the PRA, although they anticipated it being used as the exception rather than the rule. They noted that whether this is an appropriate means of certification would be part of the judgement call made by the lawyer when considering whether their client understands the agreement. It submitted that the agreement should be required to note that it was signed via audio-visual communication.

⁵⁰⁴ In one of our consultation meetings with a practitioner, she said she had a client in London who wished to execute a contracting out agreement. The practitioner was therefore obliged to travel to London in order to witness and certify the agreement.

⁵⁰⁵ Ingrid Squire "To skype or not to skype: that is the question" *The Family Advocate* (Wellington, Autumn 2014) at 17.

⁵⁰⁶ See also Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [R21F.07] which observes that it would not be desirable for agreements to be certified by video link or Skype in the absence of an overseas lawyer sitting with the overseas person, given there is no way of knowing who else might be present and what pressures may be brought to bear on the person signing the agreement.

Preferred approach

P41

A new provision should be included in Part 6 of the PRA to the effect that a lawyer may use audio-visual technology to witness a partner signing a contracting out or settlement agreement under section 21F(4).

- 8.43 We propose clarifying in the PRA the ability of a lawyer to witness a partner signing a contracting out or settlement agreement under section 21 or 21A using audio-visual technology.⁵⁰⁷
- 8.44 We do not propose prescribing a process that lawyers must follow in every case when using audio-visual technology. We consider this would be too burdensome and inflexible, given the wide variety of different situations in which lawyers may wish to use audio-visual technology to witness an agreement, and the risk that a prescribed process may be rendered unsuitable in light of future advances in technology. Ultimately, it will be up to the lawyer in question to decide how they will ensure the agreement is correctly witnessed.
- 8.45 Consistent with a lawyer's broader duties under section 21F (to provide independent legal advice and to certify that they have explained the effect and implications of the agreement), a lawyer should consider whether the use of audio-visual technology is appropriate in all the circumstances to witness a signature under section 21F(4). This should include consideration of:
- (a) whether the partners agree to the use of audio-visual technology to witness the agreement;⁵⁰⁸
 - (b) the availability and quality of the technology that is to be used;
 - (c) the arrangements for confirming the identity of the partner who is signing the agreement;⁵⁰⁹
 - (d) the need for any safeguards to ensure that the partner signing the agreement is free from off-screen influences; and
 - (e) the arrangements for ensuring the agreement being signed is the same agreement the lawyer has explained the effect and implications of, under section 21F(5).

MODEL AGREEMENTS

Current law

- 8.46 Section 21E provides for model contracting out and settlement agreements to be made by regulation, in order to "minimise the legal expense of people who wish to enter into"

⁵⁰⁷ We note similar provisions exist in the Courts (Remote Participation) Act 2010 in relation to audio-visual link, or AVL, which is defined in s 3 as:

... facilities that enable both audio and visual communication between participants, when some or all of them are not physically present at the place of hearing for all or part of the proceeding.

⁵⁰⁸ In some cases a lawyer witnessing and certifying an agreement will also have a duty of care to the other partner (that is, the other party to the agreement): see for example *Odlum v Odlum* (1989) 5 FRNZ 41 (HC). It may be prudent, therefore, to ensure that both parties agree to the use of audio-visual technology.

⁵⁰⁹ This may be unnecessary if the lawyer already has an established relationship with the partner signing the agreement.

such an agreement (section 21E(1)). Only one model agreement has been provided, for contracting out agreements under section 21 of the PRA. It was made under the Property (Relationships) Model Form of Agreement Regulations 2001 (2001 Regulations).

Issues

- 8.47 In the Issues Paper we observed that the general view is that the model contracting out agreement prescribed by the 2001 Regulations is inadequate (Issues Paper at [30.91]–[30.94]).⁵¹⁰ As a result, it is unlikely that any lawyer would draft or certify a contracting out agreement based on the model agreement. The 2001 Regulations are therefore failing to meet the objective of minimising legal costs.⁵¹¹
- 8.48 The criticisms of the model contracting out agreement raise the broader question of whether any model agreement prescribed by regulations under the PRA could save on legal costs. Any model agreement would need to be adapted to the particular circumstances of each relationship and the agreement the partners have reached. The actual drafting of an agreement is only a portion of the work the lawyer must undertake, and usually lawyers will have their own precedent documents that will also save on time and cost.

Results of consultation

- 8.49 NZLS, McWilliam Rennie and Nicola Peart all submitted that the model contracting out agreement prescribed by the 2001 Regulations is an inadequate precedent. Nor did they consider that, if the deficiencies in the existing model contracting out agreement were remedied, it would save on legal costs. McWilliam Rennie noted that lawyers must always ensure that an agreement, whether based on a model or otherwise, meets their clients' needs and that they have provided adequate advice. They submitted that a model agreement may make contracting out more difficult, as it may be seen as the "norm" for the public, and may create an expectation for the client that the matter can be straightforward. This may also make it harder for lawyers to explain why their client's situation means the model is not appropriate. McWilliam Rennie submitted that a better way of saving costs for partners wishing to contract out would be the provision of better information about the documents they are likely to need to provide to their lawyer in order to complete such an agreement.

Preferred approach

P42

Section 21E of the PRA and the Property (Relationships) Model Form of Agreement Regulations 2001 should be repealed.

- 8.50 For the reasons given above, it is very unlikely that a model agreement could ever have the effect of minimising the partners' legal costs. We therefore recommend the repeal of

⁵¹⁰ Stephen Franks "Yes Member: or why the model contracting out agreement is useless" (2001) 3 BFLJ 281; Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.02]; and Karen Harvey-Vallee (ed) *New Zealand Forms and Precedents* (online ed, LexisNexis) at [3010].

⁵¹¹ Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.03].

section 21E to remove the potential risk that partners think reliance on a model form agreement is an effective means of minimising cost.

GIVING EFFECT TO NON-COMPLYING AGREEMENTS

Current law

- 8.51 Section 21H allows a court to give effect, either wholly or in part, to a contracting out or settlement agreement that fails to comply with the requirements in section 21F. Section 21H is aimed at capturing circumstances where the partners intended to create a legally binding arrangement but failed to do so under the requirements of section 21F.⁵¹²
- 8.52 In order to give effect to a non-complying agreement, a court must be satisfied that:⁵¹³
- (a) there is a contracting out or settlement agreement, in terms of section 21 or 21A of the PRA;⁵¹⁴ and
 - (b) the non-compliance has not materially prejudiced the interests of either partner to the agreement.⁵¹⁵
- 8.53 Even if satisfied of the above matters, a court retains a residual discretion as to whether to give effect to a non-complying agreement, either wholly or in part.⁵¹⁶

Issues

- 8.54 In the Issues Paper we observed that some separating partners will make informal agreements to divide their property without observing the formalities under the PRA (Issues Paper at [30.96]). Results of the Borrin Survey (summarised at paragraph 8.17 above) also identified that almost as many people make informal contracting out agreements (six per cent of all respondents), as make formal contracting out agreements (seven per cent of respondents).
- 8.55 The question is therefore when a court should give effect to an agreement that fails to comply with section 21F. In the Issues Paper we also asked whether section 21H could be improved by providing more guidance on when a court should give effect to a non-complying agreement (Issues Paper at [30.97]).

Results of consultation

- 8.56 NZLS submitted that the test in section 21H is set at the proper threshold. It considered however that section 21H would benefit from additional criteria to guide a court on when a non-complying agreement should be given effect. It submitted that section 21H should

⁵¹² RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [5.73].

⁵¹³ *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [21].

⁵¹⁴ In *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 the Court held that the partners' agreement, reached at a Family Court settlement conference, was not an agreement under s 21A of the Property (Relationships) Act 1976 as it purported to deal with the distribution of trust property, which was not property "owned by the parties" in terms of s 21A.

⁵¹⁵ In some cases the courts have found that, even if the agreement had complied with s 21F, the partner challenging the validity of the agreement would have entered it anyway. In those cases, the courts have said that the non-compliance has not materially prejudiced the interests of that partner. See for example *McGill v Crozier* (2001) 21 FRNZ 157 (HC); and *West v West* (2001) 21 FRNZ 157 (HC).

⁵¹⁶ *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [21]; and *Radisich v Taylor* HC Auckland CIV-2007-404-3276, 10 March 2008 at [13].

be amended to incorporate provisions similar to those in section 21J(4) (set out at paragraph 8.6 above). NZLS also noted that an extra consideration could be whether the parties had complied with the terms of any informal agreement throughout the relationship.

- 8.57 McWilliam Rennie also considered that the test in section 21H is, broadly speaking, set at the proper threshold. It considered that if there was a clear and provable agreement that nevertheless failed to comply with section 21F, it should be given effect, either when neither party is materially prejudiced by the agreement or in circumstances when one partner has subsequently changed their own position in reliance on that agreement. It considered that these criteria should be set out in the legislation.
- 8.58 Some members of the public thought that non-complying agreements should be upheld if the agreement was in writing and signed, was not entered into under duress, and neither partner was concealing relevant information.

Preferred approach

- 8.59 We are satisfied that the test for giving effect to a non-complying agreement in section 21H is appropriate. While section 21H preserves a residual discretion to a court, we are satisfied that this strikes an appropriate balance between flexibility and certainty. Further, our review of the cases does not identify any cause for concern that this discretion is being exercised inappropriately.
- 8.60 We have given particular consideration to including in section 21H a list of matters for a court to consider, similar to those in section 21J(4). However we are not convinced that this is necessary, given the High Court has confirmed on several occasions that, when exercising residual discretion under section 21H, it is appropriate that a court have regard to the criteria in section 21J(4).⁵¹⁷ This is because it would be "illogical" to give effect to a non-complying agreement under section 21H, only to set that agreement aside under section 21J.⁵¹⁸ Matters, therefore, that are relevant to section 21J, such as the extent to which each partner has relied on the agreement, are also relevant to the exercise of residual discretion under section 21H.⁵¹⁹

⁵¹⁷ *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [26]; *West v West (No 2)* [2004] NZFLR 164 (HC) at [53]; *Radisich v Taylor* HC Auckland CIV-2007-404-3276, 10 March 2008 at [14]–[16]; and *C v W* HC New Plymouth CIV-2010-443-192, 28 July 2010 at [59].

⁵¹⁸ *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [26]. See also *Radisich v Taylor* HC Auckland CIV-2007-404-3276, 10 March 2008 at [11].

⁵¹⁹ See for example *Yates v Yates* [2015] NZFC 1141, where Mrs Yates had acted upon a non-complying agreement, and the Court held at [82] that failure to give effect to the agreement under s 21H of the Property (Relationships) Act 1976 would cause considerable prejudice to Mrs Yates, who had implemented her side of the agreement without receiving the benefits promised to her.

VARYING OR UPHOLDING AN AGREEMENT IN PART

Current law

- 8.61 Section 21J provides that, even if an agreement satisfies the requirements in section 21F, a court may set the agreement aside if giving effect to the agreement would cause serious injustice. If an agreement is set aside, the provisions of the PRA apply as if the agreement had never been made (section 21M).

Issues

- 8.62 The effect of sections 21J and 21M is that a court is unable to salvage any part of an agreement that is set aside for serious injustice. This is in contrast to section 21H, which allows a court to give effect to a non-complying agreement "wholly or in part".
- 8.63 In the Issues Paper we observed that, even if some parts of an agreement would cause serious injustice, there may be elements of the bargain that the partners wish to retain (Issues Paper at [30.99]). It may therefore better serve the partners' intentions if a court could preserve some aspects of the partners' agreement, or vary the agreement rather than set the whole agreement aside.
- 8.64 We are mindful that the 2001 amendment to section 21J, raising the threshold for setting aside an agreement from "unjust" to "serious injustice", was based on a concern that the courts were setting aside agreements too readily.⁵²⁰ In the Issues Paper we observed that partners and their advisers would need certainty on when an agreement would be varied or set aside completely (Issues Paper at [30.100]).

Results of consultation

- 8.65 NZLS submitted that a court should have the power under section 21J to set aside an agreement wholly or in part, or to vary an agreement. However a high threshold should be required before a court is able to do so. It also noted that if a court is to have this power under section 21J, there should be a similar provision for agreements that would be void for non-compliance under section 21F, but only if enforcement of the agreement would not cause serious injustice.⁵²¹
- 8.66 McWilliam Rennie submitted that a court should have the power to set an agreement aside wholly or in part, but that this should be done only in circumstances where the parties consent to this occurring, and/or when a court is satisfied on the evidence that doing so does not render the entire agreement materially prejudicial to one party, or contrary to the intentions of the partners with respect to the overall distribution of property.
- 8.67 Jan McCartney QC also submitted that the courts need wider powers and discretions to give relief when contracting out agreements are, or have become, seriously unjust, including the power to vary or partially set aside an agreement, or to provide compensation in respect of an agreement.

⁵²⁰ See *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235; and *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [82].

⁵²¹ NZLS submitted that if a court had a power to vary any agreement, s 25(1)(a) of the Property (Relationships) Act 1976 would need to be amended by adding a new paragraph (ii), "implementing in whole or in part an agreement made by the parties pursuant to section 21, but which has been declared void, wholly or in part, pursuant to section 21J or section 21F".

Preferred approach

P43

A court should have the additional powers under section 21J to set aside an agreement in part, or to vary an agreement if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.

- 8.68 We propose that a court should have the additional powers to partially uphold or vary an agreement under section 21J, if giving effect to that original agreement would cause serious injustice. We consider that granting a court these additional powers best promotes partners' autonomy to choose the property consequences of their separation, while still protecting a partner from serious injustice.
- 8.69 We note the risk of imposing an unintended bargain on the partners when a court varies or only partially upholds an agreement. Often agreements will include trade-offs and compromises. A partner may agree to accept less than an equal share of relationship property under a settlement agreement, for example, in return for the payment of an agreed amount of maintenance. A court should therefore only exercise the additional powers to partially uphold or vary an agreement if it is satisfied that the partners would have entered into the partially upheld or varied agreement in the first place. This will ensure that the partially upheld or varied agreement does not upset the partners' original bargain. We are also giving further consideration to the need for additional safeguards, and will address this in our final report.

CONTRACTING OUT AND CHILDREN'S INTERESTS

Current Law

- 8.70 The contracting out provisions in Part 6 of the PRA do not expressly refer to the interests of children.
- 8.71 Section 26 does, however, direct a court to have regard to the interests of any minor or dependent children of the relationship in PRA proceedings.⁵²² Children's interests may therefore be considered by a court when deciding whether to give effect to a non-complying agreement under section 21H, or whether to set aside an agreement if it would cause serious injustice under section 21J.⁵²³
- 8.72 The presence of children may also be relevant in determining whether an agreement gives rise to serious injustice. For example, the birth of a child following the execution of a contracting out agreement has been recognised as a significant matter relevant to the application of section 21J(4)(d).⁵²⁴

⁵²² Section 26 of the Property (Relationships) Act 1976 (PRA) also includes a power to settle property for the benefit of children of the relationship, and s 26(3) expressly notes that an order will have effect regardless of any agreement under pt 6 of the PRA.

⁵²³ *McMahon v McMahon* [1990] NZFLR 37 (HC) at 42–43; and *M-LA v AVW* [2012] NZFC 8640 at [38].

⁵²⁴ *M-LA v AVW* [2012] NZFC 8640 at [26]–[27].

Issues

- 8.73 The lack of reference to children's interests in Part 6 means that partners may be entering into contracting out or settlement agreements without having regard to how an agreement affects any children of the relationship. This may be a particular issue where partners enter into a contracting out agreement before the partners contemplate having, or have, children together.
- 8.74 An agreement that fails to recognise or provide for children's interests may disadvantage children. For example, the primary caregiver may have no rights of occupation or ownership in relation to the family home under the agreement. An agreement that fails to recognise or provide for children's interests also risks being set aside in future, on the grounds that it may cause serious injustice, under section 21J.
- 8.75 In the Issues Paper we asked whether the interests of children should be a consideration when partners enter into contracting out or settlement agreements, and identified two possible options for reform (Issues Paper at [30.105]–[30.110]):
- (a) **Option 1:** Amend section 21D to require partners to have regard to the interests of their children, or to ensure they have made adequate provision for the needs of their children, when entering into a contracting out or settlement agreement.
 - (b) **Option 2:** Amend section 21J(4) to expressly require a court to consider the interests of children when considering whether giving effect to a contracting out or settlement agreement would cause serious injustice.

Results of Consultation

- 8.76 The Office of the Children's Commissioner submitted that, where there are children of the relationship, there should be no ability to contract out of the PRA. It considered that the interests and rights of children, as protected in the PRA, should always apply.
- 8.77 NZLS did not consider that children's interests should be a consideration when partners contract out of the PRA, as a contracting out agreement is about adult property rights, not children's rights. It submitted that incorporating children's interests as a consideration when reviewing a contracting out agreement is likely to add more complexity, uncertainty and expense, which is likely to outweigh any benefit. It also observed that it would be difficult for a lawyer to properly advise a client at the start of a relationship how the interests of children might be affected by a contracting out agreement if the relationship ends. If the interests of children are to be a consideration when entering into a contracting out or settlement agreement, NZLS preferred Option 2 (amending section 21J(4)) over Option 1 (amending section 21D). This was because the court's consideration of the interests of children will be at the time the parties are seeking to rely on their agreement, and the many different ways in which the end of a relationship could affect the children will have resolved into more concrete realities.
- 8.78 McWilliam Rennie submitted that a requirement to have regard to children's interests, or make provision for the needs of children, is potentially problematic in relation to contracting out agreements, as the parties may not know at the time the agreement is made whether they will have children and what those children's needs might be. In addition, if one partner has children from a previous relationship, it may not be reasonable for a new partner to be expected to consider their needs when making a contracting out agreement. McWilliam Rennie submitted that such a requirement would be less problematic when partners are entering into a settlement agreement, as at

separation the partners know how many children they have, and can make a better judgement call about their needs. McWilliam Rennie also supported an amendment to section 21J(4).

Preferred approach

P44

Section 21J(4) should be amended to require a court to have regard to the best interests of any minor or dependent children of the relationship in deciding whether giving effect to a contracting out or settlement agreement would cause serious injustice.

- 8.79 Our preferred approach is to clarify in the PRA that the best interests of any minor or dependent children of the relationship is relevant to a court's consideration of whether an agreement would cause serious injustice under section 21J.
- 8.80 This is consistent with the courts' current approach under section 21J, although we propose referring to children's "best" interests, in accordance with the proposals made in Chapter 7: Children's interests. Amending section 21J to reflect the courts' current approach has the advantage of providing clear direction to partners and their advisers, when drafting contracting out and settlement agreements, to consider their children's best interests (or otherwise risk the agreement being set aside in future). We prefer an amendment to section 21J over amending section 21D, as section 21D is focused on the subject matter of agreements, and it may be difficult to give proper effect to a duty to have regard to children's best interests at the time the agreement is entered into, which may be before any children are born.

CHAPTER 9

Tikanga Māori

IN THIS CHAPTER, WE CONSIDER:

- whether there is a need for a separate regime in accordance with tikanga Māori;
- the treatment of family homes on Māori land;
- the definition and classification of taonga; and
- resolution of PRA matters that involve questions of tikanga Māori.

INTRODUCTION

9.1 In the Issues Paper we identified the importance of recognising te ao Māori and of addressing how tikanga Māori might operate within or alongside New Zealand law (Issues Paper at [2.53]–[2.64]). We stated that there is an implicit principle underpinning the PRA that a just division of property should recognise tikanga Māori and in particular whanaungatanga (Issues Paper at [3.11(g)]).⁵²⁵ It is important that the substantive provisions of the PRA should reflect this principle.

Response to consultation

- 9.2 The response to consultation on matters where tikanga Māori is especially relevant has been limited. We received 20 submissions from members of the public, three submissions from individual practitioner and academic experts, and nine submissions from organisations. Tikanga Māori was discussed at one public meeting, nine meetings with practitioners and academics, one meeting with members of the judiciary from the Māori Land Court and one meeting with members of the judiciary from the Family Court.
- 9.3 This does not mean that Māori do not have anything to say about the PRA, nor does it indicate that the current rules work satisfactorily for Māori. But limited feedback does mean it is difficult to assess the extent of PRA issues that affect Māori and the support for, and nature of, any desirable reform. We have focused therefore on identifying areas

⁵²⁵ Tikanga Māori may be understood as Māori law, custom, traditional behaviour, philosophy. It has also been described as "doing things right, doing things the right way, and doing things for the right reasons" in Māori culture: Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: a compendium of references to the concepts and institutions of Māori customary law* (Victoria University Press, Wellington, 2013) at 431. Whanaungatanga may be described as kinship, a web of relationships of descent and marriage, a sense of connection or belonging through shared experience.

where we consider incremental change to the PRA may give better effect to tikanga Māori, without pre-empting the possibility of further change in the future.

- 9.4 In developing our preferred approach to these incremental changes we have taken into account the submissions we received from both Māori and non-Māori. If legislative changes are to proceed, further consultation with Māori should occur.

NO SEPARATE REGIME ACCORDING TO TIKANGA MĀORI

- 9.5 In the Issues Paper we asked whether there should be a separate regime for property division according to tikanga Māori (Issues Paper at [4.17]).⁵²⁶ Our preliminary view was that the PRA framework can respond to matters of tikanga Māori and so a separate regime is unnecessary.

Preferred approach

P45

The PRA framework should continue to accommodate and respond to matters of tikanga Māori.

- 9.6 Academics, the judiciary, practitioners and members of the public with whom we met, together with submissions received, did not call for fundamental reform at this time. We consider that a change of such significance would need to be part of a much broader conversation about the relationship between Māori and the Crown. Our preferred approach is therefore to provide for tikanga Māori through the PRA framework, its principles and those operative provisions where tikanga Māori is especially relevant.
- 9.7 The Human Rights Commission (HRC) recommended in its submission that consideration be given to dealing with tikanga Māori issues in a separate part of the PRA. The Human Rights Commission considered this approach would enable the PRA regime to achieve greater consistency with the self-determination principles set out under the International Covenant on Economic, Social and Cultural Rights and the United Nations Declaration on the Rights of Indigenous People. The purpose of the new Part would be to provide a framework under which relationship property disputes concerning Māori land (and related entities), taonga and tikanga Māori can be specifically addressed. HRC recommended that relevant Māori cultural concepts such as manaakitanga and whanaungatanga should be incorporated into the framework to guide decision-making.⁵²⁷ HRC also suggested that provision should be made in the Part for resolution of these disputes, with a Māori Land Court judge presiding over the hearing (see paragraph 9.43).
- 9.8 We have considered but do not prefer this approach because we did not receive submissions expressing support for fundamental change. In our view, keeping the PRA's principles and those operative provisions where tikanga Māori is especially relevant

⁵²⁶ In Canada, for example, federal legislation provides for First Nations to adopt their own rules relating to interests or rights in the family home on reserves where a relationship breaks down or on the death of a partner: Family Homes on Reserves and Matrimonial Interests or Rights Act SC 2013 c 20, ss 7 and 12. The Act's provisional rules apply until First Nations rules are adopted and these rules include an entitlement on relationship breakdown to an equal division of the value of the family home and other matrimonial interests and rights (s 28) and provision for exclusive occupation orders (s 20).

