

Report | Pūrongo 143

Review of the Property (Relationships) Act 1976

Te Arotake i te Property (Relationships) Act 1976



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Minister Responsible for the Law Commission and
Minister of Justice
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WELLINGTON

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The Hon Sir Douglas White

28 June 2019

Deputy President

Helen McQueen

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**NZLC R143 – Review of the Property (Relationships) Act
1976 – Te Arotake i te Property (Relationships) Act 1976**

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I am pleased to submit to you the above report under
section 16 of the Law Commission Act 1985.

Yours sincerely,

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A handwritten signature in black ink that reads 'Douglas White.' with a period at the end.

Douglas White

President



Foreword

Tēnā koutou

The Property (Relationships) Act 1976 (PRA) is a fundamental part of New Zealand's social legislation. It contains the rules for the division of property when a relationship ends as a result of separation or on the death of one of the partners. It is therefore likely to affect most New Zealanders at some point in their lives. However, the PRA is now over 40 years old, and the ways in which relationships and families are formed, how they operate and what happens when relationships end have changed hugely in that time.

In the 1970s, the paradigm relationship involved a marriage between a man and a woman in which children were raised and wealth was accumulated over time. Now, fewer people are marrying and more people are living in de facto relationships. More relationships end in separation, and repartnering is more common. These changes have taken place against a broader backdrop of demographic change in New Zealand. As a result, public values and attitudes to relationships and families have shifted.


Some significant changes to the law are required to achieve a just division of property between partners on separation. It is essential that the right pool of property is available for sharing. We have concluded it is no longer appropriate to share automatically the family home no matter how it was brought to the relationship. Only property acquired during the relationship or acquired for the couple's common use or benefit should be shared. We also think that some property held on trust has been wrongly excluded from the pool for division and that the courts should have clearer powers to address this. In response to the longstanding problem of how to share more fairly the economic advantages and disadvantages that can arise on separation, we have proposed an entitlement to share family income for a limited period after separation. We have also concluded it would be wrong to ignore the opportunity in this review to promote the best interests of children when their parents separate. Changes to the way in which relationship property disputes are resolved are important as well to address behaviour that causes delay and increases costs.

Our recommendations constitute a package of reforms. Many of our recommendations work together. For example, refining the pool of property available for division is balanced by a more effective regime to share the economic advantages and disadvantages arising from the relationship or its end.

Despite our recommendations for change, certain fundamental aspects of the law should remain as they are. The law should continue to value all forms of contribution to a relationship. This underpins the general approach of equal sharing, a "50/50 split", of relationship property. The law should continue to apply to relationships that are substantively the same – marriages, civil unions and de facto relationships of three years or more. Tikanga Māori should underpin the treatment of Māori land and taonga. The default rules of property sharing should not apply if partners, having received independent and sufficient advice, wish to make their own agreement about their property.

This review has been striking for the quality of the feedback we have received through consultation and the considerable public interest in the issues under consideration. We are grateful again to the wider law reform community in New Zealand for its willingness to engage with us on our projects. We received extensive feedback from expert legal practitioners, academics and judges. We also received submissions from organisations working in the areas affected by the PRA. We have 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. Last but certainly not least, we are grateful to those members of the public who provided insights into their experiences with the PRA and, in many cases, shared their personal stories with us.

Nāku noa, nā

A handwritten signature in black ink that reads "Douglas White." The signature is written in a cursive, slightly informal style.

Douglas White

President

Acknowledgements

The Law Commission is grateful to all those who have assisted us during the course of this project. Since the start of the project in early 2016, we have received invaluable assistance from many individuals and organisations. We acknowledged these contributions in our earlier Issues Paper and Preferred Approach Paper. We note again the generous contributions of time and expertise from our expert advisory group and the support and guidance of the Māori Liaison Committee to the Law Commission throughout the project.

Members of the expert advisory group were:

- 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
- Dr Jan Pryor (to May 2018)
- Judge Laurence Ryan, former Principal Family Court Judge (to August 2018)
- 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 and, following her appointment, the assistance of Principal Family Court Judge Jacquelyn Moran.

We acknowledge with appreciation the role of the following independent reviewers, who considered and commented on various aspects of our work towards this report: Professor Bill Atkin, Victoria University of Wellington; Judge Andrew Becroft, Children's Commissioner; Jan Jakob Bornheim, University of Canterbury; Ms Anita Chan QC; Ms Vivienne Crawshaw QC; Mr David Goddard QC; Dr Maria Hook, Otago University; Ms Jan McCartney QC; Professor Nicola Peart, Otago University; Ms Jacinda Rennie, solicitor; Ms Kirsty Swadling, barrister and mediator; and Mr Stephen van Bohemen, barrister.

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

The Commissioner responsible for this project is Helen McQueen. The legal and policy advisers for this report are John-Luke Day, Nichola Lambie, Jesse Watts, Lisa Yarwood and Karen Yates. The clerks who have worked on this report are Lucy Kenner and Maddy Nash.

We also acknowledge the valuable contributions made to this project by former legal and policy advisers Emma Bassett, Alec Dawson, Francis McKeefry and Mihiata Pirini and by former clerks Fady Girgis, Tasneem Haradasa, Oralia Rona and Kate Wilson.

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Executive summary

A NEW RELATIONSHIP PROPERTY ACT

1. New Zealand has undergone a period of significant social change since the Property (Relationships) Act 1976 (PRA) was first enacted. Patterns of partnering, family formation, separation and repartnering have changed. These social changes influence public values and expectations and affect what constitutes a "just" division of property on separation. It is important that the law continues to keep pace with social change and reflect the reasonable expectations of New Zealanders.
2. In our view, the PRA is no longer fit for purpose for 21st century New Zealand. We recommend that the PRA is repealed and replaced with a new statute that applies to relationships that end on separation, entitled the Relationship Property Act (the new Act). The new Act should give effect to the recommendations for reform set out in this report and otherwise modernise and simplify the law.
3. The central underpinning theory of the new Act should be an entitlement to share the fruits of the family joint venture. In a relationship, partners contribute equally but often in different ways to the family joint venture. This should entitle them to share the property of the family joint venture on separation. The new Act should retain a rules-based deferred property sharing regime rather than relying on judicial discretion. It should be the principal source of law for the division of property when relationships end on separation. We think this will best achieve certainty and predictability for separating couples, which will in turn promote people's ability to resolve property matters without having to go to court.
4. The purpose of the new Act should be to achieve a just division of property between the partners when a relationship ends on separation. We also recommend a new statement of principles to guide the achievement of the purpose of the new Act, reflecting the following concepts:
 - (a) A just division of property recognises tikanga Māori.
 - (b) All forms of contribution to the relationship are to be treated as equal.
 - (c) Relationship property is to be shared equally, unless special circumstances apply.
 - (d) The Act applies in the same way to relationships that are substantively the same.
 - (e) Economic advantages or disadvantages arising from the relationship or its end are to be shared.
 - (f) The best interests of any child of the relationship is a primary consideration.
 - (g) Partners are free to make their own agreements about the status, ownership and division of property, subject to safeguards.
 - (h) Questions arising under the Act should be resolved as inexpensively, simply and speedily as is consistent with justice.

5. We do not recommend that the "clean break" concept should be expressed as a principle of the new Act. In our view, the clean break concept is but one factor that is relevant to achieving a just division of property in the circumstances of each individual case. In some cases, ongoing use of property or future periodic payments may be necessary in order to achieve the purpose of the new Act.
6. We think there is a need for greater public awareness of and education about partners' rights and obligations to share property at the end of a relationship. We recommend that the Government consider ways to improve public awareness of the PRA or the new Act, if enacted.
7. The new Act should only apply to relationships that end on separation. A separate statute is needed to deal comprehensively with relationship property claims arising on the death of a partner, alongside family protection claims and testamentary promises claims. The rules of this statute should be the subject of further consideration within a broader review of succession law.

CLASSIFYING PROPERTY

8. The PRA classifies property the partners own as either relationship property or separate property. Relationship property is generally divided equally between the partners when the relationship ends. The way the PRA classifies relationship property has emerged as a key issue in our review.
9. The PRA's definition of relationship property includes the home and chattels the family used during the relationship, regardless of which partner owns them, when they were acquired or the source of the funds used to acquire them. We consider that this "family use" approach to classifying relationship property can result in unjust outcomes if the property was owned by one partner before the relationship began or if it was received by one partner as a third party gift or inheritance during the relationship.
10. We consider that the full value of the family home should no longer be treated as relationship property just because it was used by the partners during the relationship. Instead, property should be treated as relationship property if it was:
 - (a) acquired by either partner for the partners' common use or common benefit; or
 - (b) acquired or produced by either partner during the relationship, excluding third party gifts and inheritances.
11. We do not propose changing how family chattels are classified. We think that the risk of unfairness in treating all family chattels as relationship property is small given that family chattels are usually of low value, are less likely to increase in value over time and are more likely to be replaced during the relationship. There are also exceptions for heirlooms and taonga, and we recommend below a new exception for chattels of special significance. We do, however, recommend limiting the definition of family chattels to those items "used wholly or principally for family purposes" so it only captures those family chattels that are used by the partners during the relationship.
12. Property acquired before a relationship was contemplated and property acquired by one partner as a gift or inheritance from a third party should be treated as separate property, even if that property is used as the family home. The PRA currently has different rules about when separate property becomes relationship property, depending on whether separate property was acquired before the relationship was

- contemplated or whether it was acquired by gift or inheritance. We think the law should be simplified by applying the same rules to all types of separate property as to when separate property becomes relationship property.
13. In some situations, an increase in the value of separate property will be attributable to the relationship and should therefore be treated as relationship property. This includes when separate property is used as the family home. In that case, any increase in the value of the home should be treated as being attributable to the relationship and classified as relationship property. This recognises that the home is a key family asset that has financial, emotional and practical value to the partners and recognises the likelihood that both partners will have directly or indirectly contributed to the preservation and improvement of the family home for the benefit of the family joint venture.
 14. Increases in value on other items of separate property should also be treated as relationship property if they are attributable, directly or indirectly, to:
 - (a) the application of relationship property;
 - (b) the application of the non-owning partner's separate property; or
 - (c) the actions of either or both partners.
 15. We consider this approach to classification better reflects most people's values and expectations about what property belongs to them as a family and ought to be shared.
 16. We think the PRA's definitions of relationship property and separate property should be replaced in the new Act with new provisions to modernise and simplify the law. We also favour placing the burden of proof on the partner who contends property is their separate property. At Appendix 2, we include draft new provisions that have been prepared with the assistance of Parliamentary Counsel.

CLASSIFYING DEBT

17. The PRA requires partners to share the net value of relationship property by ascertaining the total value of the relationship property and then deducting from that total the value of any relationship debts. We are broadly satisfied with the way the PRA defines a relationship debt. Our main concern is that the definition of relationship debt in the new Act should focus on debts that are incurred for the partners' common use and benefit rather than on debts that are incurred jointly. We also consider the new Act should address situations where a couple has no property but only debt. We recommend the court should have powers to divide net indebtedness.
18. There may be situations where a partner incurs debt in a way that disadvantages the other partner but that debt would still meet the definition of a relationship debt. For example, a partner may incur a debt without the knowledge or consent of the other partner or the debt may be on imprudent terms. However, because of the uncertainty it would cause, we do not think it is desirable to introduce a remedy that gives the court discretion to reclassify these kinds of debts. We anticipate too that, in extreme cases, the court could respond to such situations by using its general power to depart from equal sharing.
19. The classification of debts connected to the home needs to change to be consistent with our recommendations regarding how family homes should be classified. We recommend that, when a family home is separate property because it has been

acquired before the relationship was contemplated, any debt incurred before the relationship was contemplated to acquire, improve or maintain the home should be the owning partner's personal debt. If the partners repay the principal debt using relationship property, the non-owning partner should be compensated.

CLASSIFYING SPECIFIC ITEMS OF PROPERTY AND DEBT

20. The PRA excludes heirlooms and taonga from the definition of family chattels. This means they will not automatically be classified as relationship property when they have been used for family purposes. We recommend an additional category of property that should be excluded from the definition of family chattels. These are items of special significance that have a special meaning to a partner and cannot be replaced by a substitute item of similar monetary value.
21. Special provision is needed for personal injury payments made under either the Accident Compensation Act 2001 or a private insurance policy. Currently, personal injury payments can be treated as relationship property depending on when the entitlement to the payment accrued. This might deprive the injured partner from the funds they need for rehabilitation or from compensation for personal impairment, including funds received after a relationship ends. We prefer an approach that classifies personal injury payments depending on whether they are to support the injured partner's rehabilitation or to replace the injured partner's earnings. We therefore recommend that all personal injury payments, except those that compensate for loss of income during a relationship, should be separate property.
22. Family gifting and lending can have significant implications under the PRA. While gifts to the couple might be treated as relationship property, some loans will be deducted from the total value of the relationship property before it is divided. Problems sometimes arise when parents give financial assistance to children and the nature of the transaction is ambiguous. The law presumes the advance is a gift unless the contrary can be proved. We do not think this presumption needs to change. However, it is important the public are aware of the need to properly document the nature and terms of the advance.
23. Student loans are debts that are classified under the PRA like any other debt. Usually they are classified as personal debts. This can cause problems if a partner has repaid their loan through relationship property income, especially when the other partner's student loan remains outstanding. However, we recommend no reform because the current approach of classifying a student loan based on the circumstances of each case appears to work well.

QUALIFYING RELATIONSHIPS

24. 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. We think that some of the rules applying to different relationship types require reform in order to ensure that the law applies in the same way to relationships that are substantively the same.

Marriages and civil unions

25. The PRA applies to all marriages and civil unions, although marriages and civil unions of less than three years' duration are subject to special rules of division. These special rules were designed to prevent one partner obtaining a windfall gain if the marriage or civil union ended after a short period of time. However, relatively few marriages and civil unions end within three years, especially given that any time spent in a preceding de facto relationship is counted when calculating the length of the marriage or civil union. Our recommendations relating to the classification of property outlined above will also reduce the risk of windfall gains. We therefore think that the special rules for marriages and civil unions of less than three years' duration should be abolished and that the new Act should apply to all marriages and civil unions in the same way. We think it is appropriate to emphasise the partners' decision to formalise their relationship rather than to focus on an arbitrary three year milestone.