⁵²⁷ Manaakitanga may be understood as to look after, to care for another, to protect.

where they occur in the PRA framework is likely to make the law more accessible to Māori.

FAMILY HOMES ON MĀORI LAND

Current law

- 9.9 Māori land is excluded from the PRA under section 6.⁵²⁸ Consequently, family homes and other improvements fixed to Māori land cannot be classified as relationship property and subject to division under the PRA. This remains the case regardless of the contributions the non-owning partner made to the relationship or to the land in question (see Issues Paper at [8.30]).
- 9.10 Buildings and other improvements that are not fixed to the land are chattels and so are not excluded under section 6.⁵²⁹ The main indicators of whether a building is a fixture or a chattel are the degree and purpose of annexation.⁵³⁰
- 9.11 There is limited provision for a non-owning partner under Te Ture Whenua Māori Act 1993 (TTWMA). The rights, if any, of a non-owning partner in respect of Māori land on separation are not covered, although a life interest and/or right of occupation may exist when an owning partner dies.⁵³¹ However, the Māori Land Court has recognised that someone, including a non-owner, may separately own, by way of beneficial interest under a constructive trust, an improvement in the land.⁵³²

Issues

- 9.12 We are not aware of any issues with the exclusion of Māori land itself from the PRA and are not proposing any change to section 6.
- 9.13 However, reliance on the law of constructive trusts in the absence of legislative provisions addressing interests in family homes on Māori land may not facilitate the inexpensive, simple and speedy resolution of PRA matters (section 1N(d)). The case law demonstrates that it can be difficult to determine without a court decision whether a building is a chattel or a fixture and therefore the basis of any claim and any rights and entitlements that will follow. There has also been judicial criticism that the distinction between a building being a fixture or a chattel is artificial and inconsistent with the purpose and kaupapa of TTWMA.⁵³³ Further, the rights of a non-owner under a constructive trust are themselves unclear and rely on the Māori Land Court exercising its discretion (see Issues Paper at [8.35]–[8.41]).
- 9.14 The extent to which this is a problem is unclear. Only five per cent of New Zealand's land is Māori freehold land. We are not aware of information recorded about the number of family homes being built on Māori land and the extent to which this might be increasing.

⁵²⁸ Māori land means Māori customary land and Māori freehold land: Te Ture Whenua Māori Act 1993, s 4.

⁵²⁹ *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC).

⁵³⁰ *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL).

⁵³¹ Te Ture Whenua Māori Act 1993, ss 108, 109, 116 and 328. Note that under s 109 where an owner of a beneficial interest in Māori land dies intestate a de facto partner is not entitled to a life interest in the land.

⁵³² See *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [35]; and *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [26].

⁵³³ *Tainui – Arahura No 2A* (2015) 30 Te Waipounamu MB 168 (30 TWP 168) at [53]. Kaupapa denotes purpose, policy, scheme, framework.

The Māori Land Court is dealing with some claims relating to family homes on Māori land but it is also difficult to assess whether such claims are increasing. If there are disputes, some claimants may be resolving them outside of the courts.

Options for reform

9.15 In the Issues Paper we identified three options for reform (Issues Paper [8.42]–[8.55]):

- (a) **Option A:** Treat the family home on Māori land as a family home under the PRA. The home, or in practice its value, could be relationship property under the PRA's ordinary rules of division but a non-owning partner would not be able to claim an interest in the land on which the home sits.
- (b) **Option B:** Provide a compensation mechanism under the PRA.
- (c) **Option C:** Provide remedies under TTWMA.

Results of consultation

9.16 Most submitters favoured Option C (providing remedies for non-owning partners through TTWMA). They supported a non-owning partner sharing in the value of a family home on Māori land or being compensated by the other partner for a share of the value of the family home. Submitters recognised the practical and legal difficulties associated with providing remedies through the PRA due to Māori land being owned by multiple parties and/or by trusts. Submitters also recognised the knowledge and expertise of the Māori Land Court in dealing with such land and ownership structures.

Preferred approach

P46

Consideration should be given to providing remedies in relation to family homes built on Māori land through Te Ture Whenua Māori Act 1993.

9.17 We consider there is insufficient evidence of the extent of a problem and limited mandate from the consultation responses to recommend reform to address family homes on Māori land. However, we do acknowledge the increasing desire of government to better meet Māori aspirations to utilise their land, and the development of papakāinga housing and financial arrangements such as Kāinga Whenua loans.⁵³⁴ There is likely to be a greater need for clarity in the law in the future.

9.18 While amendments to TTWMA are outside our terms of reference, we consider that specific legislative provision for non-owning partners, particularly on separation, should more appropriately be considered as part of any further review of that Act.⁵³⁵ Further consideration could be given at that time to excluding from the PRA all structures situated on Māori land (fixtures and chattels) and including them within the jurisdiction of the Māori Land Court.

⁵³⁴ Papakāinga housing is a form of housing development on ancestral land: see Te Puni Kōkiri *A Guide to Papakāinga Housing* (December 2017). Kāinga Whenua loans can be used to finance the buying, building or relocation of houses on multiple-owned Māori land: see Housing New Zealand "Kāinga Whenua" (15 May 2016) <www.hnzc.co.nz>. The Ministry of Social Development's 2018 *Families and Whānau Status Report* details the importance of kāinga and papakāinga living to Māori wellbeing: Ministry of Social Development *Families and Whānau Status Report 2018*.

⁵³⁵ Note that Te Ture Whenua Māori Bill 2016 (126-2) was withdrawn on 20 December 2017.

TAONGA

Current law

- 9.19 Taonga are specifically excluded from the definition of family chattels in section 2 but are not excluded from the PRA. This means that:
- (a) taonga that would otherwise meet the definition of family chattels (such as household effects or ornaments) are separate property; and
 - (b) taonga that do not meet the definition of family chattels (such as other chattels and ancestral land) are classified as relationship property or separate property in the ordinary way.
- 9.20 Taonga is not defined in the PRA and the case law does not provide a conclusive definition. The courts initially took a broad approach to interpretation and this interpretation was not Māori-specific.⁵³⁶ After reviewing the case law and Ruru's writing on taonga,⁵³⁷ the Family Court in *S v S* concluded that taonga should be defined within a tikanga Māori construct; the concept could be applied pan-culturally provided the central elements of tikanga were shown to exist.⁵³⁸

Issues

- 9.21 In the Issues Paper we identified two potential issues with the PRA's approach to taonga.
- 9.22 First, whether the lack of statutory definition of taonga was a problem. In the Issues Paper we noted Ruru's suggestion that attempts to categorise non-Māori items of property as taonga may be a result of the limited interpretation of "heirloom" to items that have been passed down (Issues Paper at [11.65]). In the Issues Paper we also highlighted Ruru's recommendation, echoed by the Family Court in *S v S*, that it would be prudent for Parliament to engage with Māori about a possible definition of taonga for the PRA (Issues Paper at [11.57]).
- 9.23 Second, whether the classification of taonga provides sufficient protections against taonga being drawn into the relationship property pool. Taonga are recognised as a special item of property that should remain separate. But the protection only extends so far. Under the current rules taonga, or a portion of their value, can become relationship property through intermingling with other relationship property or where the value of the taonga has increased, or income or gains have been made, as a result of the application of relationship property or the actions of the other partner.⁵³⁹ A court has power in certain circumstances to order that a partner pay the other partner from their separate property, which could include taonga, such as where the owner of the taonga has dissipated relationship property or used relationship property to satisfy personal debts.⁵⁴⁰ We discussed in the Issues Paper the concepts of whanaungatanga and

⁵³⁶ See *Page v Page* (2001) 21 FRNZ 275 (HC); *Perry v West* DC Waitakere FP 239/01, 25 March 2003; and *Perry v West* [2004] NZFLR 515 (HC).

⁵³⁷ Jacinta Ruru "Taonga and Family Chattels" [2004] NZLJ 297.

⁵³⁸ *S v S* [2012] NZFC 2685 at [54(b)] and [58].

⁵³⁹ Property (Relationships) Act 1976, ss 10(2) and 9A,

⁵⁴⁰ Sections 15A, 18C and 20E.

kaitiakitanga and that the division of taonga under the PRA may be inconsistent with these concepts (Issues Paper at [11.42]–[11.46]).⁵⁴¹

- 9.24 In addition, the exclusion of only those taonga that are family chattels does not reflect the Māori worldview that taonga can be any item, including both the tangible and non-tangible.⁵⁴² It also prevents assertions that property that is not a family chattel, such as ancestral land, is taonga.
- 9.25 On the other hand, ancestral land is not within the TTWMA's definition of Māori land. Consequently the TTWMA's protections against alienation of Māori land do not apply, and ancestral land is not excluded from the PRA under section 6. If the PRA is amended to exclude from division ancestral land that is considered taonga, the PRA may provide protections to ancestral land that exceed the protections given under to it the TTWMA. The policy of the PRA towards ancestral land could therefore be inconsistent with the policy under the TTWMA.⁵⁴³
- 9.26 The amount of ancestral land that Māori consider to be taonga may be considerable. We were told that the 1967 amendments to the Māori Affairs Act 1953 resulted in the status of Māori freehold land being changed without owners' knowledge or consent and owners are now seeking to change the status of the land back.⁵⁴⁴ Removing ancestral land considered to be taonga from the relationship property pool could therefore have a significant impact if the land has been used for the family home.

Results of consultation

- 9.27 There was a mixed response to including a definition of taonga in the PRA. There was a general caution about defining tikanga Māori concepts or relationships in legislation. The Judges of the Māori Land Court, HRC, Perpetual Guardian and a practitioner submitted that what constitutes taonga should be decided on a case-by-case basis. The Ministry for Culture and Heritage (MCH), Professor Jacinta Ruru, Ngā Rangahautira and some practitioners we met with supported the inclusion of a definition in the PRA.
- 9.28 We asked on the consultation website if an item should only become taonga if it is taonga under tikanga Māori. This option was marginally favoured by submitters who responded to this question. Other comments from submitters suggested acceptance that what constitutes taonga and how it is treated should be governed by tikanga Māori. One practitioner commented that taonga was a Māori term not for wider application.
- 9.29 All submitters responding to the issue of how taonga should be classified supported treating taonga as separate property that cannot become relationship property in any circumstances. There was some recognition that property collectively owned and subject to kaitiakitanga should be excluded and this could include items other than family chattels. MCH and Perpetual Guardian specifically supported excluding from the PRA land that is taonga. Others noted the difficulties identified in paragraphs 9.25 and 9.26 above

⁵⁴¹ Kaitiakitanga may be understood as guardianship, stewardship, trusteeship.

⁵⁴² See for example the evidence of Professor Tapsell in *S v S* [2012] NZFC 2685 at [56].

⁵⁴³ There is, however, provision under Te Ture Whenua Māori Act 1993 for owners of general land and general land owned by Māori to apply to change the land status to Māori freehold land and so bring that land within the protections of Te Ture Whenua Māori Act 1993: Te Ture Whenua Māori Act 1993, s 133. The provisions of s 133 require the court to be satisfied there is sufficient consent between the owners for the change of status.

⁵⁴⁴ The Māori Affairs Amendment Act 1967 allowed the Registrar to change the status of Māori Freehold Land with fewer than five owners to General Land, enabling it to be sold or mortgaged.

and considered TTWMA mechanisms were a more appropriate way of protecting ancestral land.

Preferred approach

P47

Taonga should be defined in the PRA within a tikanga Māori construct.

P48

Taonga should be classified as a special item of separate property that cannot become relationship property in any circumstances, and a court should not be able to make orders requiring a partner to relinquish taonga as compensation to the other partner.

A definition of taonga

9.30 Although there was a limited response to consultation, we consider there is support to narrow the concept of taonga in the PRA and define it by reference to tikanga Māori. Such a definition would provide clarity and certainty, and direction to the court. At the same time, it would avoid a prescriptive description that did not appropriately capture what is, and is not, taonga, in the Māori worldview. Expert evidence would still need to be brought on the particular tikanga that governs the taonga in question.⁵⁴⁵ An example of such a definition was first suggested by Ruru in 2004:⁵⁴⁶

A valued possession held in accordance with tikanga Māori and highly prized by the whanāu, hapū or iwi.

9.31 The Judges of the Māori Land Court submitted that if taonga was to be defined in the PRA, the Waitangi Tribunal's definition of "taonga work" in its *Ko Aotearoa Tēnei (Wai 262) Report* may be useful to consider in this context:⁵⁴⁷

A taonga work is a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections, and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori.

9.32 We recommend that land should not be included as taonga for the purposes of the PRA for the reasons identified. Any definition of taonga in the PRA should therefore expressly exclude land.

9.33 Consultation should be carried out with Māori to inform the drafting of any definition, including whether taonga should apply pan-culturally or be limited to items of Māori significance and/or items possessed by Māori.

⁵⁴⁵ We discuss ways that could better enable the court to resolve matters of tikanga later in this chapter.

⁵⁴⁶ Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 299.

⁵⁴⁷ Waitangi Tribunal *Ko Aotearoa Tēnei: Te Taumata Tuatahi* (Wai 262, 2011) at 54. Mātauranga Māori may be understood as Māori knowledge. The authors of *Te Mātāpunenga* note that the term mātauranga most often carries with it notions of depth, cultivation and understanding: Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: a compendium of references to the concepts and institutions of Māori customary law* (Victoria University Press, Wellington, 2013) at 221. Mauri can be described as life essence. The meaning encapsulates two related but distinct ideas: the life principle or essential quality of a being or entity, and a physical object in which this essence has been located: *Te Mātāpunenga* at 239.

- 9.34 We have also considered MCH's question as to whether the term "taonga tuku iho" should be used instead of "taonga". We understand that the term refers broadly to "cultural property or objects"⁵⁴⁸ but translates specifically to taonga "handed down". This is an appropriate term in the context of taonga already in existence; for example, the term is used in the Preamble to TTWMA to describe the relationship between land and Māori people. However, the term is likely to be too limiting in the PRA context as, like the current interpretation of heirlooms, it may prevent newly created taonga from being considered taonga under the PRA.⁵⁴⁹

Classification of taonga

- 9.35 Our preferred approach is to treat taonga as separate property that cannot become relationship property in any circumstances. However, while we acknowledge that taonga is an expansive concept in the Māori worldview, we do not recommend including land within the definition or classification of taonga in the PRA for the reasons outlined in paragraphs 9.25 and 9.26 above.
- 9.36 Although the number of submissions was limited, the level of support for prioritising kaitiakitanga over division for taonga favours reform. We consider this reform simply reflects the Māori worldview and how Māori treat taonga outside of the rules of the PRA when partners separate or when one partner dies.
- 9.37 We have also considered whether the court could be given discretion to compensate for contributions the other partner may have made to taonga. For example, relationship property or the partner's actions could be applied to maintain or restore taonga. It could be unfair that these contributions are not recognised. However, there has been very limited discussion about this potential reform and we are not aware that it is an issue for Māori. We therefore do not make any proposals for reform at this time.

RESOLUTION OF PRA MATTERS THAT INVOLVE QUESTIONS OF TIKANGA MĀORI

Current law

- 9.38 Māori customary law is part of the common law in New Zealand. What constitutes Māori custom or tikanga in any particular case is a question of fact for expert evidence, unless the particular tikanga has become notorious by frequent proof and so judicial notice can be taken of it. In past cases, customary rules in issue have been proved in evidence by kaumātua or by academics, by reliance on earlier published decisions of the Māori Appellate Court and in an affidavit filed "by a distinguished New Zealand chief" (see discussion in the Issues Paper at [26.116]).

Issues

- 9.39 Māori should have meaningful input into the workings of the justice system. We noted in the Issues Paper that the current court system may not be responsive to Māori values, beliefs and cultural practices (Issues Paper at [23.18]–[23.21]). Because of this Māori may rarely use the court to enforce their rights under the PRA.

⁵⁴⁸ The Legal Māori Resource Hub "A Dictionary of Māori Legal Terms" <www.legalmaori.net>.

⁵⁴⁹ See further Professor Tapsell's evidence to the Family Court in *S v S* [2012] NZFC 2685 at [56]–[57] on what constitutes taonga.

9.40 Providing measures that would enhance the court's ability to resolve questions of tikanga Māori would give better effect to the implicit principle that a just division of property should recognise tikanga Māori and in particular whanaungatanga. Māori may then have greater confidence that the Family Court is sensitive and responsive tikanga Māori. While understanding tikanga and te reo are important elements in the ongoing education of the judiciary, in the Issues Paper we identified the following potential measures that could better enable a court to resolve questions of tikanga Māori (Issues Paper at [26.118]–[26.135]):

- (a) enable the court to obtain a cultural report;
- (b) enable the court to appoint cultural advisers as full members of the court;
- (c) enable a Māori Land Court judge to sit in the Family Court;
- (d) empower the Family Court to refer questions of tikanga to the Māori Land Court or Māori Appellate Court for consideration;
- (e) empower the Māori Land Court and/or the Māori Appellate Court to hear PRA cases; and
- (f) provide for appeals on matters of tikanga to be heard in the Māori Appellate Court rather than the High Court.

Results of consultation

9.41 There was a mixed response to the measures identified in the Issues Paper, with an equal number of submitters favouring measures that retained the jurisdiction of the Family Court to hear PRA questions on tikanga and supporting measures that give the Māori Land Court judges a role. Key submissions are discussed below.

9.42 The Judges of the Māori Land Court considered that while judicial education and the ability to appoint a person to make an inquiry and provide a cultural report would provide some understanding of tikanga Māori amongst the bench of the Family Court, they did not think such measures would be sufficient to ensure that questions of tikanga are properly understood and taken into account. Their Honours considered that at a minimum the court *must* appoint an expert to provide a report and that it would be preferable that an expert sit alongside the Family Court judge to hear and determine any question of tikanga. This would align with the practice in the Environment Court. Their Honours supported the other measures in paragraph 9.40 above and considered that those in paragraph 9.40(c)–(e) should be available both on direction of the Family Court and by consent of the parties. Their Honours acknowledged that it may be difficult in many circumstances to separate out an issue of tikanga Māori for referral to the Māori Land Court and it may be more efficient for a Māori Land Court judge to sit alongside the Family Court judge. The cross-warranting of Māori Land Court judges to sit in the Environment Court was considered a good model. Their Honours acknowledged that resourcing of the Māori Land Court could be a practical issue.

9.43 HRC submitted that there is merit in either of the measures identified in paragraph 9.40(c)–(d) above. HRC considered that "in many respects keeping the proceedings in the Family Court's jurisdiction may be preferable. This keeps the ... jurisdictions largely intact". Referring matters of tikanga to the Māori Land Court was also seen as potentially workable, although HRC considered it would have the effect of significantly augmenting

that Court's jurisdiction. HRC also considered that parties should be able to "elect, by consent, a parallel process presided over by a Māori Land Court judge".

- 9.44 Of the measures identified, the Judges of the Family Court preferred to seek assistance from experts via cultural reports. Their Honours submitted that the measures identified in paragraph 9.40(d)–(f) above could increase costs and/or delays in proceedings. The specialist nature of the Family Court and the difficulty in severing matters of tikanga from PRA matters. Their Honours did not favour Māori Land Court judges sitting in the Family Court as the judges would need to have the same specialised knowledge, education and training as Family Court judges which would be burdensome for the judges and may also cause delay. The Judges of the Family Court considered it vital for all judges to receive specialised education on tikanga Māori.
- 9.45 The New Zealand Law Society submitted that "it may be appropriate to enable the Family Court to seek assistance from experts in tikanga Māori where required, although it would be preferable for each party to bring relevant expert evidence about this". They considered that the Family Court should have sole jurisdiction in respect of PRA cases.
- 9.46 Ngā Rangahautira supported the use of cultural reports and advisors, noting the use of cultural advisory panels in other judicial fora. They considered that a combination of those measures together with training Family Court judges in tikanga Māori to be more efficient than the use of Māori Land Court judges in the Family Court.

Preferred approach

P49

The Family Court should be enabled to appoint a person to make an inquiry into matters of tikanga Māori and report to the Court.

P50

Family Court judges should receive education on tikanga Māori.

P51

Further consideration should be given to warranting Māori Land Court judges to sit alongside judges in the Family Court where there is a difficult matter of tikanga Māori at issue.

- 9.47 We propose that the Family Court should be enabled to appoint a person to make an inquiry into and report on matters of tikanga Māori relevant to an application under the legislation. This would provide independent assistance to the Court where the parties' expert evidence is insufficient or irreconcilable. We do not consider that it should be mandatory for the Court to make such inquiries as the parties should be incentivised to bring their own expert evidence in the usual way. Section 38 currently empowers the Court to appoint a person to make an inquiry and report on matters of fact in issue. We propose in Chapter 10: Resolution to broaden the Court's power to enable it to inquire into such matters it considers may assist it to deal effectively with the matters before it. This power could specifically include matters of tikanga Māori or, alternatively, a new provision could be drafted.

- 9.48 We also agree with submitters that judicial education on tikanga Māori is vital. We note that general judicial education on tikanga Māori is currently available⁵⁵⁰ and recommend that judges of the Family Court receive both this general education and education on tikanga Māori specific to whānau. This will better equip judges with the skills and knowledge to determine circumstances where an inquiry into matters of tikanga Māori is warranted and to recognise and apply the principles of tikanga Māori more generally through the adjudication process.
- 9.49 We acknowledge the concerns by some submitters about measures that involve experts other than Family Court judges in decision-making or a greater role for the Māori Land Court judges. We do not therefore recommend reform along the lines of the measures in paragraph 9.40(b)–(f) above.
- 9.50 We do, however, see merit in further considering the warranting of Māori Land Court judges to sit alongside a Family Court judge in cases where there are difficult matters of tikanga at issue. This would utilise the skill, expertise and mana of both courts whilst retaining the procedural jurisdiction of the Family Court. It would also avoid submitters' concerns about the practicalities of severing matters of tikanga from the rest of the proceedings. The process could be available both on the direction of the Family Court and on application by one of the parties. The implicit principle that a just division of property under the PRA should recognise tikanga Māori would guide the judge's exercise of discretion as to whether a Māori Land Court judge should also sit on the proceeding. We do not have evidence of the likely impact on the length of time for proceedings with both judges sitting but any potential delay would need to be balanced against the benefits of the measure. As it would be necessary to amend the Family Court Act 1980 and TTWMA to enable Māori Land Court judges to sit in the Family Court, further consideration of this measure could be given as part of a review of TTWMA or the Family Court.