De facto relationships

26. De facto relationships must satisfy two requirements in order to qualify for equal sharing under the PRA. First, the relationship must meet the statutory definition of de facto relationship. Second, the partners must have lived together as de facto partners for three years or more. We refer to this requirement as the "three year qualifying period".
27. The statutory definition of de facto relationship requires partners to "live together as a couple". The court will consider all the circumstances of the relationship when deciding whether a couple meets this requirement, including the list of matters set out in the statutory definition. We think this definition is suitable and should remain. There are benefits to its breadth and flexibility given the diverse nature of de facto relationships and the range of public attitudes and values about what is important when deciding whether a de facto relationship exists.
28. We also think that the three year qualifying period remains appropriate. It is broadly consistent with public attitudes and values, and is a well-settled feature of New Zealand's property sharing regime. While some submitters thought that the qualifying period should be longer than three years, often the underlying discontent was about what property is shared after three years. This concern will be addressed by our recommendations relating to classification discussed above.
29. While we are satisfied that the definition of de facto relationship and the three year qualifying period remain appropriate, we think that the new Act should provide partners with greater guidance about when a relationship is likely to be a qualifying de facto relationship. We therefore recommend that there should be a statutory presumption that the partners are in a qualifying de facto relationship if they have maintained a common household for a period of three years or more. The presumption should be rebuttable by evidence that the partners do not meet the definition of de facto relationship.
30. De facto relationships that do not satisfy the three year qualifying period normally fall outside the PRA unless the relationship meets additional requirements. If these requirements are satisfied, special rules of division apply. We think de facto relationships of less than three years' duration should continue to be excluded from the property sharing regime, except where:

- (a) there is a child of the relationship and the court considers it just to make an order dividing relationship property; or
 - (b) one partner has made substantial contributions to the relationship and the court considers it just to make an order dividing relationship property.
31. When either situation arises, the de facto relationship should be subject to the ordinary rules of division rather than the existing special rules that apply. This will simplify the eligibility criteria and make the new Act easier to apply.

Relationships involving young people

32. While the PRA imposes no minimum age requirement on married or civil union partners, the Marriage Act 1955 and the Civil Union Act 2004 have a minimum age requirement of 16 and require people aged 16 or 17 to first obtain the consent of a Family Court judge before marrying or entering a civil union. In contrast, only people aged 18 or over can be in a de facto relationship for the purposes of the PRA. A de facto relationship that ends before the youngest partner turns 21 will therefore generally be excluded from the PRA because the three year qualifying period will not have been met.
33. We consider that the new Act should impose minimum age requirements to ensure that young people are not subject to legal rights, duties and responsibilities that are inappropriate for their age. However, we do not think that the minimum age requirement for de facto relationships should be higher than the requirement for marriages or civil unions. We therefore recommend that the same minimum age and consent requirements should apply to all de facto relationships and marriages and civil unions governed by New Zealand law and that these should be consistent with the requirements in the Marriage Act and Civil Union Act.

LGBTQI+ relationships

34. Some relationships among members of the lesbian, gay, bisexual, transgender, queer or questioning, intersex+ (LGBTQI+) community may differ from heterosexual relationship forms and norms. We recommend that the statutory definition of de facto relationship be amended to adopt the gender neutral terminology of a relationship between two people, regardless of their sex, sexual orientation or gender identity. Otherwise, we are satisfied the definition of de facto relationship contains a flexible framework to accommodate the different ways in which members of the LGBTQI+ community may maintain relationships.

Contemporaneous relationships

35. The PRA has special rules to address the division of property in situations where a person is in more than one qualifying relationship at the same time (contemporaneous relationships). However, these rules are flawed and do not appear to have ever been successfully applied in practice. We think the special rules should be reformed so that, where property is relationship property of two or more qualifying relationships, a court can apportion the contested relationship property between the relationships in accordance with the contribution of each relationship to the acquisition, maintenance or improvement of that property. The ordinary rules of division should then apply to each relationship's pool of relationship property, including the exception that applies when

the court thinks there are extraordinary circumstances that make equal sharing repugnant to justice.

Multi-partner relationships

36. The PRA is premised on a qualifying relationship being between two people who live together as a couple. Although the PRA has special rules for when a partner maintains two separate relationships, the PRA does not apply to three or more people who are in an intimate relationship together. Multi-partner relationships may share many of the hallmarks of a qualifying relationship. However, we do not recommend any change at this time to recognise multi-partner relationships in the property sharing regime. We think that such changes would need to be considered within a broader context, involving more extensive consultation, about how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people. We recommend further research be undertaken.

Domestic relationships

37. The PRA does not apply to non-intimate relationships between two people who provide care and support for each other. Again, these relationships may share many similarities with relationships that come under the PRA, but we do not think the property sharing regime should, at this time, be extended to domestic relationships. As for multi-partner relationships, any change would be a fundamental shift in policy and should be considered as part of a broader review. We recommend further research be undertaken.

DIVIDING RELATIONSHIP PROPERTY

38. A cornerstone of the PRA is that, on division, each partner is entitled to share equally in the relationship property. We think this rule should continue. Equal sharing is easy to understand and simple to apply. It is also consistent with public attitudes and values and is familiar to many people. Repeal of the equal sharing rule would be a radical shift in policy that we do not think is warranted.
39. There are limited exceptions to equal sharing. When a court considers there are extraordinary circumstances that make equal sharing repugnant to justice, it can order that the partners' relationship property be divided based on the partners' respective contributions to the relationship. We think this exception should continue to address truly extraordinary cases where a just division of property would not be achieved if the equal sharing rule was applied.

The relevance of misconduct

40. We think the extent to which a court can take into account a partner's misconduct should be clearer. We agree with the intent of the current law that a division of property should not be based on moral judgements about the partners' conduct, nor should partners be encouraged to unnecessarily focus on each other's behaviour. We think misconduct should not generally affect a partner's entitlements under the property sharing regime.
41. However, if misconduct is gross and has significantly affected the value of relationship property, we recommend the court should be able to apply the exception to equal

sharing. The misconduct must still amount to extraordinary circumstances that would make equal sharing repugnant to justice. In addition, where a partner's misconduct is gross and affects the value of relationship property, we consider it should be possible for that misconduct to affect that partner's entitlements in other specific and limited instances. Those instances would be where the court is required to assess the partners' contributions, grant orders regarding the use and occupation of property or decide how it will implement a division of relationship property.

42. We recommend that the Government consider the relevance of family violence to the division of property at the end of a relationship in the context of its wider response to family violence.

Adjustments to equal sharing

43. In addition to the general exception to equal sharing, there are several more limited provisions in the PRA that enable the court to adjust the partners' shares in relationship property in specific circumstances. We think the court should continue to have the power to adjust property sharing where:
- (a) both partners owned a home when the relationship began but only one home is relationship property;
 - (b) one partner's separate property has been sustained by the other partner or by the application of relationship property or the other partner's separate property;
 - (c) one or both partners have made contributions after the relationship ends;
 - (d) one partner's separate property has been materially diminished by the deliberate action or inaction of the other partner;
 - (e) after the relationship ends, one partner has materially diminished the value of relationship property by their deliberate action or inaction; or
 - (f) one partner's personal debts have been satisfied out of relationship property or the other partner's separate property.
44. Several submitters told us that partners will sometimes dissipate relationship property during the relationship. While we recognise the difficulties this can cause, we are satisfied the existing remedies are adequate to address extreme cases. We do not favour the introduction of a specific remedy in the new Act for dissipation of relationship property during the relationship as we do not think it is appropriate or desirable for a partner's use of property to play a greater role in division.

SHARING ECONOMIC ADVANTAGES AND DISADVANTAGES

45. Section 15 of the PRA gives the court the power to compensate one partner from the relationship property pool when there is a significant disparity in the partners' income and living standards because of the way they divided their functions during the relationship. This gives effect to the PRA's principle that a just division of property has regard to the economic advantages or disadvantages arising from the relationship or its end (economic advantages and disadvantages).
46. This remedy is mainly intended to address situations where one partner worked less during the relationship, usually to care for the partners' children and maintain the household. The other partner is then freed up to pursue a career. At the end of the

relationship, equal division of relationship property would not recognise the reduced income-earning prospects of the partner who has given up workforce participation, nor would it recognise the economic benefits the other partner will continue to enjoy from their established career.

47. However, this remedy has been largely unsuccessful in effectively addressing economic advantages and disadvantages. Problems include the time and cost of making a successful claim and the inconsistent approaches adopted in the courts. A further problem is the requirement that compensation be awarded from relationship property, which is an issue when there is a small amount of relationship property available for division.
48. Alongside the court's powers under the PRA, under the Family Proceedings Act 1980, a court may require a partner to pay the other partner maintenance to meet their reasonable needs at the end of a relationship. There is some overlap with the court's powers under the PRA. However, maintenance does not adequately reconcile economic advantages and disadvantages. Further, the moral basis for why one partner should be liable to provide income support to the other partner through maintenance after the relationship has ended is unclear in contemporary New Zealand.
49. We think economic advantages and disadvantages could be better shared through a new limited entitlement to share family income. We therefore recommend the introduction of Family Income Sharing Arrangements (FISAs) to replace both the court's compensatory powers under the PRA and maintenance under the Family Proceedings Act. Under a FISA, partners would share income for a specified period, calculated by a formula that takes into account the partners' incomes before separation and the length of the partners' relationship.

How a FISA would work

50. The economically disadvantaged partner (Partner A) should be eligible for a FISA if they were in a qualifying relationship with the other partner (Partner B) and:
 - (a) the partners have a child together;
 - (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.
51. These eligibility criteria are designed to capture situations where the partners' varying contributions can reasonably be expected to have given rise to economic advantages and disadvantages. Through those contributions, it is likely there was an (often implicit) expectation to share economic advantages and disadvantages throughout the relationship.
52. The amount payable under a FISA should usually be determined by a statutory formula. Under the formula, Partner A would be entitled to half the family income following separation for a period of time that is approximately half the length of the relationship,

- up to a maximum of five years. The family income should be calculated based on the partners' combined average income over the three years prior to separation. The statutory formula should also apply a discount to the payments due to Partner A in order to recognise that the partners' expectations to share economic advantages and disadvantages decrease over time as they transition out of the family joint venture.
53. Either partner should be able to apply to a court for an order adjusting the amount payable under a FISA or adjusting how it should be implemented. A court should have power to make the order if it is satisfied that failure to grant the application would result in serious injustice, having regard to the purpose and principles of the new Act and a statutory list of considerations. Partners should also be able to make their own agreement about the amount of FISA payments or how a FISA is to be implemented. An agreement would need to conform to the procedural safeguards that apply to other contracting out and settlement agreements.
54. We recommend the same mechanisms that are used to enforce maintenance and child support should be available to enforce the FISA regime. The Government may also wish to consider extending the role of the Inland Revenue Department under the Child Support Act 1991 in the context of the FISA regime.

TRUSTS

55. Many people in New Zealand use trusts as a means of holding property. When a partner places property on trust, they pass legal ownership to the trustees. In most cases, trust property will fall outside the PRA because it is no longer beneficially owned by the partners.
56. 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 because they give the court inadequate powers. 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.
57. By settling property on trust, a partner can unilaterally affect the division of property in a way that is inconsistent with the procedures for contracting out of the PRA. When entering a contracting out agreement, the PRA requires the partners to follow a procedure designed to ensure they both enter the agreement with informed consent and do not unwittingly compromise their rights under the PRA. The same procedures do not apply when partners settle property on trust in contemplation of or during a relationship.
58. The task of determining what rights and remedies partners have in relation to trust property at the end of a relationship is complex. The types of interests and powers that constitute property are a developing area of law and found in case law rather than the PRA's rules. Several remedies are found outside the PRA, including the court's broad powers under the Family Proceedings Act to vary trusts that are nuptial settlements. These remedies are founded on different principles to the PRA. They give the court different powers. They involve different procedures.
59. We think the court should have broader powers in order to provide for a just division of property when a trust is involved. We recommend a new remedy that enables the court to respond to the various ways in which a trust might hold property that is produced,

preserved or enhanced by the relationship. We also recommend a partner should be able to lodge and sustain a notice of claim over land held on trust if the partner has an arguable claim under the new remedy. We think the court's power to vary a trust under the Family Proceedings Act should be repealed. The new Act should be the principal source of law in relation to the division of property when a trust is involved, and partners should not have to look elsewhere for relief.

CHILDREN'S INTERESTS

60. Parental separation can have significant and wide-ranging impacts on children. The PRA recognises that children have an indirect but nonetheless important interest in the division of relationship property. One of the purposes of the PRA is to provide a just division of property while taking account of the interests of any children of the relationship. The court is directed to have regard to the interests of any minor or dependent children, and the PRA provides a range of tools that can be used to meet children's needs following parental separation. They include powers to settle relationship property for the benefit of any children of the relationship, postpone the vesting of relationship property, grant a partner the right to occupy the family home, award use and possession of furniture and household effects to a partner and make orders in relation to child support. The PRA also provides for the appointment of a lawyer to represent any minor or dependent children in relationship property proceedings.
61. In practice, however, children's interests have not played a prominent role in relationship property matters. The tools available to benefit children are rarely used, and it is unusual for children to participate in relationship property proceedings. Consequently, we think the PRA fails to strike the right balance between partners' property entitlements and children's interests following parental separation.
62. We recommend several changes that aim to give greater priority to children's interests without altering the general rule of equal sharing. We think the new Act should include a statutory principle and an overarching obligation on the courts to have regard to the best interests of any minor or dependent children. We recommend procedural rules to ensure a court has the information it needs to perform this obligation effectively, and to promote the importance of considering children's best interests. We recommend a new presumption in favour of a temporary occupation or tenancy order for the benefit of any minor or dependent child of the relationship. It should be available to any person who is a principal caregiver of the child. The power to settle property for the benefit of any children of the relationship should remain, and the court should be required to have regard to any unmet needs of the children. Other tools, such as the court's powers to postpone vesting or grant use and possession rights over furniture, should be strengthened.
63. We also recommend a review of 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. We think that the problems identified by submitters and researchers with how parents take financial responsibility for their children ought to be addressed through a review of the child support regime rather than indirectly through reform of relationship property law.