Resolving matters out of court

- 9.51 During consultation both HRC and the Judges of the Māori Land Court identified the Rangatahi Courts as a good marae-based judicial model. The Rangatahi Courts operate in the same way as the Youth Court but are held on marae and follow Māori cultural processes.⁵⁵¹ The Rangatahi Courts are not aimed at resolving disputes but are aimed at addressing the causes and consequences of wrongdoing in terms of harm caused to others. Although part of the criminal justice process, the Courts do require willing participants as there must be an acknowledgement of responsibility on the part of the offender and the support of the offender's family and community.
- 9.52 For the purposes of resolving relationship property claims, in our view the principles of the Rangatahi Court are best reflected through voluntary tikanga-focused dispute resolution processes rather than a judicial model. We noted in the Issues Paper that dispute resolution services are more flexible than court processes and can therefore focus on resolving matters in accordance with tikanga (Issues Paper at [24.35]). Some mediators currently offer services that are based on traditional Māori values and respect te reo, tikanga and kawa, and the role of whānau.⁵⁵² A number of submitters supported

⁵⁵⁰ See the Institute of Judicial Studies *Prospectus 2017* available at <www.ijs.govt.nz>.

⁵⁵¹ See Youth Court of New Zealand "Rangatahi Courts and Pasifika Courts" <www.youthcourt.govt.nz>.

⁵⁵² Kawa refers to protocols.

improved information, mediation and other out of court services that can help Māori resolve disputes according to tikanga Māori. See Chapter 10: Resolution for further discussion on these measures.

CHAPTER 10

Resolution

IN THIS CHAPTER, WE CONSIDER:

the resolution of PRA matters and what reform is required to achieve the principle of inexpensive, simple and speedy resolution as is consistent with justice. We consider reforms to:

- improve the resolution of PRA matters out of court;
- clarify partners' obligations of disclosure; and
- improve the resolution of PRA matters that go to court.

INTRODUCTION

- 10.1 One of the principles of the PRA is that matters "should be resolved as inexpensively, simply, and speedily as is consistent with justice" (section 1N(d)). This means that division of property at the end of a relationship should be just and the process for arriving at that decision should be efficient.⁵⁵³
- 10.2 A strong theme from consultation was that the PRA does not facilitate inexpensive, simple and speedy resolution. Lengthy delay and unaffordable costs can exacerbate what is already a deeply traumatic time of anxiety, uncertainty and conflict for many.⁵⁵⁴ We received 94 submissions that raised issues about resolution of PRA matters, including 70 submissions from members of the public, 14 submissions from dispute resolution service providers and other organisations, two submissions from members of the judiciary and eight submissions from individual practitioner and academic experts. Resolution was also discussed at 16 public meetings, two meetings with members of the judiciary and 18 practitioner and academic expert meetings.
- 10.3 In this chapter we focus on the issues that prevent just and efficient resolution of PRA matters and our preferred approach to addressing these issues. We have developed our

⁵⁵³ We consider there are four important elements in achieving a just and efficient resolution of PRA matters: understanding of legal entitlements, access to financial information, appropriate support and a timely resolution: see Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [23.14].

⁵⁵⁴ We note that after the death of a spouse, divorce and separation have the second and third highest assigned values for common stressors on the social readjustment rating scale: Thomas Holmes and Richard Rahe "The Social Readjustment Rating Scale" (1967) 11 *Journal of Psychosomatic Research* 213.

preferred approach having regard to other ongoing work in the family justice sector, in particular:

- (a) In 2019 an interdisciplinary research team led by University of Otago and funded by the Borrin Foundation will investigate how separating couples divide their property and resolve disputes at the end of a relationship. This research will provide evidence that will be invaluable in determining how the State can best support just and efficient outcomes in PRA matters. The results of this research are due to be published in 2020.⁵⁵⁵
- (b) In August 2018 the Government appointed an Independent Panel to examine the 2014 family justice reforms. The 2014 reforms resulted in the most significant changes to New Zealand's family justice system since the establishment of the Family Court,⁵⁵⁶ and while the review of the 2014 reforms is focused on parenting and guardianship matters, it is likely to have implications for the resolution of PRA matters.⁵⁵⁷ For example, findings about common issues, such as access to information, legal advice and dispute resolution processes, availability of legal aid and the efficiency and resourcing of court processes will all be relevant to PRA matters.
- (c) The Ministry of Justice is currently reviewing the policy settings for legal aid.⁵⁵⁸ The Ministry is due to report to the Minister of Justice in October 2018. As part of that review the Ministry also aims to signal wider access to justice issues which could form the basis of future work.⁵⁵⁹

RESOLVING PRA MATTERS OUT OF COURT

10.4 Partners should be able to resolve PRA matters out of court wherever possible. Out of court resolution is generally quicker and less expensive than court-based resolution, and can result in more enduring and satisfactory outcomes for separating partners and their children (Issues Paper at [23.8]–[23.9]). Although we lack data about how PRA matters

⁵⁵⁵ Michael and Suzanne Borrin Foundation "Relationship property division research" <www.borrinfoundation.nz>.

⁵⁵⁶ Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [23]. See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.25]–[24.26].

⁵⁵⁷ See the Terms of Reference for the rewrite of the 2014 family justice system reforms: Andrew Little "Panel appointed to re-write 2014 Family Court reforms" (press release, 1 August 2018). The review is limited to parenting or guardianship matters and the Independent Panel is due to report to the Minister of Justice by May 2019. The review will be informed by the University of Otago Faculty of Law and Children's Issues Centre's evaluation of the 2014 Family Law Reforms through a Parenting Arrangements after Separation Study. This is a large-scale nationwide research project exploring parents' and professionals' perceptions and experience of post-separation family dispute resolution processes regarding decisions and children's care arrangements: see <www.otago.ac.nz>.

⁵⁵⁸ Ministry of Justice "Legal Aid Review" (26 July 2018) <www.justice.govt.nz>.

⁵⁵⁹ We also note research by the Law Council of Australia on effective strategies available to the legal profession to assist the "missing middle" to access legal assistance is currently being undertaken: Law Council of Australia *The Justice Project Final Report: Introduction and Overview* (August 2018) at 38–40. On the same note, valuable lessons may be learned from the University of Otago's investigation into gaps in the provision of civil legal aid and further scope for pro bono and low cost advice services: Kayla Stewart and Bridgette Toy-Cronin *The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services* (University of Otago, May 2018). See also recommendations from the New Zealand Bar Association on legal aid, pro bono initiatives and legal services and fees: New Zealand Bar Association *Access to Justice: Āhei ki te Ture* (September 2018).

are resolved in New Zealand, our research and the submissions we received indicate that the vast majority of separating partners resolve their PRA matters out of court.⁵⁶⁰

Issues

10.5 In the Issues Paper we sought feedback on three questions (Issues Paper at [24.2]–[24.16] and [24.52]–[24.54]):

- (a) Do people have access to appropriate information?
- (b) Is access to legal advice appropriate?
- (c) Is access to dispute resolution services for PRA matters appropriate?

10.6 We explore these issues in light of the results of consultation below.

Access to information on property entitlements and resolution mechanisms

10.7 People need to understand their property entitlements and obligations, and the different options for resolving PRA matters, so that they can make informed decisions. In the Issues Paper we observed that there are currently several sources of publicly available information, including the Ministry of Justice, Community Law Centres, Citizens Advice Bureaux New Zealand (CABNZ), the New Zealand Law Society (NZLS) and the Commission for Financial Capability (Issues Paper at [24.4]).

Results of consultation

- 10.8 Several submitters commented that there was a lack of easy to understand and accessible information for separating partners. Dispute resolution service providers in particular submitted that there was a lack of timely information about the different options for resolving disputes including likely costs, advantages and disadvantages and time associated with each option. Some submitters, including CABNZ, considered that there was sufficient information about the PRA and its rules. However, they considered there was a need for better guidance and self-help tools so people can apply the law to their own circumstances and navigate the process out of court, as far as they are able.
- 10.9 Some submitters, including members of community organisations and CABNZ, told us that people often want face-to-face support to understand and navigate written information, and help to make arrangements with banks, creditors and other parties involved in the resolution process.

⁵⁶⁰ Citizens Advice Bureaux New Zealand (CABNZ) submitted that in the past financial year CABNZ received 14,759 enquiries about relationship issues, with 2,355 (16 per cent) being categorised as primarily relating to relationship property issues and a further 4,654 (31.5 per cent) recorded as relating to separation and dissolution. Over the past four years the number of relationship property enquiries has increased by 44 per cent. In contrast, applications under the Property (Relationships) Act 1976 to the Family Court have been declining, from 1,217 in 2006 to 785 in 2016: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [23.29]–[23.35]. A survey of New Zealand family lawyers carried out by Grant Thornton and the New Zealand Law Society (NZLS) in October 2017 also found that where lawyers were engaged, out of court settlement methods were still the most commonly used. Lawyer-led negotiation had been used by 95 per cent of practitioners in the previous two years, litigation by 79 per cent of practitioners, mediation by 57 per cent and assisted negotiation by 20 per cent of practitioners: Grant Thornton New Zealand Ltd and NZLS *New Zealand Relationship Property Survey 2017* (October 2017) at 20.

Access to affordable legal advice

- 10.10 Many people want and need tailored legal advice in order to resolve PRA matters.⁵⁶¹ The PRA recognises the importance of legal advice in ensuring a just division of relationship property, by requiring partners to receive independent legal advice before entering into any settlement agreement in order for that agreement to be enforceable in court (section 21F). But not everyone will be able to afford a lawyer to provide tailored legal advice. In some cases, only one partner may be able to do so. In the Issues Paper we observed that inability to access affordable legal advice is a concern as it may result in partners making agreements without knowing what their legal entitlements are, and may create or enhance an imbalance of power between the partners if only one partner can afford legal advice (Issues Paper at [24.9]).
- 10.11 There is limited access to free or subsidised legal advice on PRA matters. The Family Legal Advice Service, which provides a limited amount of free legal advice for people who cannot afford a lawyer, is only available for parenting and guardianship matters and not PRA matters. Community providers such as Community Law Centres and CABNZ are generally limited to providing non-individualised advice on PRA matters. While legal aid is available to some people on low incomes, it is not available for legal assistance or representation for dispute resolution processes out of court such as private mediation (Issues Paper at [24.10]–[24.16]).⁵⁶²

Results of consultation

- 10.12 There was a strong message from submitters that resolution is expensive and the need to engage lawyers is seen as a significant cost. Submissions indicate that costs are the key reason why people settle their disputes quickly, even if they feel the terms of the settlement are unfair. Submitters including the National Council of Women of New Zealand (NCWNZ) and the New Zealand Federation of Business and Professional Women highlighted that the inability to access affordable legal advice can have a particularly negative effect on people in reduced positions of power and those who have limited financial resources, and these were often women.
- 10.13 Some submitters felt strongly that they should not have to engage lawyers at all. As well as concerns about costs, some thought lawyers raised the conflict levels between former partners and hindered simple and speedy resolution. These submitters want more freedom to resolve disputes themselves and according to their own sense of fairness. They felt it should be easier for people to make enforceable contracts without the need to involve lawyers. Some submitters recommended introducing a mechanism that

⁵⁶¹ We note that in a study to understand the causes of the increase in without notice applications following the 2014 changes to the Care of Children Act 2004, one of the key drivers identified was that applicants wanted a lawyer to represent them in the Family Court and to manage the application through the Court process: Nan Wehipeihana, Kellie Spee and Shaun Akroyd *Without Notice Applications in the Family Court* (Ministry of Justice, July 2017) at [45]–[50].

⁵⁶² Legal aid is considered a loan and may need to be repaid in full. It is only available to people on very low incomes. For example, a single applicant with no dependent children cannot earn more than \$23,820, while a single applicant with two dependent children cannot earn more than \$54,245 (for applications made after 2 July 2018). A single applicant cannot have more than \$3,500 of disposable capital, with a further allowance of \$1,500 being added for each dependent child. Disposable capital is a person's total assets after deducting the amount of any debts secured against those assets and after deducting the value of certain other liabilities and assets including household furniture, a principal personal vehicle and tools of trade. See Legal Services Act 2011, sch 1 cl 3; and Legal Services Regulations 2011, regs 5–6.

"signed off" their agreement or enabled them to lodge their agreement with, or obtain a consent order from, the Family Court.

- 10.14 Several submitters raised concerns regarding the limited availability of legal aid. Some practitioners expressed concern that the eligibility rates were too low and the interest rate, at 8 per cent, was too high, particularly given the low cost of borrowing for the Government. Practitioners also commented that repayment of a legal aid loan was much more certain in PRA matters as relationship property would likely be available when the matter was resolved and a charge can be placed on relationship property as security for the loan.
- 10.15 The low level of fees paid to legal aid lawyers for PRA matters was also a common concern raised by practitioners. A few submitters were also concerned that legally-aided clients were getting less of a service than private clients. Practitioners told us that many lawyers do not offer to act on PRA matters under legal aid as it was not economically viable to do so, given the complexity and amount of time needed to undertake the work. We also heard that there are regions in New Zealand where there were few, if any, lawyers who will accept legal aid instructions for PRA matters.
- 10.16 CABNZ submitted that access to tailored legal advice and ongoing support is limited to those who can afford to instruct a lawyer in private practice and those who are eligible for legal aid. We do not have data on the size of what the Australian Productivity Commission termed the "missing middle";⁵⁶³ one practitioner told us that the gap between the two groups was "huge".

The Ministry of Justice's legal aid review

- 10.17 Since the publication of the Issues Paper the Ministry of Justice has commenced a review of the legal aid policy settings (paragraph 10.3(c) above). Many of the concerns raised with us in consultation have also been raised in that review. In particular submitters on the legal aid review noted that cost and other barriers to access to justice generally exist for particular groups including women, Māori, disabled people, refugees and migrants, young people and self-represented litigants.⁵⁶⁴ Submissions on the legal aid review also identified that "people who do not qualify to receive legal aid but still lack the financial means to address their legal problems may decide to deal with these issues in a way that minimises costs".⁵⁶⁵ Specific problems with the legal aid framework identified by submitters included the low eligibility rates,⁵⁶⁶ the fixed fee rates paid to legal aid lawyers for PRA matters,⁵⁶⁷ the low number of lawyers providing PRA advice on legal aid⁵⁶⁸ and the absence of legal aid for assistance for dispute resolution processes.⁵⁶⁹

⁵⁶³ Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 1, 5 September 2014) at 20.

⁵⁶⁴ Ministry of Justice *Broader Access to Justice Issues* (September 2018) at 1–3.

⁵⁶⁵ Ministry of Justice *Legal aid eligibility and application process* (September 2018) at 2.

⁵⁶⁶ Ministry of Justice *Legal aid and eligibility and application process* (September 2018) at 2; and Ministry of Justice *Legal aid grants* (September 2018) at 3.

⁵⁶⁷ Ministry of Justice *Legal aid providers and quality assurance* (September 2018) at 2.

⁵⁶⁸ Ministry of Justice *Legal aid providers and quality assurance* (September 2018) at 3. The Grant Thornton and New Zealand Law Society (NZLS) survey also found that whilst some 35 per cent of lawyers surveyed had undertaken legally aided relationship property work in the last two years, those using legal aid funding indicated they did so rarely (62 per cent), a finding generally similar between regions: Grant Thornton New Zealand Ltd and NZLS *New Zealand Relationship Property Survey 2017* (October 2017) at 20. The University of Otago has identified similar issues in relation to access to civil legal aid services: Kayla Stewart and Bridgette Toy-Cronin *The New Zealand Legal Services Mapping*

Access to dispute resolution services

- 10.18 Currently there is no State-funded provision of dispute resolution services for PRA matters, although parents can raise PRA matters during Family Dispute Resolution (FDR) if it will help them resolve parenting disputes (Issues Paper at [24.19]–[24.31]). A range of dispute resolution services are available on a voluntary, user-pays basis, including mediation, collaborative law, arbitration and online dispute resolution (Issues Paper at [24.31]–[24.51]).
- 10.19 We noted in the Issues Paper that access to dispute resolution services for low value PRA matters had been recognised as a particular problem in Australia, and that our discussions with family lawyers and community groups indicated it may also be a problem in New Zealand (Issues Paper at [24.43]). We identified two possible options for reform, namely extending FDR to all PRA matters, or developing a specific dispute resolution service for PRA matters (Issues Paper at [24.55]–[24.61]). We also asked whether partners should be required to attempt out of court resolution before going to court (Issues Paper at [24.62]–[24.63]).

Results of consultation

- 10.20 A number of submitters commented on the positive attributes of dispute resolution services, and of mediation in particular. Submitters noted the informality, flexibility and less confrontational nature of mediation, and its ability to promote party self-determination, focus on the best interests of children and the cultural needs of Māori. Some members of the public strongly favoured mediation over using lawyers and the court process. Arbitration and other dispute resolution services were also viewed favourably by some submitters.
- 10.21 The cost of mediation was raised as a barrier by a number of submitters. Several submitters recognised the particular problem of disproportionate costs of legal advice and dispute resolution for low value, or debt-only, PRA disputes. They considered there should be a speedy, low cost or free service for such disputes.
- 10.22 There was a strong response from submitters that FDR in its current form would not be appropriate for PRA matters due to the complex legal and factual issues often involved in these disputes.⁵⁷⁰ The most common concerns among submitters were the lack of lawyer involvement and legally trained mediators.⁵⁷¹ The New Zealand Family Dispute Resolution Centre (FDR Centre) and the Resolution Institute proposed an extension of the FDR

Project: Finding Free and Low-Cost Legal Services (University of Otago, May 2018). The United Kingdom's Parliamentary Joint Committee on Human Rights has concluded that legal aid "deserts" have made human rights unenforceable: Joint Committee on Human Rights *Enforcing Human Rights: Tenth Report of Session 2017-19* HC 669, HL Paper 171, 19 July 2018.

⁵⁶⁹ Ministry of Justice *Legal aid eligibility and application process* (September 2018) at 3. The Minister of Justice has commented that the Family Court reform which requires separating partners in parenting disputes to negotiate without the advice or assistance of a lawyer or judge overlooking was too much to expect and unrealistic: "Justice Minister says exes negotiating alone in Family Court over future care of their kids 'unrealistic' and 'too much to expect'" (2 August 2018) TVNZ <www.tvnz.co.nz>.

⁵⁷⁰ The Family Dispute Resolution Centre's (FDR Centre) submission agreed with the Ministry of Justice's 2011 Review of the Family Court that the majority of relationship property disputes (that FDR Centre administers) involve substantial assets and highly complex factual and legal issues which make these disputes unsuitable for an FDR-type process.

⁵⁷¹ We note FairWay Resolution's submission that the concerns identified in the Issues Paper in respect of FDR following the 2015 review should be read with caution and noted the limitations of that review and initial training of FDR mediators: see Law Commission *Dividing Relationship Property – Time for Change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.28].

service, or preferably a similar service modified to better meet the needs of PRA disputes, for disputes involving property valued at under \$100,000.⁵⁷² The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) supported the proposal to extend a modified FDR service to such small-scale disputes as existing FDR would not be appropriate.

- 10.23 Several submitters suggested different ways that existing dispute resolution processes could be improved for PRA matters. Some practitioners and representatives from community organisations we spoke to supported a service similar to the Disputes Tribunal for low value claims.⁵⁷³ One practitioner suggested an arbitration-type service that could be available for all PRA matters (not just low value disputes) and which would give enforceable preliminary determinations on the papers. The preliminary decision could be challenged in court if either party was not happy with the outcome.⁵⁷⁴ Another practitioner recommended an online dispute resolution service provided by the Ministry of Justice.
- 10.24 NZLS submitted there may be scope for alternative dispute resolution/tribunal resolution in "very limited cases" where the claim is of low value or where there is a net debt situation, there are no disputes about the extent of assets or whether the PRA applies, and there are no disclosure issues. NZLS considered that the tribunal procedure would need to include pre-tribunal mandatory disclosure and access to legal advice funded by legal aid, as well as a right of appeal from any tribunal decision. NZLS suggested one option might be for the PRA to provide that the Disputes Tribunal should have jurisdiction where there is a net debt situation or where the total quantum of relationship property equity falls within the Tribunal's jurisdiction under section 10 of the Disputes Tribunal Act 1988.
- 10.25 Several submitters and practitioners we talked to at meetings supported the State encouraging parties to engage in dispute resolution. Submitters and practitioners considered that dispute resolution worked well when both parties wanted to engage and reach agreement, but that access to lawyers and the courts was necessary where parties could not or would not agree.
- 10.26 However submitters' views were mixed on whether out of court dispute resolution should be mandatory. AMINZ, FairWay Resolution and three practitioners supported a requirement to attempt mediation unless it is not appropriate in the circumstances, similar to the way FDR currently operates.⁵⁷⁵ One member of the public considered that mediation should be compulsory where parties cannot make progress in a determined timeframe. Resolution Institute identified a range of possible approaches and ultimately

⁵⁷² In their submission, FDR Centre proposed that the State fund this service for disputes where property is valued under \$50,000 (including providing access to legal aid for legal advice) and parties self-fund at a reasonable and set fee for disputes between \$50,000 and \$100,000.

⁵⁷³ This was also suggested as a potential reform by respondents to the Grant Thornton survey: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 25.

⁵⁷⁴ A similar fast track adjudication process is available for resolving building and construction disputes under the Construction Contracts Act 2002, pts 3–4. The primary purpose of the process is to improve cash flow and, while the orders are only interim, they are often accepted by the parties without further legal proceedings being required. For further information see "Mediation, arbitration and adjudication" (21 March 2016) Building Performance <www.building.govt.nz>.

⁵⁷⁵ Parties can be exempt from participating in FDR if one or both parties are unable to participate effectively, if there has been domestic violence, if FDR would be inappropriate (such as if a power imbalance exists between parties) or if there is an urgent application: Family Dispute Resolution Act 2013, s 12; and Care of Children Act 2004, s 46E.

favoured a requirement to meet with a mediator for initial screening. Divorce Partners (an Australian dispute resolution provider) favoured a form of compulsory arbitration in terms of a mandatory financial assessment prior to filing. The independent assessment would create a payment obligation of a discrete dollar sum, with the aim of encouraging parties to pay this amount and avoid court proceedings. One branch of NCWNZ suggested a non-partisan independent financial mediator should be involved in decisions about division of property. NZLS, FDR Centre, one member of the public, and practitioners at two meetings specifically considered that dispute resolution should not be mandatory. The FDR Centre and AMINZ considered that parties should be required to certify that they have obtained information relevant to the various private dispute resolution options available to them, understood the nature of those processes and the relevant costs of each option, and that having informed themselves of those options, they have nevertheless determined to proceed to the courts.

- 10.27 Other submitters, including the Family Violence Death Review Committee, Community Law Wellington and Hutt Valley, The Backbone Collective and some representatives of community law centres we spoke to, were particularly concerned about victims of family violence in the dispute resolution process. Some raised the need for access to expedited resolution and that processes should not enable abusive behaviour and deprivation from property to continue.⁵⁷⁶
- 10.28 Some submitters also commented on the benefits of State-funded counselling, which was available prior to the 2014 reforms to the family justice system (Issues Paper at [24.26]). A number of submitters advocated a return to State-funded support to help people reach a point where they can have useful settlement discussions. One meeting attendee said that following separation she was unable to open letters or answer the phone because she was so scared of what she might be told, and was incredulous she was expected to deal with lawyers and the resolution process at that time.

⁵⁷⁶ We note that exemption from participating in mandatory dispute resolution processes for Property (Relationship) Act matters on the basis of family violence or other relevant circumstances could be provided in a similar way to the exemptions from participating in FDR under the Family Dispute Resolution Act 2013 and Care of Children Act 2004. Pre-mediation screening processes could also be required to ensure matters not appropriate for mediation are screened out.

Preferred approach

P52

The Ministry of Justice should develop a comprehensive information guide for separating partners that explains the PRA and provides information about the different options for resolving PRA matters.

P53

The Ministry of Justice should consider funding community organisations to provide person-to-person support for people who have difficulty accessing, navigating and applying the information guide in order to enable first steps in the resolution process to be identified and taken.

P54

The Ministry of Justice should review the existing provision and funding for legal advice on PRA matters in order to ensure appropriate access to affordable legal advice when resolving PRA matters out of court.

P55

Voluntary out of court dispute resolution for PRA matters should be promoted by:

- a. including in the PRA statutory endorsement of voluntary dispute resolution to resolve PRA matters out of court;
- b. including new "pre-action procedures" in the Family Court Rules 2002 (proposed under Proposal 59 below), including a requirement to make a genuine effort to resolve PRA matters out of court prior to making an application to court; and
- c. requiring applicants to court to acknowledge in court application forms that they have received information about the availability of out of court dispute resolution services.

P56

The Government should consider extending a voluntary, modified Family Dispute Resolution service or other form of State-funded dispute resolution service to PRA matters following the outcome of the review of the 2014 family justice reforms.

10.29 Separating partners should be encouraged to resolve their PRA matters out of court whenever appropriate. In our view, access to affordable services that enable and support separating partners to achieve just and efficient outcomes is a major concern. The ongoing work in the family justice sector presents a significant opportunity to address the issues raised in this chapter.

Improve access to information and support

10.30 We propose that the Ministry of Justice, as the government department responsible for administering the PRA, develop and publish a comprehensive and easy to understand information guide for separating partners. The object of the information guide would be to promote out of court resolution as far as possible, by giving separating partners the information they need in order to participate effectively in the resolution of PRA

matters.⁵⁷⁷ The Ministry should consider developing the information guide with community organisations, NZLS and dispute resolution service providers.

10.31 The information guide should:

- (a) explain how the property sharing regime operates, including what property is shared, how property is shared and when the regime applies;
- (b) provide information about the options for resolving PRA matters (including likely timing and costs for each option);
- (c) include checklists, self-help workbooks and financial calculators to enable parties to collate all the information necessary to resolve their PRA matters;⁵⁷⁸ and
- (d) signpost to support and dispute resolution services for further information, support and advice, including links to online support, dispute resolution service providers and legal aid providers.

10.32 The information guide should be widely available to separating partners at an early point in the dispute resolution process. The Ministry should also consider how to make the information guide available at common trigger points in relationships (such as moving in together, getting married or entering a civil union, approaching the qualifying period for de facto relationships and buying a house).⁵⁷⁹

10.33 The information guide should be available online,⁵⁸⁰ and could be provided in a variety of formats, including podcasts and videos, and in different languages.⁵⁸¹ It should also be available in print to those without access to the internet including at CABNZ, Community Law Centres, other relevant community organisations and centres, and the Family Courts.

10.34 We also propose that the Ministry of Justice consider funding community organisations to provide person-to-person support for people who have difficulty accessing, navigating and applying the information guide. This might include contracting with community organisations including CABNZ and Community Law Centres to ensure such support is specifically funded where it is outside legal aid eligibility criteria and/or scope.⁵⁸² This

⁵⁷⁷ In Chapter 1: Introduction we also recommend that a new statute be drafted so that property entitlements and obligations, and related rules are clear and certain, which will go some way to improving accessibility.

⁵⁷⁸ See for example the United Kingdom's Divorce and money calculator ("Divorce and money calculator" the Money Advice Service <www.moneyadviceservice.org.uk>); and guidance on DIY divorce or dissolution ("How to sort out your finances on divorce or dissolution" the Money Advice Service <www.moneyadviceservice.org.uk>). Submitters considered the Ministry of Justice's parenting through separation guide to be a useful example of self-help guidance: see Ministry of Justice *Making arrangements for your children: A Parenting Through Separation programme factsheet*.

⁵⁷⁹ See Law Commission *Dividing Relationship Property – Time for Change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.4]–[24.6]; and proposals in Chapters 1: Introduction and 2: Classification of this Paper.

⁵⁸⁰ Of the 656 parents/caregivers who had completed their parenting arrangements and responded to the University of Otago's initial online survey, 49 per cent had used the Ministry of Justice website whilst 25 per cent were unaware of it: Nicola Taylor "Family Law Reform in New Zealand: Research Insights" (paper presented to New Zealand Law Society The Future of Family Law Conference, Auckland, 20 September 2018) at 145.

⁵⁸¹ See for example the videos on Understanding Legal Processes hosted on the University of Otago Legal Issues Centre website: "Understanding Legal Processes" University of Otago <www.otago.ac.nz>.

⁵⁸² CABNZ submitted that:

Increasingly people are looking for [person-to-person] support outside of the court system and often through trusted community organisations such as the CAB. If organisations like the CAB are fulfilling this role, it is important that they are appropriately resourced and equipped to do so.

Submitters to the Ministry of Justice's legal aid review suggested that a "greater/more strategic usage of community law centres" would help fill the legal aid "gap". For example, using community law centres to assist with the initial administrative stages of a legal aid case would allow legal aid lawyers to focus on the more substantive legal issues of a case: Ministry of Justice *Broader Access to Justice Issues* (September 2018) at 3. The New Zealand Institute of Economic Research has identified growth potential in the Community Law network, including by increasing the level of

proposal recognises that information guides and other self-help tools will not be appropriate for everyone. The Law Council of Australia notes that self-help tools are often ineffective for people with poor legal knowledge, literacy, language and communication skills, and people with multiple and complex legal and non-legal needs.⁵⁸³ We note that some support services like this are already available, but on an ad hoc basis. Community Law Canterbury, for example, operates a Family Law Advisory Clinic one night a week at the Family Court and provides legal advice and help completing Family Court forms which can be filed on the night.⁵⁸⁴

Review access to affordable legal advice

10.35 Access to affordable legal advice is essential in ensuring access to justice for PRA matters, especially as the PRA requires partners to obtain legal advice if they want their settlement agreements to be binding.⁵⁸⁵ While we acknowledge that some submitters did not agree that legal advice should be necessary in order to make enforceable agreements, we do not propose removing this as a procedural requirement (see Chapter 8: Contracting out and settlement agreements).⁵⁸⁶

10.36 The Ministry of Justice's review of legal aid is ongoing. In light of this we do not make specific proposals on how access to affordable legal advice ought to be ensured for PRA matters. Instead we propose that the Ministry of Justice review the existing provision and funding for legal advice on PRA matters, in order to ensure appropriate access to affordable legal advice when resolving PRA matters out of court. Specific consideration should be given to:

- (a) whether the income thresholds for legal aid for PRA matters strike an appropriate balance between access to justice and responsible government spending;
- (b) whether the rates of remuneration for legal aid providers for PRA matters adequately meet the cost of the services;
- (c) improving access to legal aid lawyers undertaking PRA work; and
- (d) providing free or subsidised legal advice to assist separating partners using out of court dispute resolution processes, including through extending the scope of the Family Legal Advice Service and/or legal aid.

qualifying income eligible for Community Law services, providing in-house mediation services and facilitating pro bono services: New Zealand Institute of Economic Research *The value of investing in Community Law Centres: An economic investigation* (September 2017) at 40. See also the assistance in bankruptcy and employment disputes provided by the Litigants in Person Service developed by the Auckland Community Law Service: Darryn Aitchison "Unlocking potential through the Litigants in Person Service" (2 March 2018) New Zealand Law Society <www.lawsociety.org.nz>.

⁵⁸³ Law Council of Australia *The Justice Project Final Report - People: Building Legal Capability and Awareness* (August 2018) at 10.

⁵⁸⁴ See "Services: Outreach Services" Community Law Canterbury <www.canlaw.org.nz>.

⁵⁸⁵ Section 21F of the Property (Relationships) Act 1976 requires a lawyer to witness a partner's signature to an agreement. The lawyer must certify that they explained to the partner the effects and implications of the agreement. If inadequate advice has been given, the agreement is void.

⁵⁸⁶ We have given consideration to the proposal raised by some submitters that there should be a different mechanism for "signing off" agreements, such as obtaining a consent order from the Family Court. We are not satisfied, however, that a different mechanism to the current procedural protection of obtaining independent legal advice would be more efficient or would ensure just outcomes, given the complex questions of fact and law that often arise and the risk of injustice caused by information asymmetries and imbalances of power among partners. Transferring the procedural protections currently provided through independent legal advice to the Family Court is arguably not the most appropriate or efficient use of State resources. It is also unclear whether the Family Court would issue consent orders in the absence of independent legal advice to each party.

10.37 This work should take into account the findings of the Borrin Foundation research into how separated couples resolve their relationship property disputes due to be published in 2020.

Promote the use of out of court dispute resolution services

10.38 Our preferred approach is to encourage parties to voluntarily participate in out of court dispute resolution processes. We make the following proposals:

- (a) The PRA should include statutory endorsement of the use of voluntary dispute resolution to resolve PRA matters out of court.⁵⁸⁷ This would also resolve the current uncertainty as to whether PRA matters can be determined through arbitration (Issues Paper at [24.81]–[24.83]).
- (b) "Pre-action procedures" should be developed for PRA matters and included in the Family Court Rules 2002. The pre-action procedures should include a requirement to make a genuine effort to resolve matters out of court prior to making an application to court. This would include participating in one or more dispute resolution processes, such as negotiation, counselling, mediation, arbitration, or in other recognised dispute resolution services. Pre-action procedures are discussed further in paragraphs 10.76–10.77.
- (c) Applicants under the PRA should be required to acknowledge in court application forms that they have received information about the availability of out of court dispute resolution services.⁵⁸⁸

10.39 We have considered, but do not propose mandatory participation in dispute resolution. In our view dispute resolution should be voluntary, and this was a view shared by several submitters. In the Issues Paper we highlighted that compulsory dispute resolution raises important ethical issues as it conflicts with core dispute resolution principles such as voluntary participation by the parties, their empowerment in and ownership of their dispute and self-determination in its resolution (see Issues Paper at [24.63]). Unwilling participants may also take steps to avoid compulsory dispute resolution, or simply not engage with the process, delaying matters and potentially increasing costs further.⁵⁸⁹

⁵⁸⁷ Similar statutory endorsements are found in comparable jurisdictions. See for example the British Columbia Family Law Act SBC 2011 c 25, s 4, which emphasises that out of court dispute resolution is preferred, including encouraging resolution through agreements and appropriate family dispute resolution processes before making an application to a court; and the Ontario Family Law Act RSO 1990 c F-3, s 3, which endorses voluntary mediation as a process for resolving any matter that the court specifies.

⁵⁸⁸ We also considered whether the current duty on lawyers to advise clients of alternatives to litigation should be strengthened, for example by requiring lawyers to certify that they have provided this information (a requirement to advise on alternatives already exists under Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.4). However we did not receive any feedback that lawyers are not complying with this duty and such measures may therefore be unnecessary.

⁵⁸⁹ In a review of the 2014 reforms to the family justice system, the Ministry of Justice found that whilst the average number of applications under the Care of Children Act 2004 filed on notice across 2014/15 and 2015/16 decreased by 63 per cent from the average across 2011/12 and 2012/13, the average number of applications filed without notice for the same years increased by 69 per cent: Ministry of Justice *Family Justice: An Administrative Review of Family Justice System Reforms* (December 2017) at 14. A study to understand the causes of this increase found without notice applications were seen as the quickest way to get in front of a judge and that compulsory FDR for on notice applications was a contributing factor: Nan Wehipeihana, Kellie Spee and Shaun Akroyd *Without Notice Applications in the Family Court* (Ministry of Justice, July 2017) at [44] and [51]–[71]. The Ministry of Justice also examined the reasons why parties did not participate in FDR. Parties can be exempt from participating in FDR if domestic violence has been disclosed, if a power imbalance exists between parties, if one or both parties are unable to effectively participate or where parties would not participate in FDR. The Ministry found that 83 per cent of those who that did not participate between 1 July 2016 and 30 June 2017 did so because one of the parties would not participate. The most common

Dispute resolution works best when both parties want to engage and reach agreement, and are supported to do so.⁵⁹⁰ We also note that mandatory dispute resolution is unlikely to significantly reduce the Family Court's workload. This is because the proportion of separating partners who are currently going to court is very small, and make up a very small part of the Family Court's case load.

Consider extending a voluntary, modified FDR service to PRA matters in future

- 10.40 We do not propose extending FDR in its current form to PRA matters. As we observed in the Issues Paper, PRA matters are different in nature to parenting disputes. They will often involve complex legal and factual issues. A just outcome is dependent on full and frank disclosure and will often require the parties to have received and carefully considered legal advice (Issues Paper at [24.57]). Several submitters raised similar concerns during consultation (paragraph 10.22 above).
- 10.41 However we propose that this issue be revisited following the review of the 2014 family justice reforms, which will include examination of FDR and the decision to remove State-funded counselling. The outcome of the review may therefore lead to a FDR service (or the introduction of some other dispute resolution service that is more appropriate for PRA matters).⁵⁹¹ This may include the reintroduction of State-funded counselling to assist partners through the emotional and psychological stress of separation.⁵⁹²
- 10.42 Extending a voluntary and modified FDR service may be an efficient and effective way to provide for funded dispute resolution services for PRA matters, with the additional benefit that parenting matters and PRA matters could be resolved at the same time by the same dispute resolution service provider, if preferred.⁵⁹³ Extending FDR to PRA matters would also enable the development of standard processes for PRA mediation.⁵⁹⁴
- 10.43 If FDR were extended to PRA matters, safeguards would be necessary to ensure that FDR is appropriate in the parties' individual circumstances and that the parties are properly prepared for FDR. In particular, the parties must be emotionally prepared for the

reasons for lack of participation were that the 2nd party would not engage (40 per cent), that the 2nd party could not be reached (23 per cent), and because of the cost involved (14 per cent): Ministry of Justice *Exemptions from Family Dispute Resolution where a party did not participate* (September 2017) at 5.

⁵⁹⁰ Similar views were expressed by applicants interviewed in a study into without notice applications in the Family Court: Nan Wehipeihana, Kellie Spee and Shaun Akroyd *Without Notice Applications in the Family Court* (Ministry of Justice, July 2017) at [72].

⁵⁹¹ The Minister of Justice has commented that the Family Court reform which requires separating partners in parenting disputes to negotiate without the advice or assistance of a lawyer or judge overlooking was too much to expect and unrealistic: "Justice Minister says exes negotiating alone in Family Court over future care of their kids 'unrealistic' and 'too much to expect'" (2 August 2018) TVNZ <www.tvnz.co.nz>. In our view, funding lawyers to provide advice and/or representation in the dispute resolution process is a possible reform that could result from the Family Court review.

⁵⁹² The New Zealand Association of Psychotherapists strongly urged the review of the 2014 family justice reforms to consider the re-establishment of free counselling for couples considering separation, highlighting the negative impact conflict can have on children in particular: New Zealand Association of Psychotherapists "NZAP Press Release: Family Court Counsellors Needed" (press release, 6 August 2018).

⁵⁹³ We note that in Australia the Productivity Commission recommended that family dispute resolution be extended to property and financial matters, although it observed that issues of training and accreditation of family dispute resolution providers would need to be worked through first: Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 2, 5 September 2014) at 875–877.

⁵⁹⁴ While we have not received any feedback or concerns about the quality or consistency of existing services, we note that just under a third of respondents to the Grant Thornton survey identified formal procedural codes for private and compulsory mediation as being most beneficial in achieving effective resolution of Property (Relationships) Act matters compared to current practice: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 37.

mediation, be aware of their property entitlements and obligations, have sufficient property information and have met the proposed disclosure requirements for dispute resolution processes. Parties must also have access to independent legal advice during the process,⁵⁹⁵ and mediators must have sufficient legal training and experience in PRA matters.

10.44 We have also considered, but do not propose, providing a specific dispute resolution service for some or all PRA matters, such as low value claims. This is for several reasons:

- (a) There is no "one size fits all" dispute resolution process which is appropriate for or best meets the needs of parties in all PRA matters. Each process has different strengths and weaknesses (Issues Paper at [24.32]–[24.51]). The nature of the dispute and the characteristics of the parties will determine whether out of court resolution is appropriate in any given context and, if so, what dispute resolution service should be used. People should be able to pursue the resolution method that works for their situation.
- (b) Mandating a specific dispute resolution service for only some PRA matters (such as low value disputes) raises difficult questions around what the entry criteria should be, and how to mitigate against strategic behaviour, such as minimising the value of relationship property in order to access the service (particularly if it is fully or partially subsidised) or challenging the jurisdiction of the service as a delay tactic.
- (c) We are not persuaded that providing a separate dispute resolution service would be more effective or cost efficient than the status quo. Many speed and cost gains accrue in alternative dispute mechanisms because processes are simple and parties must self-represent.⁵⁹⁶ But PRA matters are often complex and many people want and need legal advice and assistance. Also, because parenting disputes and PRA matters often overlap, it would be inefficient to require parties to participate in two different dispute resolution services when the issues could be properly resolved in one. It is also unclear whether there would be a sufficiently high volume of PRA matters that would warrant the cost of setting up and running a new dispute resolution service.

10.45 For these reasons, we think that the resources that would be needed to meet the costs of establishing and maintaining a separate dispute resolution service would be better invested in improving access to legal advice and improving efficiencies in the Family Court processes to reduce costs and delay.

⁵⁹⁵ In Chapter 8: Contracting out and settlement agreements, we recommend retaining the procedural requirements in s 21F of the Property (Relationships) Act 1976 so each party must still receive independent legal advice before any mediated agreement can be enforced.

⁵⁹⁶ The Disputes Tribunal, for example, is available to settle many types of civil claims up to a value of \$15,000, or \$20,000 if parties agree. Parties cannot have legal representation at the hearing and the referee will make a decision which is binding on the parties if they cannot agree between themselves. For more information see Disputes Tribunal Act 1988; and "Disputes" (14 March 2017) Disputes Tribunal of New Zealand <www.disputestribunal.govt.nz>.

DISCLOSURE

10.46 Achieving a just and efficient resolution of PRA matters in and out of court relies on both partners having sufficient information about each other's finances. This includes information about jointly and separately owned property, investments, bank accounts, income streams and any other property interests, including beneficial interests under a trust. Failing to disclose all relevant financial information to the other partner can increase costs, delay resolution and result in unjust outcomes.

Current law

10.47 There is no express duty of disclosure on partners in the PRA. However, the courts have confirmed that, in the context of PRA matters that go to court, the law requires "total disclosure and cooperation" between parties,⁵⁹⁷ and have endorsed an approach that recognises that parties "are under an obligation to make full and frank disclosure of all relevant information", in order to ensure that the court is in a position to make appropriate orders under the PRA.⁵⁹⁸

10.48 The Family Court Rules 2002 apply to PRA matters that go to court (PRA proceedings), and provide for initial disclosure by requiring each party to file an affidavit of assets and liabilities in the prescribed P(R)1 form.⁵⁹⁹ If the applicant fails to file an affidavit of assets and liabilities with their application, the proceedings can be dismissed or stayed until the affidavit is filed and served.

10.49 If there has been inadequate disclosure of assets and liabilities, there are several orders a court can make to require additional disclosure, including an order for discovery (Issues Paper at [25.9]). Discovery is the process through which each party identifies the documents which are relevant to the proceeding and discloses those documents to the other party (Issues Paper at [25.11]). In this chapter we use the term "disclosure" to refer to the overarching duty to disclose all relevant information, and the term "discovery" to refer to the specific process for identifying and disclosing relevant documents under the Family Court Rules.

10.50 There are several possible consequences for failing to comply with disclosure obligations (Issues Paper at [25.12]):

- (a) A court can impose procedural consequences, including staying or dismissing proceedings, imposing restrictions on a party's participation in the proceedings until disclosure obligations are met, and ultimately contempt of court.
- (b) When hearing the issues in dispute, a court can draw inferences that are adverse to the non-disclosing party's position.⁶⁰⁰

⁵⁹⁷ *M v B* [2006] 3 NZLR 660 (CA) at [49].

⁵⁹⁸ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

⁵⁹⁹ Family Court Rules 2002, r 398 and sch 8 form P(R) 1. Parties must set out full details of all of their assets, including all legal and beneficial interests, and liabilities, as well as details of any income, capital payments, and dealings in assets since the parties separated. The prescribed form provides for supporting documents such as valuations, proof of deposits and financial statements to be attached to the affidavit.

⁶⁰⁰ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186]. In British Columbia the court may draw an adverse inference and penalise non-disclosure directly from the pool of relationship property. In *Cunha v Cunha* [1994] BCJ No 2573 (SC) the Supreme Court of British Columbia held at [13] that if non-disclosure is established at any stage, there is an onus on the non-disclosing party to satisfy the court that full disclosure has been made. If the court is satisfied of this, costs might be the appropriate penalty. Where a non-disclosing party has not satisfied the court that full disclosure of assets has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the

- (c) Non-disclosure can be taken into account in an award of costs under section 40 of the PRA.