CONTRACTING OUT AND SETTLEMENT AGREEMENTS

64. The PRA allows partners to opt out of the PRA by making a contracting out or settlement agreement about how their property is to be divided.
65. The PRA ensures partners do not sign away their rights without appreciating their entitlements under the PRA and the implications of the agreement. For example, partners must receive independent legal advice, each partner's lawyer must witness them sign the agreement and the lawyer must certify that they have explained the effect and implications of the agreement. If these requirements are not met, the agreement is void, although a court can give effect to it in some circumstances.
66. Even if an agreement has been properly entered, the court retains power to set the agreement aside entirely if it is satisfied the agreement would cause serious injustice.
67. We think the PRA strikes the right balance. It gives 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. We recommend the general policy continue under which the procedural safeguards remain and the court has discretion to set aside agreements that would cause serious injustice.
68. However, we think the regime could be improved through several changes:
- (a) Cost and time could be saved by allowing lawyers to use audio-visual technology to witness a partner signing an agreement.
 - (b) The provisions that allow a model form agreement to be set by regulation should be repealed. We doubt the model agreement is used in practice or saves legal costs.
 - (c) The court should have power to set aside seriously unjust agreements wholly or in part. We think a court could better serve the partners' intentions by preserving some aspects of their agreement or varying the agreement rather than setting the whole agreement aside.
 - (d) When the court considers whether to set aside an agreement because it would cause serious injustice, or whether to give effect to a non-compliant agreement, it should have regard to the best interests of any minor or dependent children.

TIKANGA MĀORI

69. We think that the new Act should continue to accommodate and respond to matters of tikanga Māori through its framework, principles and operative provisions. In particular, we recommend the statement of principles in the new Act include the principle that a just division of property recognises tikanga Māori.
70. Māori land should continue to be excluded under the new Act. This means that, if the family home is on Māori land, or property a partner has contributed to is Māori land, the non-owning partner will have to look to other remedies outside the property sharing regime. We do not have evidence that this is a significant problem in practice. However, consideration could be given to providing remedies through Te Ture Whenua Māori Act 1993.
71. We recommend greater protections for taonga. Currently, taonga are excluded from the definition of family chattels, but they are not excluded entirely from the PRA. This

means that, in some situations, a partner may have to relinquish taonga when a relationship ends. We recommend reform to ensure a partner does not have to relinquish taonga on separation. We also recommend that taonga be defined in the new Act by reference to tikanga Māori, but further consultation is required to inform how the definition should be drafted.

72. We do not recommend reform to recognise Māori customary marriage under the new Act. Recognition of Māori customary marriage, and the property entitlements that should follow, should be considered within a broader context that also considers how Māori customary marriage should be accommodated in other areas of law, in particular, the Marriage Act 1955.
73. What constitutes Māori custom or tikanga in any particular case is a question of fact that may require expert evidence. We think there are several ways of improving how the courts resolve questions of tikanga Māori, including a greater use of experts and warranting Māori Land Court judges to sit alongside judges in the Family Court.

PROPERTY ORDERS

74. We are broadly satisfied the court has adequate powers to implement a final division of relationship property. However, we consider the court's powers to make interim distributions of property could be clarified and strengthened. We think the new Act should allow the court to make interim distributions of any property it has determined is relationship property. In appropriate circumstances, the court should also be able to require a partner to distribute their separate property to account for the relationship property they retain in their possession.

Superannuation and KiwiSaver entitlements

75. We recommend several changes to the way partners' entitlements under superannuation and KiwiSaver schemes should be divided. The court's powers to bind superannuation and KiwiSaver scheme managers are currently based on a requirement that the partners enter an arrangement or deed. We do not think this requirement serves a useful purpose, so it should be removed.
76. We also recommend making specific provision for partners to be able to divide KiwiSaver entitlements without needing a court order but only on certain conditions. KiwiSaver entitlements provide important long-term financial benefits, particularly in retirement. They are becoming a common item for property division. Partners should therefore be able to require a scheme manager to transfer funds between the partners' KiwiSaver accounts unless one partner is ineligible to join a scheme. The partners' agreement to divide the entitlements must satisfy the requirements for a valid contracting out or settlement agreement. Partners wishing to divide KiwiSaver entitlements in another way should continue to be able to offset the entitlements by one partner keeping their KiwiSaver entitlements while the other takes relationship property of equivalent value, or otherwise seek a court order.

Protection of property prior to division

77. The PRA contains several mechanisms to prevent a partner from disposing of property prior to division:

- (a) A partner can register a notice of claim on land in which they claim an interest under the PRA to prevent dealings with the land.
 - (b) A partner can apply to the court to restrain dispositions of property that will defeat their rights under the PRA or recover the property if the disposition has already been made.
 - (c) While proceedings under the PRA are pending, it is a criminal offence for a partner to dispose of family chattels or remove furniture and household effects from the family home without the other partner's consent.
78. We are generally satisfied these mechanisms are adequate. We suggest some minor amendments to make the court's powers to restrain dispositions more consistent with the court's general powers to make interlocutory injunctions and to extend the criminal offence relating to unauthorised disposal or removal of chattels to apply earlier in the resolution of relationship property matters.

Rights to occupy or possess property

79. The court has powers to grant a partner exclusive use and occupation of the family home and vest a tenancy in one partner. When exercising these powers, the court must have particular regard to the need to provide a home for any minor or dependent children of the relationship. When one partner has exclusive possession of relationship property after separation, the court may sometimes order that the partner pay occupation rent to the other partner to compensate them for preventing access to their share of the property.
80. We think the court's powers to grant occupation and tenancy orders are important to provide for the accommodation needs of partners and their children after separation. In paragraph 61 we recommend a new presumption in favour of a temporary occupation or tenancy order for the benefit of any minor or dependent child of the relationship. We also think the court's powers could be strengthened in several other respects.
81. The court should have greater powers to make occupation orders over property that is not relationship property. We recommend that the court should have the ability to make occupation orders over one partner's separate property. We also recommend that the court's jurisdiction should extend to homes held on trusts that are connected to the relationship. The court should continue to have broad powers to make occupation orders on terms it considers appropriate in the circumstances, including the payment of occupation rent.

RESOLUTION

82. A key issue identified in this review is that the PRA does not facilitate the inexpensive, simple and speedy resolution of relationship property matters. Lengthy delays and unaffordable costs can exacerbate what is already a deeply traumatic time of anxiety, uncertainty and conflict for many separating partners. We therefore make a range of recommendations designed to promote the just and efficient resolution of relationship property matters.

Access to information

83. We think there needs to be more comprehensive and easy to understand information about the property sharing regime and options for resolving relationship property matters. We therefore recommend that the Government develop and publish a comprehensive information guide. The object of the information guide should be to promote out of court resolution as far as possible by giving partners the information they need in order to participate effectively in the resolution of relationship property matters. The information guide should be widely available in a range of different formats and languages. We also think that consideration should be given to funding community organisations to provide person-to-person support for people who have difficulty accessing, navigating and applying the information guide themselves. Such support should enable people to take the first steps in the resolution process but is not intended to replace the need to obtain legal advice.