- 10.51 There is limited provision for disclosure when resolving PRA matters out of court. The Family Court Rules enable a party to apply to the Family Court for discovery before proceedings are filed, but only if it is impossible or impractical for the intending applicant to formulate their application to the court without reference to a document or class of documents.⁶⁰¹ The provisions in the PRA relating to contracting out and settlement agreements do not expressly refer to disclosure obligations. However an agreement can be set aside if giving effect to the agreement would cause serious injustice, having regard to "whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made" (section 21J(4)(c)).
- 10.52 Lawyers have professional responsibilities to the court and their client in relation to disclosure (see Issues Paper at [25.59]). Lawyers who breach these requirements can face disciplinary action and can be found in contempt of court for failing to comply with an order or direction of the court.

Issues

- 10.53 PRA matters have unique characteristics which can make disclosure challenging (Issues Paper at [25.30]–[25.34]). They are different from most other Family Court matters because they "are not so much about personal relationships as they are about property".⁶⁰² PRA matters often involve complex legal and factual issues, such as valuation issues, disputes over the classification of property and issues to do with trust property. But PRA matters also have an emotional component that is often not present in other civil cases, and "all too often one [party] is intent on causing financial or psychological harm to the other".⁶⁰³ Disclosure can be even more challenging if one partner has greater knowledge of the couple's financial affairs. This can put the other partner at a distinct disadvantage on separation.
- 10.54 These unique characteristics emphasise the need for effective disclosure obligations and penalties for non-compliance. However the current law and processes are inadequate. This is evident from the Grant Thornton survey of practitioners which indicated that non-disclosure is the most problematic issue that PRA lawyers face.⁶⁰⁴ Specific issues include:
- (a) There is no express disclosure obligation on partners resolving PRA matters out of court, and no prescribed process for making disclosure, including when partners enter into contracting out agreements under section 21, or settlement agreements under section 21A.

disclosed assets. The court may then vest all disclosed assets in the other party on the basis of equal division between the parties. See also *Laxton v Coglon* 2008 BCSC 42, [2008] BCJ No 45. An adverse inference attributing income to a non-disclosing party has since been incorporated in legislation through s 213 of the Family Law Act SBC 2011, c 25.

⁶⁰¹ Family Court Rules 2002, r 140.

⁶⁰² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 25.

⁶⁰³ *Brown v Sinclair* [2016] NZHC 3196 at [3].

⁶⁰⁴ Participants were asked to "select the top three problematic issues that you most commonly encounter in your relationship property cases". Non-disclosure of information was the most common answer, being selected by 67 per cent of respondents: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 36. The survey also found that the second most common instruction to forensic accountants (17 per cent) is the identification of undisclosed assets and income (at 27).

- (b) If disclosure obligations are not met in PRA proceedings, the court process places the onus on the partner without the information to take further action, incurring additional cost and delay. Often this will be the partner in a more vulnerable financial position. Lawyers may therefore be reluctant to use options for seeking further disclosure except as a last resort.⁶⁰⁵
- (c) The lack of a structured case management process for PRA proceedings, with prescribed timeframes for disclosure and other procedural steps, means that it is too easy for one party to slow the process down, for example by filing incomplete information.

Results of consultation

10.55 A clear theme of consultation was that the current disclosure obligations and penalties for non-compliance do not facilitate inexpensive, simple, and speedy resolution as is consistent with justice, contrary to section 1N(d) of the PRA. NZLS submitted that:

[T]he lack of disclosure and absence of clear rules around disclosure for out of court resolution is the single largest impediment to speedy and fair resolution of relationship property matters.

10.56 NZLS said that, while "all section 21 agreements currently contain clauses that each party certifies their full and frank disclosure to the other party", the difficulty is that without a statutory obligation behind disclosure, it may take months of correspondence to secure full disclosure in order to finally reach agreement.

10.57 Several submitters also commented on the imbalance of power and cost implications resulting from information asymmetries between partners. The Judges of the Family Court noted that:

Ultimately, the party who complies with their obligations of disclosure suffers financially from the failures and inaction of the other party who withholds information to cause intentional delay and put pressure on the other party.

10.58 Some practitioners noted a common experience where one partner simply does not respond to the other partner's attempts to resolve PRA matters and does not engage a lawyer. The partner seeking to resolve PRA matters is then left with no option but to file in court. Practitioners considered this particularly problematic as the filing fees are prohibitive for many and costs are rarely ordered for refusal to engage in pre-court negotiations.

Options for reform

10.59 In the Issues Paper we expressed our preliminary view that out of court resolution should be supported by clear rules about what information separating partners need to share with each other. We thought that a prescribed process, like the pre-action procedures in

⁶⁰⁵ The Grant Thornton survey found that whilst participants considered non-disclosure of information by the parties as the most problematic area (67 per cent of respondents), only two in five participants reported they had made application for disclosure under rr 140–141 of the Family Court Rules 2002: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 24. Grant Thornton suggested that there may be real benefit in further education for family lawyers of the tools and consequences available. They also noted at 24 that the responses suggest that "practitioners may be seeking additional tools with more severe and enforced outcomes for parties who fail to disclose information".

Australia, would be a good model for New Zealand (see Issues Paper at [24.69]–[24.73]).⁶⁰⁶

10.60 We also identified the following options for reform to improve disclosure when PRA matters go to court (Issues Paper at [25.52]–[25.61]):

- (a) confirming the duty of disclosure in the PRA or Family Court Rules;
- (b) amending the Family Court Rules to improve the quality of initial disclosure;
- (c) imposing stricter consequences for party non-disclosure, by providing better guidance about when a court should award costs, imposing a financial penalty, such as a fine or civil pecuniary penalty, or penalising non-disclosure directly from the relationship property pool; and
- (d) introducing sanctions for lawyers in connection with client non-disclosure.

Results of consultation

Improving disclosure obligations

10.61 There was broad support from a number of organisations, members of the judiciary and practitioner and academic experts for clearer and stronger disclosure obligations applying both in and out of court.

10.62 A number of submitters supported an express statutory duty of disclosure. NZLS submitted that such a duty should require full and ongoing disclosure, should clearly apply to resolution out of court as well as in court, and should be expressly provided for in the principles of the PRA. The Judges of the Family Court also supported codifying the common law obligation of disclosure in a statutory duty. Their Honours also considered that the duty should be binding on third parties, including trusts. Divorce Partners supported the imposition of "an explicit primary statutory obligation to their relationship partner, and to the State, to promptly disclose financial information with the upmost good faith".

10.63 A prescribed pre-action procedure was also supported by NZLS. It submitted that such a procedure, similar to that in Australia, would promote consistent and uniform procedures and ensure that disclosure is provided. It would also assist to prevent delay by one party stonewalling settlement through failure to provide full and timely disclosure. NZLS did not consider that providing a general disclosure bundle before court proceedings are issued would be onerous, as such documents already have to be collated and provided so that the advising lawyers can complete due diligence. NZLS considered tailored disclosure could then be sought for items outside the scope of this general disclosure, where parties dispute a specific issue or the sufficiency of general disclosure.

10.64 The Judges of the Family Court agreed that improving disclosure obligations will simplify the court process and help reduce delay. However their Honours submitted that a general obligation of discovery of all documents at the outset of proceedings could add significant cost to parties and create further delay, by inundating the other party with large quantities of information. Their Honours supported a more tailored and sophisticated approach to disclosure, and submitted that the Family Court Rules should

⁶⁰⁶ A pre-application protocol also applies in family courts in England and Wales and outlines the steps parties should take to seek and provide information from and to each other prior to going to court. See United Kingdom Ministry of Justice "Practice Direction 9A – Application for a Financial Remedy", which supplements pt 9 of the Family Procedure Rules 2010 (UK).

establish a clear procedure for initial disclosure tailored to the needs of PRA proceedings. One judge of the Family Court submitted separately that the High Court rules relating to discovery be incorporated into the Family Court Rules.

- 10.65 Some practitioners also thought that the disclosure requirements should be clearer, and applicants should not be able to file the PR(1) affidavit unless all supporting information was attached. Other practitioners highlighted concerns around the burden of excessive disclosure. One practitioner considered that judges need to use their powers more to stop overuse of discovery applications.

Stricter consequences for non-disclosure

- 10.66 Stricter consequences for non-disclosure received support from many submitters and practitioners we spoke with at consultation meetings. The Judges of the Family Court noted, however, the need to be alive to the issue of fairness with respect to unrepresented litigants, who may not be aware of their procedural obligations.
- 10.67 NZLS and several practitioners supported stricter consequences through costs awards, with some practitioners supporting the automatic imposition of costs. But there were a range of views on the efficacy of current costs awards. One practitioner submitted that awards have been significant and are a good deterrent particularly in the High Court. However another practitioner submitted that the prospect of an adverse costs award was not a sufficient deterrent. Other practitioners told us that existing sanctions for behaviour causing delay, including non-disclosure, are not used appropriately and that Family Court judges "put up" with more than High Court judges in this regard. Some practitioners told us that interim costs orders were difficult to get. A judge of the Family Court supported costs being awarded on an escalating basis, so that if non-compliance was ongoing the costs award would increase.
- 10.68 Some submitters supported the adoption of financial penalties for non-disclosure, including NZLS and Divorce Partners. NZLS considered civil pecuniary penalties to be appropriate, or criminal sanctions for the most egregious cases.⁶⁰⁷ The Judges of the Family Court submitted that, if financial penalties are proposed, they should contain a discretionary element and be coupled with the need to give a prior specific warning before imposing a penalty, in order to avoid unduly harsh penalties on unrepresented litigants. One attendee at a public meeting considered non-compliance should be a crime and not left up to the applicant to incur further costs in applying for costs orders.
- 10.69 NZLS, practitioners at one consultation meeting and three members of the public supported penalising non-disclosure directly from the relationship property pool, particularly where one party has concealed property through non-disclosure.

Sanctions for lawyers

- 10.70 Submitters had mixed views on whether there should be stronger sanctions for lawyers in connection to party non-disclosure. NZLS said it was not aware of concerns regarding widespread non-compliance by lawyers relating to non-disclosure, and submitted that existing avenues (disciplinary processes and court sanctions, such as contempt of court) are sufficient to address this issue.

⁶⁰⁷ NZLS's submission noted that it was uncertain whether the criminal sanctions for disposing of family chattels (the only current criminal sanction) has ever been actioned as a criminal offence by the police.

- 10.71 The Judges of the Family Court noted that the Family Court does not have the power to award costs against a party's lawyer, but has, on occasion, awarded costs against a party, coupled with the recommendation that the lawyer pays the costs. Their Honours submitted that lawyers who are seen as complicit in tactics that cause intentional delay and put pressure on the other party should not be immune to reproach. However, they considered that introducing the power to award costs against lawyers could lead to an increase in "sideshow litigation" to dispute those orders, which would conflict with the principle of inexpensive, simple and speedy resolution of PRA matters. One judge of the Family Court submitted separately that additional sanctions for lawyers are unnecessary, because parties soon become unhappy with their lawyers if a judge has coupled a costs award with the recommendation that the lawyer pays.
- 10.72 Practitioners we spoke with had mixed views. Some supported the imposition of costs orders against lawyers, while others told us they did not generally encounter problems with disclosure as they had a collegial and supportive local bar of family lawyers. Divorce Partners supported judges having explicit powers to "habitually and by default make costs orders against recalcitrant solicitors", as part of a broader move to "shift the burden of litigation to solicitors".

Preferred approach

P57

The PRA should include an express duty of disclosure.

P58

A Family Court Rules Committee should be established for the purpose of developing specific procedural rules and guidance for PRA matters.

P59

The Family Court Rules should be amended to include:

- a. pre-action procedures that set out dispute resolution and disclosure requirements prior to making an application to the court; and
- b. a clear procedure for initial and subsequent disclosure tailored to the needs of PRA proceedings.

P60

Clearer and stricter consequences for non-disclosure should be provided. We propose that:

- a. the consequences for non-compliance with disclosure obligations should be clearly set out in the Family Court Rules;
- b. guidance should be provided on the imposition of costs and other consequences for non-disclosure; and
- c. case management processes that facilitate application for, and imposition of, costs for non-disclosure should be considered.

P61

The Ministry of Justice should:

- a. provide clearer guidance to parties about how to complete key court documentation, including information about the potential consequences of non-compliance; and
- b. develop process guides to better prepare self-represented litigants for court processes.

10.73 Our proposals are designed to better encourage a culture of compliance with disclosure obligations when resolving PRA matters in and out of court. They should facilitate more focused and structured negotiations, because lawyers and dispute resolution providers will have a baseline of documents to refer clients to, which will in turn help narrow any issues in dispute.

An express duty of disclosure

10.74 The PRA should provide that parties have a continuing duty to give timely, full and frank disclosure of all relevant information. Including the duty in the PRA, rather than the Family Court Rules, is more accessible and sends a clear message that the duty applies to the resolution of all PRA matters.⁶⁰⁸ It should also apply whenever partners enter into a contracting out agreement under section 21 of the PRA, or resolve PRA matters out of court by entering into a settlement agreement under section 21A of the PRA. The duty of disclosure will work in conjunction with the disclosure rules in the Family Court Rules (see discussion below). We are considering whether the duty of disclosure ought to extend to third parties, such as trustees, and will address this in our final report.

Separate procedural rules for PRA matters

10.75 We propose that separate procedural rules for PRA matters should be developed and included as a sub-part of the Family Court Rules. In our view, the unique characteristics of PRA matters (see paragraph 10.53) mean that they are sufficiently different to other family or civil matters so as to justify the development of rules that are tailored to the particular needs of parties in PRA matters. We propose that a Family Court Rules committee be established to develop and supervise these rules.⁶⁰⁹

New pre-action procedures for PRA matters

10.76 We propose establishing new pre-action procedures for PRA matters. The pre-action procedures should sit within the Family Court Rules.⁶¹⁰ This will keep all rules relating to the Family Court's jurisdiction and PRA matters in one place, ensure currency and consistency with the rules governing practice in court, and ensure ongoing supervision and development by the Family Court Rules Committee. The pre-action procedures will apply to negotiation and other dispute resolution practices undertaken prior to a partner

⁶⁰⁸ We have considered but do not prefer the suggestion by NZLS that the duty of disclosure should be included as a principle in the Property (Relationships) Act 1976 (PRA). In our view, a duty of disclosure operates at a subordinate level to the principles. It facilitates the principle that PRA matters should be resolved as inexpensively, simply, and speedily as is consistent with justice (s 1N(d)). We note that the Australian Law Reform Commission has recently proposed including disclosure obligations in the Family Law Act 1975 (Cth) rather than in the court rules, as is currently the case: Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP86, October 2018) at [5.40].

⁶⁰⁹ A Family Court Rules committee could be convened as a sub-committee of the Rules Committee established by s 51B of the Judicature Act 1908 and continued by s 155 of the Senior Courts Act 2016. Consequential amendments to the Senior Courts Act 2016 and the Family Court Act 1980 would be necessary. Consequential amendments to the High Court Rules 2016 would also be necessary for proceedings transferred to the High Court under s 38A of the Property (Relationships) Act 1976.

⁶¹⁰ The Family Court Act 1980 may need to be amended to expressly enable regulation of practices outside the court through the pre-action procedures. This is because the Family Court Rules 2002 are made pursuant to s 16A of the Family Court Act, which permits the Governor-General, by Order in Council, to make rules "regulating the practice and procedure of the Family Court in proceedings that the Family Court has jurisdiction to hear and determine" (s 16A(1)).

applying to court.⁶¹¹ The procedures must be complied with unless there are good reasons for not doing so.⁶¹²

10.77 The pre-action procedures should set out disclosure requirements that must be met in order to give effect to the general duty of disclosure in the PRA. We consider the disclosure requirements in the Australian pre-action procedures for financial cases provide a good model for PRA proceedings in New Zealand (see Issues Paper at [24.71]–[24.72]).⁶¹³ When developing the pre-action procedures specific consideration should also be given to:

- (a) whether the pre-action procedures should specify timeframes for completing disclosure requirements;⁶¹⁴ and
- (b) how the pre-action procedures can facilitate easy access to a court in order to enforce disclosure requirements.

New rules of disclosure for PRA proceedings

10.78 We propose that the Family Court Rules be amended to include a clear procedure for initial and subsequent disclosure, tailored to the needs of parties in PRA proceedings. The rules should:

- (a) include initial disclosure requirements, such as a non-exhaustive list of documents to be provided, subject to agreement between the parties that particular documents are not required;
- (b) provide for tailored discovery beyond those initial disclosure requirements; and
- (c) include timetabled disclosure requirements in conjunction with improved case management processes (see paragraphs 10.108–10.112 below).

10.79 In developing the new rules of disclosure, consideration should be given to whether the current requirements in the High Court Rules and District Court Rules provide a helpful model for PRA proceedings.⁶¹⁵

⁶¹¹ We note that respondents to the Grant Thornton survey suggested a uniform procedural code for s 21 agreements (including process and information disclosure) as an area of relationship property reform: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 25. While not a mandatory procedural code, the pre-action procedures will likely inform the development of contracting out agreements. We discuss contracting out agreements in Chapter 8: Contracting out and settlement agreements.

⁶¹² Under the Australian model, circumstances in which a court may accept that it was not possible or appropriate for a party to follow the pre-action procedures include cases that involve urgency, allegations of family violence or where there is a genuinely intractable dispute: Family Law Rules 2004 (Cth), sch 1 pt 1 cl 1(4). See also existing exemptions from participating in Family Dispute Resolution in s 12 of the Family Dispute Resolution Act 2013 and s 46E of the Care of Children Act 2004.

⁶¹³ Family Law Rules 2004 (Cth), sch 1. We note that some submissions to the Australian Law Reform Commission's Review of the Family Law System indicated that compliance with pre-action procedures is very limited: Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at [5.28]. It is not clear whether compliance issues relate to disclosure obligations or other aspects of the pre-action procedures. We will however give further consideration to options for promoting compliance with pre-action procedures for PRA matters prior to completing our final report.

⁶¹⁴ Minimum timeframes for exchanging a notice of intention to claim are provided in the Australian procedures but there are no specific timeframes for completing other elements in the procedures: Family Law Rules 2004 (Cth), sch 1 pt 1 cls 3(5) and (6). This recognises that, in addition to disclosure requirements, those procedures provide a framework for out of court negotiation and resolution and strict timeframes are not appropriate in those circumstances.

⁶¹⁵ High Court Rules 2016 rr 8.8–8.10 and sch 9 pt 1 cl 3; and District Court Rules 2014, rr 8.8–8.10.

Clearer and stricter consequences for party non-disclosure

- 10.80 We propose that there should be stricter consequences for non-compliance with disclosure obligations, and that these consequences should be clearly set out in the Family Court Rules.⁶¹⁶
- 10.81 In our view, stricter consequences for non-disclosure should be imposed through penalty costs orders, rather than through a separate criminal or civil pecuniary penalty regime, or by penalising non-compliance directly from the relationship property pool. We consider that an improved costs regime appropriately addresses the nature and impact of non-disclosure, as it both penalises non-compliance and provides relief to the other party for escalated costs resulting from non-compliance. We also think that the court is the most appropriate body to impose a penalty, and that it should be able to do so at its discretion. We do not, therefore, consider that a separate penalty regime is necessary or desirable.⁶¹⁷ Nor do we think it would be the most cost-efficient or effective mechanism to address non-disclosure.⁶¹⁸ As costs orders provide financial relief to the other party, additional powers to penalise non-compliance directly from the relationship property pool are unnecessary.
- 10.82 We acknowledge the concerns of some submitters about the efficacy of costs orders as a consequence of non-compliance. We propose that the Family Law Rules Committee provide guidance through a Practice Note about when costs and other consequences for non-disclosure should be imposed to ensure they are a meaningful deterrent and applied consistently. We also propose that consideration be given to improving the court's ability to impose penalty costs during proceedings. This could include the escalation of costs as non-compliance continues. Consideration should also be given to providing a mechanism for the application for, and imposition of, costs for non-compliance with disclosure in the pre-action procedures.
- 10.83 To assist parties to comply with their disclosure requirements, we propose that the Ministry of Justice provide clearer guidance about how to complete key court documentation, such as the PR(1) and supporting affidavit, and about the potential consequences of non-compliance in that court documentation. The Ministry should also develop process guides to better prepare self-represented litigants for court processes.⁶¹⁹

No additional sanctions for lawyers

- 10.84 We do not propose introducing of additional sanctions for lawyers in connection with non-disclosure, for the reasons outlined in the Issues Paper (Issues Paper at [25.61]). We

⁶¹⁶ Stronger penalties and enforcement for parties' failure to disclose information was viewed by practitioners in the Grant Thornton survey as the third most beneficial area of relationship property reform, after speedier resolution in the Family Court and specialist relationship property judges and relationship property tracks in Family Court: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 37. We make proposals to address delay in the Family Court, and consider specialist PRA judges, in the following section of this chapter on resolving PRA matters in court.

⁶¹⁷ We are not aware of any criminal or civil pecuniary penalties in New Zealand that apply to breaches of rules or court orders regarding disclosure.

⁶¹⁸ Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* at ch 22–27.

⁶¹⁹ See for example the "How to run your family law case kit" from Victoria Legal Aid available at <www.legalaid.vic.gov.au>. Assisting self-represented litigants by developing self-help tools may go some way to addressing concerns raised with us by some practitioners that such litigants inappropriately receive extra help from the court.

also agree with the Judges of the Family Court that introducing a power to make an order for parties' lawyers to pay costs could increase litigation and this would not facilitate inexpensive, simple and speedy resolution of PRA matters as is consistent with justice.

RESOLVING PRA MATTERS IN COURT

10.85 When separating partners cannot resolve PRA matters themselves, they can apply to the Family Court for orders dividing their property. Below we address practical issues with the Family Court process that can hinder the just and efficient resolution of PRA matters.

10.86 In Chapter 26 of the Issues Paper we also identified issues with the jurisdiction of the Family Court and High Court in PRA proceedings. These issues will be addressed in our final report.⁶²⁰

Issues

Delays in the Family Court

10.87 PRA proceedings take a long time to resolve (Issues Paper at [25.24]–[25.29]).⁶²¹ This can have significant financial and emotional implications for the parties. For many, the costs and delays associated with going to court "remain at least as daunting as the bewildering complexity of the law itself".⁶²²

10.88 As noted at paragraph 10.53, PRA matters have unique characteristics which are likely to contribute to delays. Tactics aimed at delaying the court process and forcing the other party to incur added expense are evident in some PRA proceedings. As the Ministry of Justice has previously observed, when one party fails to comply with the court process, the onus is on the other party to take action, often placing that party in a vulnerable position.⁶²³

10.89 Because of the unique characteristics of PRA proceedings, Family Court processes must facilitate timely progression of PRA proceedings and disincentivise tactics aimed at delaying the court process and incurring added expense. In the Issues Paper we observed that some aspects of the current court process may be contributing to unreasonable delay in PRA proceedings (Issues Paper at [25.36]):

- (a) First, relying on affidavit evidence in the PR(1) form to identify matters in issue is problematic as affidavits are often inadequate or incomplete and can stray into inappropriate areas. There is also no obligation to disclose defences and no clear

⁶²⁰ This will include consideration of the Trusts Bill 2017 (290-1). A report of the select committee was due on 31 October 2018. Clause 136 of the Trusts Bill would amend the jurisdiction of the Family Court to give the Court the tools necessary to deal with trust matters closely related to proceedings properly before it, such as Property (Relationships) Act 1976 matters.

⁶²¹ Respondents to the Grant Thornton survey ranked systemic delay in the Family Court as the third most problematic area in relationship property cases (57 per cent of respondents) and speedier resolution in the Family Court as the most beneficial reform in achieving effective resolution of PRA matters compared to current practice (73 per cent of respondents): Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 36–37.

⁶²² Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive Seminar, Wellington, September 2016) 151 at 152.

⁶²³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23, discussed in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.34].

process for responding to claims or defences. These and other problems highlighted in the Issues Paper can lead to ongoing interlocutory applications for further evidence, which is sometimes used as a litigation tactic to add cost and delay to the court process (Issues Paper at [25.38]).

- (b) Second, there is no structured case management process with prescribed timeframes that all PRA proceedings must follow. This means that it is too easy for one party to slow the process down, for example by filing incomplete information, making multiple interlocutory applications or seeking multiple adjournments. As the Ministry of Justice has previously observed, "[t]he lack of clear processes [in the Family Court] has compromised the Court's efficiency and cost effectiveness and has contributed to delay".⁶²⁴
- (c) Third, current practice is not to allocate a hearing date early in the process, which means that parties are not incentivised to enter into settlement negotiations early on or to arrange their case in an efficient manner.

10.90 Since publication of the Issues Paper, two measures have been commenced to address delay in the Family Court.

- (a) In May 2018 the Chief District Court Judge announced that up to 100 judge days a month would be diverted to the Family Court from the criminal jurisdiction. Her Honour observed that the combination of several factors were "placing unsustainable pressure on workloads", and that "[i]n the Family Court especially, the unrelenting pressure is now creating unacceptable delay".⁶²⁵
- (b) The Judges of the Family Court have introduced a new "Docket System" for PRA proceedings in a number of the larger Family Courts around the country. The system is designed to address delay in PRA proceedings through closer case management of PRA cases.⁶²⁶

Other issues with the Family Court process

10.91 We have also identified several other issues with the Family Court process that may be preventing the just and efficient resolution of PRA matters:

- (a) **The specific procedural tool for PRA proceedings in section 38 of the PRA is underutilised.** Section 38 enables a court to appoint a person to inquire into and report on facts in issue between the parties. In the Issues Paper we identified a number of reasons why this power may be underutilised, including the lack of procedural powers for the person appointed to carry out the inquiry, the limitation of

⁶²⁴ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 54. As a result of that review a new standard case management process was introduced, but was limited to applications under the Care of Children Act 2004. As noted at paragraph 10.3(b), in August 2018 the Government appointed an Independent Panel to examine these and other reforms.

⁶²⁵ Chief District Court Judge Jan-Marie Doogue "Pressures spell redeployment of judicial workforce" (24 May 2018) New Zealand Law Society <www.lawsociety.org.nz>.

⁶²⁶ NZLS submitted:

The intention of the new docket system is to give these cases better focus and achieve consistency in how they are managed. The judges have been placed into teams of two. Each judicial team is allocated a number of files and deals with all interlocutory matters on those files. The narrative affidavits are filed and counsel are prepared to address discovery issues at the first conference. The new system is in its early stages but it intends to make discovery orders at that initial conference where appropriate, aligned to the kind of disclosure required in the High Court Rules, and to introduce standard directions for relationship property cases.

inquiries in practice to discrete topics such as valuation issues, and the potential delay and expense resulting from undertaking an inquiry (Issues Paper at [25.63]).

- (b) **Fees for PRA proceedings may be a barrier to accessing justice for some vulnerable parties.** In the Issues Paper we observed that the number of PRA matters going to court has declined significantly in the period from 2004 to 2016, and that the decrease was steeper following changes to the Family Court fee structure in 2012, resulting in a noticeable reduction in the proportion of female applicants (Issues Paper at [23.28]).⁶²⁷
- (c) **The unique characteristics of PRA matters may justify a different approach to costs.** The PRA gives the Family Court the power to make orders as to costs for any proceeding, step in a proceeding or any matter incidental to a proceeding as it thinks fit (section 40). Outside of imposing penalty costs, traditionally the Court took the view that PRA proceedings were a "mutual approach to the court for assistance in dividing property" and therefore each party should bear their own costs (Issues Paper at [25.21]–[25.23]). More recently, however, the growing trend is for the Court to apply the civil costs regime in the District Court Rules 2014 to PRA proceedings, and the guiding principle of this regime is for the party who fails to pay costs to the party who succeeds.⁶²⁸ The unique characteristics of PRA proceedings (see paragraph 10.53) may, however, justify a different approach.

Results of consultation

10.92 Unreasonable delay in the Family Court and its impact on PRA proceedings was raised as a significant concern by a number of submitters. Submitters told us of cases taking several years to resolve, with some taking more than 10 years. One member of the public whose case still had not been heard 6 years following separation submitted that the experience had been "long, unnecessarily complicated, prohibitively expensive, punishing and cruel". A number of members of the public felt that lawyers contributed to delays by "dragging out the process" and "unnecessarily complicating matters" because they have a "vested interest".

10.93 The Judges of the Family Court, NZLS and almost all practitioners who raised delay as an issue identified the resourcing of the Family Court as a key cause of delay. NZLS said that lack of judicial resourcing and court time meant that the timeframes prescribed in the current Family Court Case Management Practice Note could not be met.⁶²⁹ NZLS submitted that this is exacerbated in PRA proceedings due to the triage system which

⁶²⁷ We note the Chief Justice's recent comments concerning the "barriers to access to the court provided by fees which seek to recover from litigants the costs of the provision of the courts": Sian Elias, Chief Justice of New Zealand "Towards Justice: Reflections on the system and society" (2018 Sir John Graham Lecture, Auckland, 10 August 2018). Fees to apply for an order about relationship property are \$700 and fees for a hearing about relationship property in the Family Court are \$906 per half day or part of a half day. In contrast, the fee to apply for a Dissolution Order is \$211.50, for a Parenting Order (or to vary or discharge a Parenting Order) is \$220 and other applications to the Family Court do not have a fee. An applicant can ask for the court to waive the fee if they are experiencing financial hardship (including if the applicant receives legal aid).

⁶²⁸ However we note that in the Grant Thornton survey, over half of respondents (55 per cent) indicated they rarely obtained costs, with a further 34 per cent saying they had never obtained costs at the conclusion of a Family Court hearing. Of those practitioners who said they had obtained costs at the conclusion of a hearing (66 per cent of practitioners), a majority (56 per cent) indicated scale costs were ordered, with the remainder (44 per cent) indicating that costs awarded were at the court's discretion: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 29.

⁶²⁹ NZLS noted, however, that causes of delay can differ from registry to registry.

prioritises Care of Children Act, Hague Convention and Domestic Violence Act cases (and the significant number of without notice cases filed in these proceedings) ahead of PRA matters. Practitioners also noted the impact of the triage system on PRA cases. One practitioner told us that a case had taken 18 months to get to a judicial settlement conference when litigation usually takes 18 months in total. Another practitioner said it can be six months between judicial conferences "which is exhausting". Some practitioners observed that resourcing and getting court time were particular problems in smaller centres. One practitioner said they were "ashamed" of the Family Court delays in their regional court, and that there "was nothing the judges can do as they are hugely overworked".

- 10.94 There was broad agreement that the lack of a prescribed case management process with specific timetabling for PRA proceedings was problematic, and that the Family Court Rules are out of date and require reform in a number of areas. The Judges of the Family Court said that the Family Court Rules are "long overdue for an update". A Family Court judge submitting separately observed that the Rules had not received satisfactory consideration for well over 25 years. NZLS also submitted that the Family Court Rules have needed updating for many years.
- 10.95 Several submitters thought that the fees for filing PRA proceedings, and the risk of costs being awarded against the "unsuccessful" party, created significant access to justice issues, especially for vulnerable parties. NZLS observed that fees for PRA proceedings are significantly higher than filing fees for parenting orders and submitted that this creates unreasonable impediments for clients trying to resolve issues when they have reached an impasse. One practitioner considered that the growing trend to apply the civil costs regime had "serious and scary consequences" for applicants, particularly applicants for maintenance.
- 10.96 Submitters' views on specific improvements to the Family Court process are considered under options for reform below.

Options for reform

- 10.97 In the Issues Paper we identified several options for reform to improve the Family Court process for PRA proceedings and reduce delay:
- (a) introducing pleadings for PRA proceedings, or requiring parties to file a memorandum of issues before the first judicial conference, in order to better define the matters in issue between the parties (Issues Paper at [25.37]–[25.41]);
 - (b) introducing a more structured case management process (Issues Paper at [25.42]–[25.48]; and
 - (c) encouraging better use of section 38 inquiries (Issues Paper at [25.62]–[25.65]).

Results of consultation

Mixed response to introducing pleadings for PRA proceedings

- 10.98 There was a mixed response as to whether pleadings should be introduced for PRA proceedings. Practitioners at three meetings and one member of the public supported pleadings, potentially in conjunction with improvements to the PR(1) affidavit. One judge of the Family Court supported pleadings provided the Court could remove the statement of claim or response if inappropriately drafted.

10.99 NZLS, the Judges of the Family Court and one practitioner preferred requiring parties to identify the matters in issue in a memorandum of issues to be filed before the first judicial conference. NZLS submitted that a requirement to file formal pleadings in PRA proceedings was neither necessary nor desirable, and that the current documents are useful and appropriate provided they are properly completed. It also submitted that the list of issues should be able to be amended if required as the case progresses.⁶³⁰ The Judges of the Family Court did not favour requiring formal pleadings in PRA proceedings, observing that issues and entitlements cannot always be identified until parties have received full disclosure. Their Honours recommended amending the Family Court Rules to prescribe exactly what information should be included in the memorandum and provided a suggested list of information. One practitioner also supported a memorandum of issues, noting this was part of the PRA "Docket System" trial, and considered that introducing pleadings would be "too hard" on lay litigants.

More prescriptive case management is necessary

10.100 The introduction of more prescriptive case management processes and timetabling was broadly supported by submitters on this issue, including the Judges of the Family Court, one judge of the Family Court submitting separately, NZLS and practitioners. The Judges of the Family Court submitted, however, that the large volume of cases dealt with in the Family Court means the Court would not be able to adhere to the strict timeframes in the High Court Rules case management process. In addition, the variability of the Family Court Judges' roster would create practical limitations to implementing a similar scheduling regime in PRA proceedings in the Family Court.

10.101 NZLS and the Judges of the Family Court supported adapting aspects of the District Court Rules tailored to PRA proceedings. Both submitters also referred to the PRA "Docket System" trial. The Judges of the Family Court submitted that while the docket system has been a novel initiative in metropolitan courts, it is predicted to be of less benefit to small satellite courts. Their Honours submitted that any case management tool introduced for the purposes of managing PRA cases needs to take into account the practical differences of each court.

10.102 Other suggestions for improved case management procedures included:

- (a) improving access to judicial settlement conferences;⁶³¹
- (b) making specific provision for single issue hearings in the Family Court Rules;
- (c) having an associate judge, master or highly qualified registrar to deal with case management and/or interlocutory matters;

⁶³⁰ NZLS further submitted that:

Provided the court identifies issues before the first judicial conference, evidential issues (such as portions of affidavits that stray into inappropriate areas) can be dealt with by way of judicial rulings. The Evidence Act 2006 should be the primary law for any decisions about evidence and consideration should be given to revoking section 12A of the Family Court Act 1980 (although that inquiry is outside the ambit of this review).

⁶³¹ Some practitioners supported easier access to a judicial settlement conference (JSC), even if it were only for a half day. Practitioners at one meeting considered that parties should pay for JSCs and the court could then contract private mediators to conduct the JSC if needed. One practitioner referred to a settlement conference model in the England and Wales Family Courts at which indicative findings on contentious issues are given to enable the parties to settle. See Family Procedure Rules 2010 (UK), r 9.17; United Kingdom Ministry of Justice "Practice Direction 9A – Application for a Financial Remedy" at [6.1]–[6.5]; and Family Justice Council *Financial Dispute Resolution Appointments: Best Practice Guidance* (December 2012) at [29(iv)].

- (d) placing cases on different tracks depending on their complexity or the value of the relationship property pool;
- (e) providing for the same judge to stay with a case or a complex case if there were different tracks;
- (f) having specialist PRA judges;
- (g) setting early hearing dates; and
- (h) better use of teleconferencing and videoconferencing.

Clarifying the scope of section 38 inquiries

10.103 The Judges of the Family Court submitted that the PRA or the Family Court Rules should be amended to clarify the powers the court will have to authorise a section 38 appointee to address specific issues.⁶³² Their Honours also proposed that section 38 be amended to allow the court to inquire into other, non-pecuniary or value-based matters, such as to enable a court to inquire into matters of tikanga by obtaining a cultural report. One practitioner favoured the court generally taking a more inquisitorial approach in proceedings.

10.104 The Judges of the Family Court also submitted that the cost regime of section 38 should be revised to reflect the fact that such inquiries are typically the result of intentionally inadequate disclosure by one party. Their Honours proposed that costs be paid up front by one or both parties in an advance payment to the court. If a party is not compliant with this obligation, the full costs could be borne by one party, with half reimbursement drawn from the non-paying party's final property division, or other such amount determined by the court. One Family Court judge submitted separately that it is not justified that the New Zealand taxpayer has to pay for these inquiries and noted that he has often required both parties to make payment into court. His Honour noted the issue can be avoided by appropriate case management directions and timetables, including instructing forensic accountants. His Honour did not consider that amendment of section 38 was necessary. NZLS did not consider that enabling the court to direct parties to pay the costs of any inquiry would encourage better use of section 38.⁶³³

Better penalties and enforcement for non-compliance needed

10.105 Several practitioners and members of the public considered that there should be stricter penalties for non-compliance with court directions and causing intentional delay, and better enforcement of court directions and timetabling requirements by the court. One Family Court judge submitted that there are little or no consequences for intentional delay tactics, such as holding off on discovery and bringing interlocutory applications as tactical manoeuvres. His Honour said that costs are sometimes awarded but these are "usually small change compared to the gains". NZLS submitted that the use of sanctions such as monetary penalties for failure to comply with timetabled directions would be a helpful and appropriate way to encourage compliance. One practitioner told us that the court should be more willing to impose costs for interlocutory matters.

⁶³² Their Honours recommended that powers of inquiry similar to those in pt 16 of the District Court Rules 2014 be explicitly adopted into the Family Court Rules 2002.

⁶³³ We are also considering submissions that proposed reform to court procedures in relation to expert evidence.

Clarifying the proper basis for costs and reconsidering Family Court fees

10.106 NZLS submitted that costs available in PRA proceedings should have their own particular scale to recognise the different nature of PRA proceedings. It considered retaining court discretion as often each party will succeed on different points and this context justifies a different approach to that taken in determining civil costs. One practitioner submitted that the policy that costs should lie where they fall is correct in PRA cases. The practitioner also considered that the court should be specifically directed to take into account the principles of the PRA when considering costs. A member of the public submitted that legal fees should be shared between the partners as an incentive for both parties to "get on and get a resolution". Alternatively, a judge should consider whether sharing the legal fees would be equitable.

10.107 NZLS submitted that reform options should be investigated to address the "unreasonable impediments" that filing and hearing fees in PRA proceedings create. Practitioners suggested reducing the fees, sharing the fees equally between the parties, paying by instalments or recovery of fees through costs if these are ordered.

Preferred approach

P62

The Family Court Rules should be amended to include case management procedures tailored to the needs of PRA proceedings.

P63

The PRA and Family Court Rules should be amended to:

- a. clarify the powers of a person appointed by the Family Court under section 38; and
- b. enable the Court to inquire into such matters it considers may assist it to deal effectively with the matters before it.

P64

Guidance should be provided on the imposition of costs and other consequences for non-compliance with procedural requirements and for the exercise of the Court's discretion to make costs orders that are not for the purpose of penalising non-compliance.

P65

A separate scale of costs for PRA cases should be established.

P66

The Ministry of Justice should consider reducing the application and hearing fees for PRA proceedings.

10.108 Our preferred approach is that new case management procedures, tailored to the unique characteristics of PRA proceedings, be established in the Family Court Rules. We consider that this would provide greater certainty for parties, and more efficient resolution of PRA proceedings, both in terms of reducing costs to the parties and freeing up court resources. Our proposals will also allow sufficient flexibility for each court to respond to the individual needs and circumstances of PRA proceedings on a case-by-

case basis. As proposed under Proposal P58 above, these procedures should be developed by a Family Court Rules Committee.

10.109 We note that wider resourcing issues with the Family Court, which was identified as a key cause of delay in PRA proceedings during consultation, will be considered in the independent review of the 2014 family justice reforms.⁶³⁴

New prescribed case management procedures for PRA proceedings

10.110 When developing new case management procedures, consideration should be given to experiences under the "Docket System" recently introduced for PRA proceedings in some of the larger courts, the extent to which the procedures in the District Court Rules 2014 provide an appropriate model for PRA proceedings, and the outcome of the independent review of the 2014 family justice reforms (see paragraph 10.3(b)). While that independent review is focused on parenting disputes, it may result in reforms to court process which could be relevant to PRA proceedings.

10.111 We do not propose that formal pleadings for PRA proceedings should be introduced. We do not consider that this would be the most effective way to respond to delay in the Family Court, given the unique characteristics of PRA proceedings and the need for adequate disclosure before matters in issue can be fully identified. Rather, we propose that new case management procedures include an obligation to file a Memorandum of Issues ahead of the first judicial conference. Ideally this would be an agreed memorandum, or separate memoranda with an opportunity to respond to the other party's memorandum if agreement is not possible.⁶³⁵ The case management procedures should also include a non-exhaustive list of information to be included in the memorandum. This could include:⁶³⁶

- (a) an agreed statement of facts;
- (b) the discovery sought by each party;
- (c) identification of the property that each party believes to be relationship property and separate property, and why;⁶³⁷
- (d) identification of the issues in dispute, including any legal issues in dispute;
- (e) the proposed method and date of valuation of property;
- (f) whether expert evidence is required and how that evidence will be produced; and
- (g) the identity and control of information possessed by each party.

10.112 The new case management procedures should include express provision for single issue hearings, clear deadlines for disclosure and other procedural steps, and consequences for non-compliance with procedural requirements. Consistent with our approach to disclosure requirements, the court's power to impose consequences and costs for non-compliance with procedural requirements should continue to be discretionary. Guidance

⁶³⁴ Ministry of Justice "Terms of Reference for rewrite of the 2014 family justice reforms" (1 August 2018) <www.justice.govt.nz>.

⁶³⁵ See for example the process set out in the High Court Rules 2016, r 7.3.

⁶³⁶ This list is based on the submission of the Judges of the Family Court. Their Honours also suggested that parties could be required to formulate the issue of identification of property in question form as this requires parties to foreshadow the substance of their claim, but without limiting the claim to the form of pleadings.

⁶³⁷ This requirement would need to be consistent with our proposal in Chapter 2: Classification, that the burden of proof of establishing whether property is separate property should be on the owning partner.

should be provided through a Practice Note about the imposition of costs and other consequences to ensure they are applied consistently and act as a meaningful deterrent.

- 10.113 Consideration should also be given to submitters' suggestions for improved case management procedures outlined at paragraph 10.102. We see particular merit in case management procedures that can facilitate early access to judicial settlement conferences in appropriate cases and the use of associate judges or experienced judicial officers to progress case management processes.⁶³⁸

Amend provision for section 38 inquiries

- 10.114 We propose that section 38 of the PRA be amended and that the Family Court Rules be developed to clarify the powers of a person appointed by the Family Court under section 38. The powers of inquiry in Part 16 of the District Court Rules 2014 should be used as a guide.
- 10.115 We also propose that section 38 be broadened beyond inquiries into "the matters of fact in issue" in order to enable the Family Court to inquire into such matters it considers may assist it to deal effectively with the matters before it. We consider a broader power of inquiry than currently provided in the PRA is consistent with the Family Court's semi-inquisitorial approach in PRA proceedings (Issues Paper at [25.17]–[25.19]). It will enable the Court to undertake inquiries into matters that are not matters of fact, such as values-based matters of tikanga. It will also signal that the power is not confined to discrete or pecuniary issues, nor is it a "remedy of last resort". The Court should have the discretion to define the scope and nature of any particular inquiry and associated powers necessary to conduct that inquiry. Consideration should be given to whether guidance should be developed through a Practice Note to assist the Court in this regard.
- 10.116 In view of these proposals, we do not propose to amend section 38 with respect to who pays the cost of the inquiry. The Court will retain the discretion to direct either or both of the parties to make such payments into the Court as it considers appropriate, taking into account the reason for the inquiry and circumstances of the case.

Develop guidance for costs and other procedural consequences and a separate scale of costs for PRA proceedings

- 10.117 Guidance should be provided on the imposition of penalty costs and other consequences for non-compliance with procedural requirements, such as the possibility of the Family Court ordering a section 38 inquiry at the non-compliant party's cost.
- 10.118 Guidance should also be provided on the imposition of non-penalty costs. In our view, the approach that such costs should "lie where they fall" is generally appropriate for PRA proceedings due to their unique characteristics. This approach reflects the semi-inquisitorial approach taken by the Family Court in PRA proceedings. It also recognises that parties may succeed on different points and that what constitutes "success" is not

⁶³⁸ We note the Australian Law Reform Commission has proposed that a streamlined court process with simplified procedural and evidential procedures should be provided for matters involving small property pools: Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) Proposals 6-4-6-6. However in our view, given the low number of Property (Relationships) Act 1976 cases in the court in New Zealand, there is unlikely to be a significant enough number of simple cases with low value relationship property pools to warrant developing streamlined processes for such cases. We consider that other case management processes, such as early access to judicial settlement conferences, together with improved access to legal advice and dispute resolution out of court will better provide for resolution of cases with low value relationship property pools.

always clear or relevant in PRA proceedings. However, we propose that the Court should retain the discretion to award non-penalty costs if it considers it appropriate in the circumstances to do so.