Access to affordable legal advice

84. Access to affordable legal advice is essential in ensuring access to justice for relationship property matters given the complexity of the law in this area and its impact on partners' rights and responsibilities. Without legal advice, any contracting out or settlement agreements partners reach are unenforceable. Access to affordable legal advice was raised as an issue by many submitters. We think the Government should reconsider the current policy settings for the provision and funding of legal advice on relationship property matters.

Resolving relationship property matters out of court

85. Partners can resolve their relationship property matters out of court in a range of different ways, including by lawyer-led negotiation or by using a dispute resolution service such as mediation, collaborative law, arbitration or online dispute resolution. There is no publicly funded service, although parents can raise relationship property matters during Family Dispute Resolution (FDR) if it will help them resolve parenting disputes.
86. We think that partners should be encouraged to voluntarily participate in out of court dispute resolution processes to resolve relationship property matters. We recommend promoting out of court resolution by introducing new "pre-action procedures" in the Family Court Rules 2002 that will provide a clear process for partners to follow when attempting to resolve relationship property matters out of court. Consideration should also be given to extending a voluntary modified FDR service or some other form of publicly funded service to relationship property matters, particularly in light of the recommendations the Independent Panel examining the 2014 family justice reforms has made relating to FDR. Safeguards would be necessary to ensure that FDR is appropriate for relationship property matters. We do not recommend providing a specific dispute resolution service for some or all relationship property matters such as low value claims.

Resolving relationship property matters in court

87. When partners cannot resolve relationship property matters themselves, they can apply to the Family Court for orders dividing their property. There are several practical issues

with the Family Court process that can hinder the just and efficient resolution of relationship property matters. There are costs and delays in going to court because relationship property proceedings take a long time to resolve. Partners may sometimes use tactics to delay proceedings to force the other partner to incur added expense and settle for less than they are entitled to.

88. We think the Family Court processes could be improved to facilitate the timely progression of relationship property proceedings. This will help ensure that the threat of court action and court-imposed penalties effectively deters partners from engaging in bad behaviour when resolving relationship property matters out of court. It will also ensure that court action is a real and efficient option in those cases where resolution is not possible any other way. We recommend establishing a new Family Court Rules Committee to develop new procedural rules for relationship property matters and issue guidance on these rules as required. This should include case management procedures tailored to relationship property proceedings. We also think the Family Court should have a broader power to appoint a person to conduct an inquiry into any such matter as may assist the court to deal effectively with the matters before it.
89. Clearer guidance should be provided on the imposition of penalty costs and other consequences for non-compliance with procedural requirements. Otherwise, we are satisfied the general principle that costs should "lie where they fall" is appropriate for relationship property proceedings. Where costs are awarded, the distinctive characteristics of relationship property proceedings justify a separate scale of costs, and we propose this be developed by the new Family Court Rules Committee.
90. We recommend that the Government consider reducing the application and hearing fees for relationship property proceedings in recognition of the fact that the introduction of fees for relationship property proceedings in 2012 resulted in a reduction of PRA applications to the Family Court. We also recommend that the Government collect data on the progress and resolution of relationship property proceedings in the Family Court in order to monitor whether the Family Court is adequately resourced to deal appropriately with relationship property proceedings.

Disclosure

91. Achieving a just and efficient resolution of relationship property matters in and out of court relies on both partners having sufficient information about each other's property and finances. Disclosure can be challenging in relationship property matters, particularly when one partner has greater knowledge of the couple's financial affairs. This can put the other partner at a disadvantage. While partners are required to make some initial disclosure when they file proceedings and can apply for discovery under the Family Court Rules, we think that the current law and processes are inadequate. We recommend that the requirements for disclosure should be strengthened by:
 - (a) providing in the new Act that the partners have a continuing duty to give timely, full and frank disclosure of all relevant information;
 - (b) developing specific procedural rules that set out a prescribed process for disclosure that applies before an application is made to the court and provide a clear procedure for initial and subsequent disclosure in relationship property proceedings; and
 - (c) having clearer and stricter consequences for non-disclosure.

JURISDICTION OF THE COURTS

92. Every application under the PRA must be heard and determined in the Family Court. There is no financial limit on the claims the Family Court can hear. The Family Court can, however, transfer proceedings to the High Court if it decides that the High Court is the more appropriate venue to deal with those proceedings. Substantive decisions under the PRA are subject to a right of appeal to the High Court.
93. There are several issues that affect the Family Court's ability to hear and determine property disputes that arise between partners at the end of a relationship. It is unclear whether the Family Court can decide certain issues relating to trusts or general civil law and the Court has no jurisdiction under the Trustee Act 1956 or the Companies Act 1993.
94. We think that the Family Court should have first instance jurisdiction to determine all matters related to relationship property proceedings. The Family Court has a specialist jurisdiction in family and relationship property matters. It regularly deals with complex cases and applies principles of general law. We are satisfied extending its jurisdiction to handle wider property issues in relationship property proceedings is appropriate. The High Court should continue to exercise a supervisory role through the existing rights of appeal and the ability to transfer proceedings to the High Court.

Appealing interlocutory decisions

95. Although partners have a right of appeal to the High Court, the law is not settled on whether this includes a right to appeal interlocutory decisions. Some interlocutory decisions are important and concern the partners' substantive rights, whereas others are relatively insignificant procedural matters. We recommend there should be an automatic right to appeal interlocutory decisions in relation to interim distributions, occupation, tenancy and furniture orders, transfer of proceedings to the High Court, notices of claim, restraining dispositions of property or orders for disclosure made in relation to a trust or company or under the Family Court Rules. For all other interlocutory decisions, a partner should need to seek the Family Court's leave to appeal.

Overlap with the Domestic Actions Act 1975

96. We recommend the repeal of Part 2 of the Domestic Actions Act 1975. It provides for the settlement of property disputes arising from the termination of agreements to marry. It overlaps with the PRA regime and is outdated. A remedy will continue to be available through a claim based on constructive trust for couples who made decisions affecting their property but were not in a qualifying relationship for the purposes of the new Act.

CREDITORS' INTERESTS

97. As a general rule, the PRA does not affect the rights of creditors. Apart from limited exceptions, creditors have the same rights against a partner and that partner's property as if the PRA had not been passed. We think this general rule remains sound and should continue under the new Act.
98. One of the exceptions is a partner's protected interest in the family home. This takes priority over the unsecured debts of the other partner. The protected interest suffers

from many problems because it is available only to homeowners and it is questionable whether the extent of the interest provides effective protection. However, it is difficult at this stage to recommend reform. The broad question of the appropriate balance of interests between a debtor, their family, and creditors is not within the terms of our review. We consider further policy work is needed to determine what property rights partners and creditors have in bankruptcy.

99. The PRA provides remedies for creditors when an agreement or disposition between partners has the effect of defeating creditors' interests. There are difficulties with how this provision applies in practice that we think need to be clarified in the new Act. In particular, we recommend creditors should have a two year period in which to challenge agreements or dispositions that have a defeating effect. When a partner is bankrupt, the Official Assignee should have clear powers to set an agreement or disposition aside. We also think the provision should clarify that, in some cases, a court should not order recovery from a partner who receives property under a settlement agreement. The partner would need to show that they received the property in good faith, that they did not suspect the other partner's insolvency and that they have altered their position.

CROSS-BORDER ISSUES

100. Cross-border issues can arise where one or both partners live overseas or have a connection to another country or where their property is located overseas. The PRA applies to immovable property situated in New Zealand and movable property regardless of where it is situated if at least one of the partners is domiciled in New Zealand. The PRA does not apply to immovable property situated outside New Zealand. These rules give rise to several problems. They prevent the resolution of property disputes under a single legal regime. They are silent on what country's law is to apply when the PRA does not apply, which creates uncertainty and risks leaving gaps in the law. The domicile test is also problematic. The country where a partner is domiciled might have very little connection to the relationship. Relying on one partner's domicile might also be unfair to the other partner, especially if the domicile was acquired after the relationship ended.
101. We think that the law to be applied to property disputes between partners should be the law of the country with which the relationship had its closest connection. When the new Act applies under this rule, a court should be able to classify all the partners' property as relationship property or separate property regardless of where it is located, and the net value of relationship property available for division between the partners should include the value of any items of relationship property that are situated overseas. A court should be able to use its full range of ancillary powers to implement a division in a way that best addresses the partners' circumstances and the location of the property. If property is situated outside New Zealand and is immovable (for example, land), a court should be able to make orders against the partners themselves rather than against the property directly.
102. We think the PRA's provisions regarding choice of law agreements should be repealed and replaced with rules in the new Act that give partners more flexibility to make agreements about their property. Agreements should need to satisfy certain requirements, including that the agreement is valid under the law of the country that is chosen under the agreement, or under the law of the country with which the

relationship had its closest connection. The court should, however, retain discretion not to give effect to a valid agreement if it would be contrary to New Zealand public policy.

103. We recommend that the Family Court should have first instance jurisdiction in respect of all property disputes between partners, regardless of whether the new Act or the law of another country applies. The Family Court is generally more accessible and cost-effective than the High Court, and it has the expertise to deal with property disputes between partners. However, we think that partners should continue to apply to the High Court in order to enforce in New Zealand a judgment made by a foreign court. Various requirements must be satisfied before a New Zealand court will enforce a foreign judgment, depending on the jurisdiction where the order was made, the type of judgment and the relevant law that applies to the enforcement procedure. We think the procedures in the High Court should continue to apply.
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Recommendations for reform

CHAPTER 2: A NEW RELATIONSHIP PROPERTY ACT

R1

A new statute, the Relationship Property Act (the new Act), should be enacted as the principal source of law applying to the division of property when relationships end on separation.

R2

The new Act should retain a rules-based regime of deferred property sharing that is based on the theory that each partner is entitled to share in the fruits of the family joint venture.

R3

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

R4

The new Act should include a revised statement of principles to guide the achievement of the purpose of the Act. The principles should address the following concepts:

- a. A just division of property recognises tikanga Māori.
- b. All forms of contribution to the relationship are to be treated as equal.
- c. Relationship property is to be shared equally, unless special circumstances apply.
- d. The Act applies in the same way to relationships that are substantively the same.
- e. Economic advantages or disadvantages arising from the relationship or its end are to be shared.
- f. The best interests of any child of the relationship is a primary consideration under the Act.
- g. Partners are free to make their own agreements about the status, ownership and division of property, subject to safeguards.
- h. Questions arising under the Act should be resolved as inexpensively, simply and speedily as is consistent with justice.

- R5** The Government should consider ways to improve public awareness of and education about the PRA and the new Act, if enacted.
- R6** The rules that apply to relationships ending on death should be the subject of further consideration within a broader review of succession law.
- R7** The Minister Responsible for the Law Commission should ask the Law Commission to undertake a review of succession law as a matter of priority in the Law Commission's next annual programme.

CHAPTER 3: CLASSIFYING PROPERTY

- R8** The definition of property in the new Act should retain the definition of property from the PRA.
- R9** Property owned by either or both partners should be classified as relationship property if it:
- was acquired for the partners' common use or common benefit;
 - was acquired during the relationship other than as a third party gift or inheritance; or
 - is a family chattel.
- R10** Homesteads should continue to be treated as a discrete item of property, distinct from the part of the land not used wholly or principally for the purposes of the household. Homesteads should be classified and divided under the same rules that apply to family homes.
- R11** The definition of family chattels should be limited to chattels used wholly or principally for family purposes.
- R12** 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. All forms of separate property should be subject to the same rules as to when separate property becomes relationship property.

R13 Any increase in the value of any separate property, or any income or gains derived from separate property, that is attributable directly or indirectly to the application of relationship property, the application of the other partner's separate property or the actions of either or both partners should be classified as relationship property. Section 15A of the PRA should be repealed.

R14 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.

R15 The new Act should include new classification provisions that give effect to R9–R14 and modernise and simplify the law.

R16 The burden of proof of establishing whether property is separate property should be on the owning partner.

CHAPTER 4: CLASSIFYING DEBT

R17 Debts incurred by either or both partners should be classified as relationship debts to the extent the debts have been incurred:

- a. for the common use or common benefit of the partners;
- b. in the course of a common enterprise carried on by the partners, whether alone or together with another person;
- c. for the purpose of acquiring, improving or maintaining relationship property; or
- d. for the purpose of bringing up any child of the relationship.

R18 The burden of proof of establishing whether a debt is a relationship debt should be on the partner contending the debt is a relationship debt.

R19 A court should have jurisdiction to make orders dividing relationship debts in circumstances where the total value of relationship debts exceeds the total value of relationship property.

- R20** The new Act should make express provision for debt incurred in connection with a family home that is separate property, providing that:
- a. a debt incurred by one partner before the relationship began to acquire, improve or maintain the home is that partner's personal debt; and
 - b. any repayment of that personal debt using relationship property or the other partner's separate property should entitle the other partner to compensation for an amount equal to half the reduction in principal debt or some other amount that a court considers just in the circumstances.

CHAPTER 5: CLASSIFYING SPECIFIC ITEMS OF PROPERTY AND DEBT

- R21** The definition of family chattels should exclude items of special significance so that an item of special significance is classified in the same way as any other item of property that is not a family chattel.

- R22** Items of special significance should be defined in the new Act in a way that captures items that:
- a. have special meaning to a partner; and
 - b. are irreplaceable, in that a similar substitute item or its monetary value would be an insufficient replacement.

- R23** Payments 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.

CHAPTER 6: QUALIFYING RELATIONSHIPS

- R24** The new Act should apply in the same way to all marriages, civil unions and qualifying de facto relationships.

- R25** The eligibility criteria for de facto relationships should retain the existing definition of de facto relationship and the existing three year qualifying period.

R26 The new Act should include a presumption that two people are in a qualifying de facto relationship when they have maintained a common household for a period of at least three years. The presumption should be rebuttable by evidence that the partners did not live together as a couple, having regard to all the circumstances of the relationship and the matters currently prescribed in section 2D(2) of the PRA.

R27 When the partners have not maintained a common household for three years or more, the burden of proof of establishing that a qualifying de facto relationship exists should be on the applicant partner.

R28 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.