10.119 We also agree with NZLS that the unique characteristics of PRA proceedings justify a separate scale of costs and propose this be developed by the Family Court Rules Committee.

Consider reducing application and hearing fees for PRA proceedings

10.120 We propose that the Ministry of Justice consider reducing the application and hearing fees for PRA proceedings, in recognition of the fact that changes to the Family Court fee structure have resulted in a reduction of PRA applications to the Family Court. We consider that the level of fees are a potential barrier to access to justice and are likely to disproportionately affect the financially weaker partner.

CHAPTER 11

Creditors

IN THIS CHAPTER, WE CONSIDER:

how the rights of creditors are affected by the PRA, and whether reform is required in relation to:

- the general policy of the PRA on creditors;
- the protected interest in the family home;
- the procedure for section 42 notices of claim of interest in land;
- the two year period for challenging agreements that defeat creditors' rights (section 47(2)); and
- the effect of partners' settlement agreements on creditors' rights (section 47(3)).

THE GENERAL POLICY OF THE PRA ON CREDITORS

Current law

- 11.1 As a general rule the PRA does not affect the rights of creditors. This is reflected in the key provisions of section 19 (which preserves each partner's right to deal with their property as if the PRA had not been passed) and section 20A (which provides that the creditors of a partner have the same rights against that partner as if the PRA had not been passed).⁶³⁹ Generally speaking, the rights of secured creditors take priority over the rights of partners (section 46).
- 11.2 Sections 19 and 20A apply except as otherwise expressly provided in the PRA. The main exceptions to the general rule relate to the protected interest in the family home, registering notices of claim on land and the provision for agreements that defeat the rights of creditors. These matters are discussed below.

⁶³⁹ We do not discuss the situation in relation to creditors and a deceased partner but note in this context different provisions apply: Property (Relationships) Act 1976, ss 58 and 59; and Insolvency Act 2006, s 389.

Issues

- 11.3 In the Issues Paper we explored whether creditors' general priority over a partner's rights under the PRA could cause unfairness in some cases, including where one partner has incurred imprudent or purely personal debt for which both partners are liable (Issues Paper at [31.34]–[31.39]). We observed that section 20E (which provides that where a personal debt has been paid from relationship property, the court may order that the other partner receive compensation or a greater share of relationship property) is only an adequate remedy for partners with sufficient relationship or separate property from which to pay compensation. We also observed that lenders' credit practices would likely change if creditors' rights are diminished when partners separate.

Results of consultation

- 11.4 We received submissions addressing the general policy of the PRA from the New Zealand Law Society (NZLS), the New Zealand Bankers' Association (NZBA), Bank of New Zealand (BNZ), the New Zealand Federation of Business and Professional Women (BPWNZ), Simpson Grierson and five members of the public. No submitter favoured change to the general policy of the PRA on creditors. BPWNZ submitted that if debts are outstanding they should be addressed in the partners' property division and balanced equitably. Some members of the public submitted that a partner should have greater rights when their partner obtains credit using relationship property without their knowledge, although most submitters focused on how this should be addressed through the division of relationship property, rather than whether it should directly affect creditors' rights.

Preferred approach

- 11.5 We are satisfied that the general policy remains sound for the reasons given in the Issues Paper (Issues Paper at [31.34]–[31.37]). This is endorsed by the submissions received on this issue.
- 11.6 Some submitters raised the problem where one partner improperly dissipates relationship property, for example by incurring imprudent or purely personal obligations to third party creditors. We think the preferable remedy in such circumstances is to provide relief as between the partners rather than affect the partners' liability to the third party creditor. We will address the dissipation of relationship property by one partner during the relationship in our final report.
- 11.7 Although we do not recommend any reform of the PRA's general approach to creditors, there are specific issues relating to the protected interest in the family home, notices of a claim of interest in land (section 42) and the provisions for setting aside agreements that defeat creditors' rights (section 47), which we address below. While some of these issues are of a technical nature, others squarely raise the broader issue of the appropriate balance between the rights of a non-debtor partner to salvage something from the relationship property pool and the rights of an unsecured creditor to recover from a debtor partner. Linked to this is a general issue of financial literacy and the need for education to enable New Zealanders to organise their financial affairs appropriately.

THE PROTECTED INTEREST IN THE FAMILY HOME

Current law

- 11.8 Section 20B provides that each partner has a protected interest in the family home.⁶⁴⁰ It is protected in the sense that a partner's interest takes priority over the unsecured debts of the other partner, unless the debt has been incurred jointly by the partners or the debt has been incurred by a partner subsequently declared bankrupt in order to purchase, improve or repair the family home.
- 11.9 The value of the protected interest is the lesser of the specified sum or half of the partners' equity in the family home. The specified sum is set by regulations under section 53A of the PRA and is currently \$103,000.⁶⁴¹
- 11.10 The protected interest is also relevant when assessing agreements, dispositions or other transactions between the partners that have the effect of defeating the rights of creditors. Section 47 provides a court with the power to set aside such agreements. Case law has established that an agreement between the partners will not have the effect of defeating creditors' rights if it transfers only the value of the non-debtor partner's protected interest.⁶⁴²
- 11.11 There is considerable overlap between the PRA and the Joint Family Homes Act 1964 (JFHA).⁶⁴³ The classification of the family home as relationship property under the PRA recognises the home as the joint property of the partners. It is a very similar result to registering a home under the JFHA. Likewise, the PRA adopts the protected interest scheme from the JFHA. The Law Commission reviewed the JFHA in 2001 and recommended that it be repealed.⁶⁴⁴ While this has not happened, the reasons for this recommendation remain valid (Issues Paper at [31.40]–[31.45]).
- 11.12 We also observe that section 158 of the Insolvency Act 2006 provides for a bankrupt to retain certain assets. This includes household furniture and effects for the bankrupt and his or her relatives and dependents. This allows the interests of the bankrupt's partner to be taken into account by the Official Assignee in the application of the Insolvency Act.

Issues

- 11.13 In the Issues Paper we observed that the philosophy behind the protected interest in the family home is that one partner's share of relationship property should not be seized to satisfy the purely personal creditors of the other partner (Issues Paper at [31.46]). We also explained that the drafters of the PRA saw the family home as the principal family asset that would constitute relationship property under the equal sharing regime and thus deserved particular attention (Issues Paper at [31.12]).

⁶⁴⁰ If no family home exists because it has been sold, or because none existed, or because the family home exists as a homestead, the protected interest applies to the proceeds of the sale, or the property or money shared in place of the family home, as the case may be: Property (Relationships) Act 1976, ss 11A–12.

⁶⁴¹ Property (Relationships) Specified Sum Order 2002, cl 3.

⁶⁴² *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 327.

⁶⁴³ Section 20F of the Property (Relationships) Act 1976 provides that nothing in ss 20–20E derogates from the provisions of the Joint Family Homes Act 1964.

⁶⁴⁴ Law Commission *The Future of the Joint Family Homes Act* (NZLC PP44, 2001); and Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001).

- 11.14 Our preliminary view was that the PRA should continue to provide partners with a protected interest in some form, but we identified several issues with the way the protected interest operates in practice (Issues Paper at [31.47]–[31.63]):
- (a) The decreasing rate of home ownership means that the protected interest is not of practical benefit for an increasing number of New Zealanders.⁶⁴⁵ The protected interest may be an anomaly in that the PRA confers greater protection on some partners, simply because they invested in a home rather than other types of property.
 - (b) The specified sum is inadequate and leads to geographic inequalities. It no longer reflects a sum which would provide the equity required for a house of a reasonable minimum standard across New Zealand.⁶⁴⁶
 - (c) The family home may often be mortgaged and little or no equity may be available to provide a protected interest against unsecured creditors.
- 11.15 There are two further issues which were not addressed in the Issues Paper, which we discuss below.

How should the protected interest work when equal sharing does not apply?

- 11.16 There is an issue with how the protected interest works in cases where the general rule of equal sharing does not apply. Section 20B(3) sets out the value of the protected interest in cases where sections 11–12 apply. It is silent about how the protected interest applies if division occurs where extraordinary circumstances make equal sharing repugnant to justice (section 13) or in the case of relationships of short duration (sections 14–14A). Case law has established that the protected interest will apply to marriages of short duration, but a partner cannot claim a protected interest which is greater than what they could attain on the division of relationship property under the PRA.⁶⁴⁷ While our proposal in Chapter 4: Qualifying relationships to repeal sections 14–14A will resolve this issue for short-term relationships, the issue remains in situations where section 13 applies.

How should the protected interest work when the family home is not relationship property?

- 11.17 The protected interest assumes that the family home will always be relationship property. However this is not the case when the family home is held on trust.⁶⁴⁸ It will also no longer be the case when the family home is owned by one partner before the relationship began, or was received by one partner as a gift or inheritance from a third party during the relationship, under our preferred approach to classification outlined in

⁶⁴⁵ While the Property (Relationships) Act 1976 attempts to provide for a protected interest when the partners have no family home (ss 11B, 20B(1)(b) and 20B(3)), these provisions are very unlikely to apply when creditors claim against the partners' relationship property, for the reasons discussed in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.48]–[31.50].

⁶⁴⁶ Case law under the Joint Family Homes Act 1964, on which the protected interest is based, has established that the purpose of the specified sum is to represent the equity required for a house of reasonable minimum standard: *Official Assignee v Lawford* [1984] 2 NZLR 257 (CA) at 265 per Cooke J.

⁶⁴⁷ *Walsh and NZ Law Society v Powell* (1982) 1 NZFLR 103 (HC) at 110. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [9.9]. Fisher also explains at [9.2] that it is uncertain whether the protected interest would apply to de facto relationships of short duration.

⁶⁴⁸ The 2015 Household Economic Survey found that 12 per cent of all New Zealand households held their home on trust: Statistics New Zealand *Household Net Worth Statistics: Year ended June 2015* (June 2016) at 9 and 11, cited in Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 48.

Chapter 2. When one of these situations applies the family home will remain the owning partner's separate property, except that any increase in value occurring during the relationship will be relationship property. As noted, a partner's protected interest could not exceed their entitlement under the PRA. This means there will be more relationships where no or little value in the family home would be available to a partner to support a protected interest.

Results of consultation

- 11.18 There was general support from submitters for the PRA continuing to provide a protected interest that takes priority over the other partner's unsecured creditors. We note, however, that the Issues Paper did not include details of our preferred approach to classification and that this will likely further decrease the practical benefits of the protected interest. Nor did the Issues Paper outline possible options for reforming the protected interest.
- 11.19 NZLS agreed that it is potentially anomalous that the protected interest confers greater protection on those who have invested in a home rather than other types of property and that there is no clear reason why the protected interest should be limited to one particular asset. NZLS noted that many people have an increasingly diverse spread of assets (for example, KiwiSaver entitlements now make up a significant and growing proportion of the relationship property pool). NZLS also acknowledged that a protected interest over a global pool of relationship property may prove unwieldy and less easy to identify than the extent of a partner's interest in a family home. NZBA supported the application of protected interests to relationship property generally but only if there is no family home. NZBA also favoured giving the court or the Official Assignee the ability to overturn a protected interest where there is deliberate action to defeat the rights of unsecured creditors. NZBA observed that if the definition of relationship property is amended to focus on fruits of the relationship, creditors would need appropriate guidance about what is meant by "acquired during or as a result of the relationship". One member of the public submitted that only the home should be subject to the protected interest while two others submitted that all relationship property should be subject to the protected interest.
- 11.20 NZLS submitted that the protected interest should be set at a level that better reflects the purpose of facilitating home ownership after the end of a relationship. It said there should be further examination of whether the intention is to ensure there is money available for the affected partner to find alternative accommodation or to provide a resource pool that ensures that one partner is protected against the other partner's unsecured debts. NZLS agreed that there are insurmountable problems in fixing a sum or a percentage that is principled and fair across the country. It suggested considering an alternative methodology that identifies the maximum sum that can be granted to a partner, depending on the nature and value of the relationship property pool and the circumstances affecting the specific relationship.
- 11.21 A number of practitioners submitted that the amount of the protected interest should be raised. One member of the public submitted that the protected interest should be half the equity in the family home, or up to the average house price in the city or region. Other members of the public proposed different sums, one suggesting \$1 million and another \$250,000. An academic expert observed that the specified sum needed to be revisited and inflation-adjusted.

11.22 The Insolvency and Trustee Service (Official Assignee)⁶⁴⁹ supported the existence of a protected interest in the family home but observed that in its experience, the protected interest rarely applied. This might be because the home was held by the partners as tenants in common, was held in trust, or due to the mortgage obligations, no equity was available.

Options for reform

11.23 While we did not address possible options for reform in the Issues Paper, we have given consideration to the following options:

- (a) amending the protected interest provisions, by:
 - (i) extending the protected interest to all relationship property, or to specified items of relationship property; and/or
 - (ii) changing how the amount of the protected interest is calculated; or
- (b) removing the protected interest provisions from the PRA, with a view to consolidating the rights of a non-debtor partner in the insolvency regime.

Preferred approach

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The Government should undertake further policy work that considers the options for amending or repealing the protected interest provisions within a broader investigation into the relationship between the insolvency regime and the interests of partners under the PRA. Such an investigation should also:

- a. reach a concluded policy decision on the availability of retirement savings to creditors in bankruptcy;
- b. consider whether to give greater rights to bankrupts and their families over unsecured creditors in the Insolvency Act 2006; and
- c. progress the repeal of the Joint Family Homes Act 1964.

11.24 Our preferred approach is to acknowledge the inadequacies of the current protected interest provisions and for further policy work to be undertaken.

11.25 We have reached this view having regard to the limited availability of the protected interest in practical terms (see paragraph 11.14 above), its failure now to fulfil its original purpose⁶⁵⁰ and the difficulties in addressing these issues through amendment of the protected interest provisions, as we explain below.

Problems with extending the protected interest to all relationship property or to specified items of relationship property

11.26 Extending the protected interest to all relationship property or to specified items of relationship property presents a number of problems.

⁶⁴⁹ The Insolvency and Trustee service is a business unit of the Ministry of Business, Innovation and Employment. It is appointed as the Official Assignee under the State Sector Act 1988 to administer the Insolvency Act 2006, the insolvency provisions of the Companies Act 1993 and the Criminal Proceeds (Recovery) Act 2009.

⁶⁵⁰ The initial premise of the protected interest as provided for in the Property (Relationships) Act 1976 reflects outdated thinking that focuses unduly on the family home. See discussion in Law Commission *The Future of the Joint Family Homes Act* (NZLC PP44, 2001) at [4], [13] and [14].

- 11.27 If the protected interest were extended to specified items of relationship property other than the family home, the assets would need to be assets that are common to most relationships and of sufficient value to provide a meaningful protected interest. The debtor partner's retirement savings, such as KiwiSaver entitlements, might be the most obvious assets.⁶⁵¹ However under the current law KiwiSaver entitlements are not available to the creditors of a KiwiSaver scheme member in their bankruptcy.⁶⁵² So there may be little utility in extending the protected interest to assets that are already safe from the claims of creditors. Furthermore, the Ministry of Business, Innovation and Employment is currently considering the policy around the accessibility of retirement savings in bankruptcy for the repayment of creditors.⁶⁵³ Until this review is complete, it is difficult to make any recommendations around extending the protected interest to retirement savings.
- 11.28 Extending the protected interest to a wider category of relationship property would create considerable complexities for creditors when taking steps to enforce a debt against a partner's property. It would be difficult to determine whether the property in question was relationship property or not. It could also be difficult to determine the extent of the protected interest, depending on how it is to be calculated (see discussion below). The creditor or partner, depending on where the onus would sit, would likely need to undertake the full PRA division process of classification, valuation and determination of the partners' respective shares in the relationship property.
- 11.29 This approach would be simpler where a partner is adjudicated bankrupt as the Official Assignee will administer all the bankrupt's property. After secured debts are paid out to creditors, the non-bankrupt partner could be given priority ahead of unsecured creditors (other than in respect of joint debts or relationship debts), up to the value of the protected interest. Nonetheless, the Official Assignee would still need to assess the extent of the partners' relationship property, its value and the shares in which the relationship property should be divided. This is likely to increase the costs of administration of bankruptcy.
- 11.30 This approach could theoretically be enhanced if the partners had the ability to register notice that they claimed an interest under the PRA in items of relationship property other than land, which is currently provided for under section 42 (see discussion below). For example, the Personal Property Securities Act 1999 could be amended so that a partner could lodge a notice in the Personal Properties Security Register (PPSR). This would give notice that a partner claimed an interest in the property under the PRA. It could be removed through similar procedures to challenges to section 42 notices of claim. There would also be similarities to the registration process under the JFHA. A registration scheme could give greater clarity to creditors as to whether or not an item of property would be subject to the non-debtor partner's protected interest. We are aware that British Columbia and Alberta provide partners with a similar ability to register notices

⁶⁵¹ Family chattels would be common to most relationships but in many cases would not provide sufficient value, particularly when divided under an equal sharing approach. Family chattels are also essential to day to day living and it does not seem appropriate that they should be used for this purpose. See also Property (Relationships) Act 1976, s 45.

⁶⁵² *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224. See also KiwiSaver Act 2006, s 127.

⁶⁵³ The Ministry of Business, Innovation and Employment published a discussion document in 2016, and we understand their consideration of this issue is ongoing, although there have been no further developments since consultation closed. See Ministry of Business, Innovation & Employment *Discussion Document: Accessibility of retirement savings in bankruptcy for the repayment of creditors* (July 2016).

over personal property.⁶⁵⁴ However, establishing a registration scheme would be a significant and costly exercise. We are not persuaded at this stage that a notice regime would be used by partners.⁶⁵⁵ Its introduction would also impose a further level of complexity for creditors which may decrease the availability of credit and increase the cost of accessing it.

Problems with changing how the amount of the protected interest is calculated

- 11.31 Regardless of what property the protected interest should apply to, the amount of the protected interest requires reform, given the issues identified at paragraph 11.14(b) above.
- 11.32 We have not however been able to identify a principled and fair means by which to update the specified sum, if it is to remain connected to buying a house of a reasonable minimum standard. Regional variations in house prices mean it is difficult to identify how a specified sum could be achieved in a way that is fair on a nationwide basis.
- 11.33 Basing the specified sum on a percentage of the net value of a property has also been criticised as it disproportionately rewards those who spend more on a family home than those who do not.⁶⁵⁶ The choice of percentage would be arbitrary. There is no apparent logic in choosing say 25 per cent over say 10 per cent as a measure of the balance of fairness between a partner and a creditor. Perceptions of fairness might be affected by individual circumstances, such as where a partner had considerable separate property not affected by creditors' claims.
- 11.34 While it would be possible to set an arbitrary specified sum which does not have any link to buying a house, we do not think this is appropriate given that partners will find themselves in such a variety of financial situations. We note that the two members of the public who did submit on this issue suggested drastically different sums (\$250,000 and \$1 million).
- 11.35 It would, however, be possible to specify a percentage proportion of some or all relationship property which could be protected from creditors rather than linking the protected interest to just the home. This would be more responsive to the variety of property the partners may own. If this approach was to be taken we think there would be no need for a specified sum. Nonetheless, identifying an appropriate percentage figure is another potentially arbitrary exercise.
- 11.36 Alternatively, one approach would be to create a protected interest in say 25 per cent of the net value of some or all relationship property, on the basis that this might be said to appropriately reflect the risk the partner should bear (noting that the PRA has other provisions to respond to dissipation of relationship property by a partner) and the risk an unsecured creditor should bear.
- 11.37 For the reasons given at paragraph 11.29 above, calculating the protected interest as a percentage of some or all of the relationship property would be easier if the partner was adjudicated bankrupt, although the Official Assignee would still need to identify, classify

⁶⁵⁴ Matrimonial Property Act RSA 2000 c M-8, s 22; and Family Law Act SBC 2011 c 25, s 99.

⁶⁵⁵ We note, for example, that the Borrin Survey identified that only 7 per cent of respondents had made a contracting out agreement that was certified by a lawyer: I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [211].

⁶⁵⁶ Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [15] (footnote 13).

and value the relationship property and determine the partners' respective shares in order to apply the protected interest.

Further policy work is required

- 11.38 Despite our concern about how the current regime is functioning, and the problems identified with the different options for reform, there may continue to be a place for the concept of a protected interest under the PRA. It may be that a protected interest calculated as a percentage of defined relationship property is the best way forward. We recognise the Law Commission's earlier concern about using a percentage of the net value of the home.⁶⁵⁷ But we suggest that relating the percentage to the net equity in defined relationship property which could include retirement savings would be possible while minimising these concerns.⁶⁵⁸ It may be that such a protected interest should only be available when the debtor partner has been adjudicated bankrupt. This would mean the Official Assignee would be in control of the bankrupt's property and would promote an orderly dealing with the interests of the non-debtor partner and the unsecured creditors.
- 11.39 Alternatively there may be potential for the Insolvency Act to better respond to the interests of non-debtor partners where their partner has been adjudicated bankrupt. Section 158 of the Insolvency Act already provides for a bankrupt to retain certain assets. This includes household furniture and effects for the bankrupt and his or her relatives and dependents. The protected interest could be removed from the PRA and section 158 of the Insolvency Act amended so that other assets (or a proportion of them) are retained for the bankrupt or the bankrupt's partner or family in preference to unsecured creditors.⁶⁵⁹ This would provide the benefit against unsecured creditors to all individuals and would not be premised on them being in a relationship. However, the broad question of the appropriate balance of interests between a bankrupt and his or her family, and creditors, is not within the terms of our review so these questions would require separate investigation.
- 11.40 There are also important choices to be made about the availability of retirement savings to creditors in bankruptcy. These matters fall outside our terms of reference but deserve attention.
- 11.41 This broader policy work should also consider the ongoing role of the JFHA. While the JFHA remains law, partners are able to register their house as a joint family home and obtain the protections offered by that Act (although the specified sum under that Act is subject to the same criticisms made earlier in relation to the specified sum under the PRA). While the status of the JFHA is not within the terms of our review, we think that the Law Commission's 2001 recommendation to repeal the JFHA remains valid.⁶⁶⁰

⁶⁵⁷ Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [15] (footnote 13).

⁶⁵⁸ Given the relative illiquidity of retirement savings there will not be the same opportunity for gaming as the Law Commission identified with a house.

⁶⁵⁹ The Law Commission proposed something similar in its discussion document about the Joint Family Homes Act 1964: Law Commission *The Future of the Joint Family Homes Act* (NZLC PP44, 2001) at [45]. The Law Commission rejected a blanket protection for homes in its report on the Joint Family Homes Act 1964: Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [16]–[18].

⁶⁶⁰ Law Commission *The Future of the Joint Family Homes Act* (NZLC PP44, 2001); and the Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001).

- 11.42 There is a need for the Government to undertake further policy work in this area. Our review has identified significant problems with the operation of the protected interest provisions. But there are no simple amendments that would address the issues. In light of this, there is a strong argument for removing the protected interest provisions from the PRA. But a final decision on amendment or repeal needs to be considered within the broader context of the relationship between the insolvency regime and the interests of partners under the PRA, which is beyond the scope of this review.

SECTION 42 NOTICES OF CLAIM OVER LAND

Current law

- 11.43 Section 42 allows a partner with a claim or interest in land under the PRA to register a notice on the title of the land. Section 42(5) provides that a notice can be registered even though no PRA proceedings are pending or in contemplation. The effect of a notice has been described as a "stop sign" because once registered it prevents dealings with land.⁶⁶¹ Once lodged, notices of claim can only be removed by order of the Family Court, District Court or High Court (section 42(3)). A notice of claim will be removed if a court is satisfied that the claimed interest is unsustainable or suspicious or the notice has done its work.⁶⁶²
- 11.44 Section 42 is significant because it allows a partner to register a notice at any point in the relationship, despite the rule that partners' rights under the PRA are deferred until they separate and their property is divided. In this way, it alters the general position under the PRA that the claims of a partner do not affect the rights of third parties and creditors.

Issues

- 11.45 We discussed the section 42 notice of claim procedure in the Issues Paper (at [31.64]–[31.66] and [14.84]–[14.94]). We observed that the notice of claim procedure was widely used, which suggests that many people find it a useful mechanism.
- 11.46 We noted that concerns had been expressed about the form prescribed for section 42 notices because the form does not clearly contemplate the possibility that the parties may have separated or that one of them has died.⁶⁶³
- 11.47 We also observed that section 42 may be seen as another example of the PRA giving special protection to the family home, in circumstances where rates of home ownership in New Zealand are decreasing. However, a section 42 notice of claim may be used in relation to any land, not just the family home, and so is more broadly available.
- 11.48 We noted that it is uncertain how the notice of claim procedure applies to certain types of property, including property legally owned by a third party, such as a company or trustee.

⁶⁶¹ *Moriarty v Roman Catholic Bishop of Auckland* (1982) 1 NZFLR 144 (HC) at 146. Section 42(1) of the Property (Relationships) Act 1976 (PRA) deems the alleged claim or interest to be a registerable interest under the Land Transfer Act 1952. Section 42(3) of the PRA provides that a notice once lodged has effect as if it were a caveat.

⁶⁶² See *Gregan v Gregan* [1983] NZLR (CA); *Laing v Laing* (1988) 4 NZFLR 629 (HC); *Doyle v Doyle (No 2)* [2004] NZFLR 43 (CA); *Mulholland v Tonar* HC Auckland CIV-2005-404-6870, 30 March 2006; and *C v C* FC Auckland FAM-2009-004-1390, 8 September 2009.

⁶⁶³ Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR42.05].

Results of consultation

- 11.49 Submitters supported the PRA continuing to provide partners with the ability to lodge notices of claim in respect of land in which they assert an interest.
- 11.50 NZLS submitted that the section 42 notice of claim procedure remains relevant as a means to preserve property that will form part of a relationship property claim. NZLS observed that this is particularly critical for a partner potentially affected by dealings with relationship property where that partner has no control over the property in question. That the right can be exercised quickly and at a relatively low cost also makes the right accessible from a practical perspective. NZLS regards section 42 as a reasonable exception to the general principle concerning creditors' rights, noting that public registers are at the heart of credit-related activities and it is not unduly onerous to expect a creditor to monitor relevant public registers, recognise when a notice of claim has been lodged, and take action as necessary to preserve its position.
- 11.51 NZBA expressed concern about situations where a partner registers a baseless claim. NZBA thought the process for challenging a notice of claim should be simplified thereby reducing the cost of removal, helping to minimise the erosion of equity on the property. Alternatively, NZBA suggested that a partner provide evidence to support a notice of claim. NZBA did not provide detailed proposals for such changes. BNZ generally supported NZBA's submission.

Preferred approach

- 11.52 No reform is required to the section 42 notice of claim procedure.

CHALLENGING AGREEMENTS THAT HAVE THE EFFECT OF DEFEATING CREDITORS' RIGHTS

Current law

- 11.53 Section 47(2) provides that an agreement or disposition between partners that has the effect of defeating creditors' interests (but was not intended to do so) "is void against such creditors and the Official Assignee during the period of two years after it is made".
- 11.54 In *Felton v Johnson*, the Supreme Court said the reference to the two year period in section 47(2) should be interpreted as a limitation period.⁶⁶⁴ Creditors must therefore challenge an agreement within a two year period after the agreement is made if the agreement is to be void against affected creditors.

Issues

- 11.55 In the Issues Paper we noted that interpreting section 47(2) as imposing a two year limitation period may disadvantage creditors and the Official Assignee (Issues Paper at [31.67]–[37.72]). Specifically:
- (a) Many creditors will be unaware that partners have entered an agreement until after the two year limitation period has expired, or they may not have been creditors when the relevant agreement was made. Involuntary creditors must first obtain

⁶⁶⁴ *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475.

judgment against the partner or partners, which may take months if not years. The partners may also conceal their agreement.

- (b) Section 47(2) is different to the position under general insolvency law, which is arguably more favourable to creditors. Sections 194 and 195 of the Insolvency Act provide that the Official Assignee may cancel transactions that prefer one creditor over others when a debtor is insolvent. The transaction must be made within the two years immediately before the person who made the transaction was adjudicated bankrupt. As a result, affected creditors may benefit from the cancellation of the transaction without having to bring proceedings within a strict time limit as they do under section 47(2) of the PRA. We noted however that there may be good reasons to limit creditors' rights to set aside partners' agreements. Partners will want confidence that the agreements they reach with one another can be relied upon. There may be situations where a partner's rights to relationship property are more deserving than those of unsecured creditors.

- 11.56 The Supreme Court in *Felton v Johnson* was also uncertain how the limitation period would apply to the Official Assignee (Issues Paper at [31.73]–[31.75]).⁶⁶⁵ The Court held that a creditor could challenge an agreement within the two year limitation period by bringing proceedings under section 47(2) or by seeking to enforce a court judgment against the property which is the subject of the agreement.⁶⁶⁶ The Court considered that the Official Assignee's position was a "matter of considerable difficulty".⁶⁶⁷ It was unclear whether section 47(2) simply required the partner be adjudicated bankrupt within the two year period or whether the Official Assignee must take some other step to invoke section 47(2).⁶⁶⁸ It is also uncertain whether and to what extent a claim by the Official Assignee displaces the claims of individual creditors.⁶⁶⁹
- 11.57 The Supreme Court concluded its judgment in *Felton v Johnson* by recommending legislative attention to section 47. We agree that this is appropriate.

Options for reform

- 11.58 In the Issues Paper we presented two options for reform (Issues Paper at [31.76]–[31.81]):
- (a) **Option 1:** Remove section 47 from the PRA and rely on the general law of insolvency.⁶⁷⁰ Agreements or transactions made with intent to prejudice creditors could be dealt with under Subpart 6 of Part 6 of the Property Law Act 2007. Agreements or transactions with the effect of defeating creditors could be dealt with under sections 194 and 195 of the Insolvency Act.
 - (b) **Option 2:** Amend section 47(2). We identified several possible amendments that could be made, including amendments so that:
 - (i) the meaning of the two year period is made explicit;
 - (ii) the steps the Official Assignee must take to challenge an agreement are set out; and

⁶⁶⁵ At [24].

⁶⁶⁶ At [21].

⁶⁶⁷ At [24].

⁶⁶⁸ At [24].

⁶⁶⁹ At [24]. See also *Official Assignee of X (Bankrupt) v Y* [2017] NZHC 1117, [2017] NZFLR 320.

⁶⁷⁰ Elizabeth Tobeck "Relationship property and creditors" [2006] NZLJ 413 at 414–416.

- (iii) if the Official Assignee intervenes, the effect that would have on the position of other creditors is clarified.

Results of consultation

11.59 NZLS submitted that partners should be able to achieve certainty in managing their PRA matters and supported amending section 47(2). NZLS preferred Option 2, and harmonising section 47(2) with the Insolvency Act, by providing that an agreement or transaction could be challenged if it is made within the two year period prior to a partner's bankruptcy. NZLS submitted that the amended provision should be expressed in simple terms to enhance its accessibility. The Official Assignee agreed that the two year period referred to in section 47(2) was problematic and if interpreted as a limitation period could mean that the Official Assignee did not have enough time to act once appointed to commence proceedings. The Official Assignee favoured harmonising the PRA's provisions with the Insolvency Act, in particular the voidable preference provisions, and also having the High Court deal with such issues. NZBA considered that the two year limitation period provided by section 47(2) is difficult for creditors as often they will not know an agreement exists and the consequences of such an agreement may only become apparent after the two year period has passed. NZBA preferred Option 2, and considered the two year period too short. BNZ generally supported NZBA's submission. One practitioner considered that the two year, no knowledge, limitation period in section 47(2) was anomalous. An academic considered that it was a concern that creditors did not know "that or when" the transaction between the parties occurred.

Preferred approach

P68

The PRA should clarify that a creditor may only challenge an agreement, disposition or other transaction between the partners that has the effect of defeating the rights of creditors as void within two years of the agreement, disposition or transaction being made.

P69

The Official Assignee should be able to treat an agreement, disposition or other transaction between the partners as an insolvent transaction under the Insolvency Act 2006 if it:

- a. enabled a partner to receive more than they would in the other partner's bankruptcy; and
- b. was made within the two years immediately before the partner is adjudicated bankrupt.

P70

An application by the Official Assignee to set aside an insolvent transaction should displace any claims by other creditors that an agreement, disposition or other transaction has the effect of defeating creditors' rights.

11.60 Our preferred approach is to clarify the operation of section 47(2) by confirming the Supreme Court's approach in *Felton v Johnson* and addressing how the limitation period applies to the Official Assignee.

- 11.61 We recognise there is some merit in Option 1. Removing section 47 and relying on the general law of insolvency might be seen as aligning the PRA with the PRA's general position that creditors' rights continue as if the PRA had not been passed. The difficulties with section 47 would cease to exist. The general law of insolvency, however, currently gives no additional protections to partners. There is no recognition of the particular interest a partner might have under the PRA in the property which is the subject of an agreement or transaction between the partners. As we concluded earlier, further work on the intersection of the insolvency regime with the interests of partners under the PRA is required. Until that work is undertaken, we prefer Option 2 as it addresses current difficulties in the operation of section 47(2).
- 11.62 We are not persuaded that the two year period is too short. While there will be situations where creditors are unaware of a transaction between the partners, a longer period would be just as arbitrary. We think that it is desirable that partners have certainty that their resolution of PRA matters will not be overturned after a longer period, given the likelihood they will have moved on with their lives
- 11.63 We also propose that the Official Assignee be given powers that are broadly in line with the regime for insolvent transactions under the Insolvency Act (see particularly sections 194 and 206). The Official Assignee should be able to treat an agreement, disposition or other transaction between the partners as an insolvent transaction if:
- (a) it enabled a partner to receive more than they would in the other partner's bankruptcy (which may require a determination of the solvent partner's protected interest); and
 - (b) it was made within two years immediately before the partner is adjudicated bankrupt.
- 11.64 If the transaction between the partners constitutes an insolvent transaction the Official Assignee should be able to apply to the court to cancel the transaction. Any application to set aside an insolvent transaction would displace creditors' claims that an agreement, disposition or other transaction has the effect of defeating creditors' rights. The court may cancel the transaction to the extent that it has enabled the non-bankrupt partner to receive a preference.
- 11.65 We propose that the Official Assignee should be required to make any application to cancel an insolvent transaction to the High Court, in order to keep issues relating to a bankrupt's estate within the same court and broadly the same procedures. The process concerns a narrow issue under the PRA rather than substantive questions about the division of relationship property so there is less reason to refer the matter to the specialist Family Court.

THE EFFECT OF SETTLEMENT AGREEMENTS ON CREDITORS' RIGHTS

Current law

- 11.66 Section 47(3) provides that, for the purposes of section 47(2), an agreement made for the purpose of settling the partners' rights under the PRA⁶⁷¹ is "deemed to have been made for valuable consideration".

⁶⁷¹ It is unclear whether the agreements referred to in s 47(3) of the Property (Relationships) Act 1976 are settlement agreements under s 21A or include agreements under both s 21 and s 21A. The use of the word "settlement" suggests

Issues

- 11.67 In the Issues Paper we said that the practical effect of section 47(3) was unclear and identified three particular uncertainties (Issues Paper at [31.84]):
- (a) Section 21K already provides that all contracting out agreements are "taken to have been for valuable consideration". It is unclear whether section 47(3) means something different.
 - (b) Regardless of section 47(3), creditors must always show that consideration is inadequate. Section 47(2) is concerned with agreements that deprive partners of property in a way that defeats unsecured creditors. An agreement for adequate consideration will not have that effect because it does not reduce the value of the partner's property.⁶⁷² Section 47(3) may be redundant if it was intended to require creditors to prove the inadequacy of consideration, as creditors already bear that onus under section 47(2).
 - (c) It is unclear why deeming agreements to be for "valuable consideration" is relevant to section 47(2). Section 47(2) is concerned with whether an agreement was for adequate consideration. An agreement could be for valuable consideration but still defeat creditors.
- 11.68 In the Issues Paper we discussed whether section 47(3) appropriately balances the rights of separated partners and the interests of unsecured creditors (Issues Paper at [31.85]–[31.89]). We explained that if a partner's property rights under the PRA are based on the contributions they make to a relationship, those contributions have been made regardless of whether the partners have separated or not. We also observed that giving greater rights to separated partners would be a further erosion of the general principle that creditors' rights continue as if the PRA had not been passed.
- 11.69 We noted that there may be some cases where the partners would not exchange consideration under an agreement that was of exact monetary value, but there may still be good reasons not to set aside the transaction. We said that such bargains should not be lightly overturned because:
- (a) a partner may receive advantages that indirectly benefit creditors, such as allowing a partner to retain business assets so their business and income stream can continue without interruption;
 - (b) creditors will often benefit from the stability and certainty a settlement agreement provides as opposed to the costs and uncertainty of a dispute;
 - (c) a partner may accept significant burdens in order to receive a greater share of the property, such as childcare responsibilities. It is doubly hard on that partner (and the children) if they are left with the burdens under the agreement but the benefits are taken from them to satisfy creditors' claims.

that the agreement has been entered under s 21A. Also, s 47(3)(a) provides that the agreement must have been entered when "a situation described in section 25(2) has arisen", namely the partners have ceased to live together. Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) says at [PRA 21A.01]:

In contrast to a contracting out agreement [under s 21] which is entered into prior to, or during a relationship, an agreement under s 21A is entered into between the partners after a relationship has ended ... The purpose of a separation agreement [under s 21A] is to record and formalise the division of property at the end of a relationship.

⁶⁷² This is because if under the agreement the partner has received the same value as consideration for the property he or she relinquished, the creditors will not be deprived of rights to that value: *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 323 per Richardson J.

Options for reform

11.70 In the Issues Paper we suggested several options for reform (Issues Paper at [31.90]–[31.98]):

- (a) **Option 1:** Remove section 47(3) altogether. This reflects a policy position that a partner's rights under a section 21A settlement agreement should not take priority over the rights of the other partner's unsecured creditors. The amendment would be insignificant as it would simply remove a provision with no practical effect.
- (b) **Option 2:** Replace section 47(3) with the defences that exist under general insolvency law. Under the Insolvency Act, a court must not order recovery from a person who receives property if the recipient:⁶⁷³
 - (i) received the property in good faith from the bankrupt;
 - (ii) did not suspect the person who provided the property was insolvent; and
 - (iii) gave value for the property or altered their position in the reasonably held belief that the transfer of the property was valid and would not be cancelled.

Such a provision could be brought into section 47 as a defence to section 47(2). This would mean a partner who provided value or altered their position could take advantage of the defence even if he or she did not provide adequate consideration.

- (c) **Option 3:** Remove section 47(3) and amend section 47(2) so a court may set aside a settlement agreement (in whole or in part) that has the effect of defeating creditors' rights. The purpose of giving a court discretion would be to protect agreements if, for example:
 - (i) the agreement conferred benefits on creditors even if those benefits did not equate to the actual value of the property the debtor partner relinquished under the agreement; or
 - (ii) the non-debtor partner (or the partners' children) would suffer hardship or injustice if the agreement was defeated.
- (d) **Option 4:** Increase the amount of the protected interest (see discussion on the protected interest above).

Results of consultation

11.71 NZLS shared the concern about the apparent arbitrariness of providing partners who have separated with greater rights than those who have not separated. NZLS also agreed that this could undermine the rule in section 20A of the PRA that creditors have the same rights as if the PRA had not been enacted. NZLS concluded that further policy work and consultation was required as to whether a partner's rights under a settlement agreement should take priority over the rights of unsecured creditors for the purposes of section 47(2). Despite not reaching a conclusion on the case for reform, NZLS expressed a preliminary preference for Option 2. NZLS suggested that there may also be scope for alternative dispute resolution/tribunal resolution in "very limited cases" where the claim is of low value or where there is a net debt situation, there are no disputes about the extent of assets or whether the PRA applies, and there are no disclosure issues. NZLS considered that the tribunal procedure would need to include pre-tribunal mandatory

⁶⁷³ Insolvency Act 2006, s 208.

disclosure and access to legal advice funded by legal aid, as well as a right of appeal from any tribunal decision. NZLS suggested one option for reform would be to provide for the Disputes Tribunal to have jurisdiction where there is a net debt situation or where the total quantum of relationship property equity falls within the Tribunal's jurisdiction under section 10 of the Disputes Tribunal Act 1988.

- 11.72 The Official Assignee observed that it was difficult to understand section 47(3) and that, if the focus is on valuable consideration, the provision misses the point as valuable consideration must be assessed in relation to how creditors have been defeated rather than what the partner has given as consideration. The Official Assignee favoured harmonising the PRA's provisions with the provisions of the Insolvency Act, including having the issue dealt with by the High Court. BNZ submitted that if reform of section 47(3) was recommended, it favoured Option 3 (allowing any protection for partners to be exercised through the court's discretion) as this would be the most equitable proposal for both partners and creditors.

Preferred approach

P71

A court should not be able to order recovery from a partner who receives property under a section 21A agreement if the recipient:

- a. received the property in good faith from the other partner;
- b. did not suspect the other partner was insolvent; and
- c. gave value for the property or altered their position in the reasonably held belief that the transfer of property was valid and would not be cancelled.

- 11.73 We broadly favour an approach to the relationship between partners' and creditors' rights under the PRA which more closely reflects the general law of insolvency. Accordingly, we prefer Option 2, replacing section 47(3) with the defences available under section 208 of the Insolvency Act.

Appendix 1

TERMS OF REFERENCE

The Property (Relationships) Act 1976 (“the Act”) created a code which governs the division of property held by married couples, civil union couples and couples who have lived in a de facto relationship when they separate or one of them dies.

The Act was amended in 2001 and 2005 to extend its application to civil unions and de facto partnerships but has not been comprehensively reviewed since its inception. Over time the Act affects almost every New Zealander, both adults and children, and as such it should be reviewed to ensure that it is operating appropriately and effectively.

The Law Commission’s review of the Act will include (but not be limited to) the following matters:

1. The definitions of property, relationship property, and separate property;
2. How a de facto relationship is defined for the purposes of the Act;
3. Differences in the rules governing de facto relationships and marriages/civil unions;
4. Whether the Act gives rise to matters of particular concern to Māori and how these should be addressed;
5. How the interests of children are recognised and protected under the Act and in how it is applied;
6. How the Act functions in relation to sequential relationships and blended families;
7. The ability to make adjustments to take account of economic disparity between spouses and partners, and other departures from equal sharing as contemplated by the Act;
8. The operation of Part 5 of the Act concerning relationship property and creditors;
9. How the Act deals with property held by a company or trust and the powers of the courts in this area;
10. The relationship between and application of the Act and section 182 of the Family Proceedings Act 1980;
11. The provisions relating to contracting out and settlement agreements;
12. The provisions relating to division of property on death;
13. The requirements for disclosure of information in relationship property matters and the consequences for failing to disclose;

14. The jurisdiction of the courts over relationship property matters and the range of orders the courts can make;
15. Whether the Act adequately deals with cross-border issues;
16. Whether the Act facilitates the resolution of relationship property matters in accordance with the reasonable expectations of the parties.

The Law Commission will consult with experts, stakeholders, and the general public.

Revised Timing

The Law Commission will report to the Minister responsible for the Law Commission in 2019.

Appendix 2

LIST OF ORGANISATIONAL SUBMITTERS

Groups and organisations that made submissions are listed below.

- Accident Compensation Corporation Te Kaporeihana Āwhina Hunga Whara and Ministry of Business, Innovation and Employment Hīkina Whakatutuki (ACC and MBIE)
- ANZ Bank (ANZ)
- Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ)
- ASCO Legal
- Barnardos New Zealand (Barnardos)
- Bank of New Zealand (BNZ)
- Chapman Tripp
- Office of the Children's Commissioner Manaakitia a Tātou Tamariki (Children's Commissioner)
- Citizens Advice Bureaux New Zealand Ngā Pou Whakawhirinaki o Aotearoa (CABNZ)
- Community Law Wellington and Hutt Valley
- Divorce Partners
- FairWay Resolution Ltd
- Family Violence Death Review Committee (FVDRC)
- Judges of the Family Court
- McWilliam Rennie Lawyers
- Meredith Connell
- Manatū Taonga Ministry for Culture and Heritage (MCH)
- Ministry for Women Minitatanga mō ngā Wāhine
- The National Council of Women of New Zealand Te Kaunihera Wahine o Aotearoa (NCWNZ)
- New Zealand Bankers' Association (NZBA)
- New Zealand Family Dispute Resolution Centre Limited (FDR Centre)
- New Zealand Federation of Business and Professional Women Inc (BPWNZ)
- Human Rights Commission Te Kāhui Tika Tangata (HRC)

- New Zealand Law Society (NZLS)
- Ngā Rangahautira Māori Law Students Association of Victoria University of Wellington (Ngā Rangahautira)
- Perpetual Guardian
- Public Trust
- Resolution Institute
- Rural Women New Zealand
- Simpson Grierson
- The Backbone Collective
- Vicki Amundsen Trust Law Ltd
- Wellington Women Lawyers' Association (WWLA)
- Workplace Savings NZ Te māngai penapena ā-mahi