R29 A qualifying de facto relationship should include a de facto relationship that does not satisfy the three year qualifying period if it meets the additional eligibility criteria that:

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

CHAPTER 7: SPECIFIC RELATIONSHIP TYPES

R30 The definition of de facto relationship in the new Act should require that both partners are aged 16 years or older but that a de facto relationship involving a person aged 16 or 17 years requires the consent of a Family Court judge in accordance with section 46A of the Care of Children Act 2004.

R31 The new Act should not apply to a marriage or civil union that is governed by New Zealand law and that is void for failing to satisfy the minimum age and consent requirements in the Marriage Act 1955 or the Civil Union Act 2004 until both partners reach the age of 18 years.

R32 The definition of de facto relationship should adopt the gender neutral terminology of a relationship between two people, regardless of their sex, sexual orientation or gender identity.

- R33** The new Act should provide for contemporaneous relationships in a stand-alone provision that:
- a. applies whenever property is the relationship property of two or more qualifying relationships (contested relationship property); and
 - b. requires a court to apportion contested relationship property in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.
- R34** The definition of marriage in the new Act should expressly include valid foreign polygamous marriages, consistent with the definition of marriage in the Family Proceedings Act 1980.
- R35** The Government should consider undertaking research to identify the nature and extent of multi-partner relationships in New Zealand and how multi-partner relationships should be recognised and provided for in the law.
- R36** The Government should consider undertaking research to identify the nature and extent of domestic relationships in New Zealand and how domestic relationships should be recognised and provided for in the law.

CHAPTER 8: DIVIDING RELATIONSHIP PROPERTY

- R37** Each partner should continue to be entitled to share equally in all relationship property under the new Act, subject to limited exceptions.
- R38** Sections 11A and 11B of the PRA should be repealed.
- R39** The new Act should continue to provide an exception to equal sharing for extraordinary circumstances that make equal sharing repugnant to justice. Where the exception applies, relationship property should continue to be divided in accordance with each partner's contributions to the relationship.
- R40** The new Act should retain the existing definition of contributions to the relationship in section 18 of the PRA but should clarify that the care of any former child of the relationship is included.

R41

The new Act should provide that a court may not take into account any misconduct of a partner for the purposes of:

- a. diminishing or detracting from that partner's positive contributions to the relationship; or
- b. diminishing or detracting from that partner's entitlement, rights or interests when determining whether to make any order under sections 26, 26A, 27, 28, 28B, 28C and 33 of the PRA (those provisions to be retained in the new Act);

unless that misconduct amounts to gross misconduct that has significantly affected the extent or value of the relationship property.

R42

For the avoidance of doubt, the new Act should provide that, when deciding whether there are extraordinary circumstances that make equal sharing repugnant to justice, a court may take into account a partner's gross misconduct when that misconduct has significantly affected the extent or value of relationship property.

R43

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

CHAPTER 9: ADJUSTMENTS TO EQUAL SHARING

R44

An adjustment to equal sharing should be available where:

- a. both partners owned homes when the relationship began; and
- b. the increase in the value of the home owned by one partner (Partner A) is divided as relationship property while the home owned by the other partner (Partner B) remains their separate property;

unless Partner A sold their home and used the sale proceeds to acquire new items of relationship property.

R45

An adjustment to equal sharing should be available where a partner's separate property has been sustained by the application of relationship property, the actions of the other partner or the application of the other partner's separate property.

R46

An adjustment to equal sharing should continue to be available for contributions made by a partner after the relationship has ended.

R47 An adjustment to equal sharing should continue to be available where one partner has, through deliberate action or inaction, materially diminished:

- a. the other partner's separate property; or
- b. relationship property after the relationship has ended.

R48 An adjustment to equal sharing should be available where a partner's personal debt has been paid or satisfied (directly or indirectly) out of relationship property or the other partner's separate property.

R49 The powers of adjustment described in R44–R48 should grant broad and consistent powers to a court to compensate one partner through an adjustment to the partners' shares in relationship property, the payment of a sum of money or the transfer of property, whether that property is relationship property or separate property.

CHAPTER 10: SHARING ECONOMIC ADVANTAGES AND DISADVANTAGES

R50 Section 15 of the PRA and maintenance under Part 6 of the Family Proceedings Act 1980 should be repealed, and the new Act should provide for a new limited entitlement to share family income through a Family Income Sharing Arrangement or FISA.

R51 The objective of a FISA is to share the economic disadvantages a partner (Partner A) suffers or the economic advantages a partner (Partner B) gains arising from the relationship or its end.

R52 Partner A should be entitled to a FISA when:

- a. the partners have a child together;
- 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.

R53 The total amount payable under a FISA should usually be determined by a statutory formula that shares the family income for a period of time that is approximately half the length of the relationship up to a maximum of five years. The family income should be calculated based on what the partners earned in the period before separation.

R54 Entitlement to a FISA should arise from the date of separation, and default implementation rules should provide for the implementation of a FISA by way of monthly periodic payments until a court orders otherwise.

R55 A court should be able to adjust a FISA and depart from the statutory formula and default implementation rules if satisfied failure to do so would result in serious injustice to either partner, having regard to a number of specified considerations.

R56 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 implementation rules or as otherwise ordered by the court.

R57 Partners should be able to make their own agreement as to the amount and implementation of a FISA before or during a relationship under a contracting out agreement or after a relationship ends under a settlement agreement.

CHAPTER 11: TRUSTS

R58 Section 44C of the PRA should be retained in the new Act but 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.

R59 An amended section 44C should 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 new Act;
- 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 directly or indirectly to the application of relationship property or the actions of either or both partners.

R60 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. The court should also have ancillary powers to remove, appoint or replace trustees.

R61 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 new Act and the preservation of trusts.

R62 Where a claim is made under amended section 44C, notice must be given to the following parties granting them the right to appear and be heard in the matter as a party to the application:

- a. the trustees of the trust;
- b. the beneficiaries of the trust, including discretionary beneficiaries; and
- c. any other person with an interest in the property held on trust, including creditors of the trust.

R63 Partners should be able to agree not to make any claim under amended section 44C for the purposes of contracting out of or settling claims under the new Act.

R64 Section 44 of the PRA should be retained in the new Act, continuing to provide a remedy for other avoidance mechanisms.

R65 A partner should be able to lodge a notice of claim against land held on trust and sustain that notice of claim if they have an arguable claim under section 44 or amended section 44C.

R66 Section 182 of the Family Proceedings Act 1980 should be repealed.

CHAPTER 12: CHILDREN'S INTERESTS

R67 Children's best interests should be a primary consideration under the new Act. This should be given effect through:

- a. a statutory principle to guide the achievement of the purpose of the new Act;
- b. an overarching obligation on the courts to have regard to the best interests of any minor or dependent children of the relationship; and
- c. procedural rules to ensure a court is provided with the information it needs in order to perform effectively 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.

R68 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. The court should be directed to have particular regard to any unmet needs of the child or children during minority or dependency.

R69 There should be a presumption in favour of granting a temporary occupation or tenancy order on application by a principal 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.

R70 The other tools available to meet children's needs should be retained in the new Act and improved by:

- a. broadening the jurisdiction of furniture orders to include all family chattels 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.

R71 The Government should consider ways to strengthen child participation in relationship property proceedings in any work undertaken in response to the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms.

R72 The Government should 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 13: CONTRACTING OUT AND SETTLEMENT AGREEMENTS

- R73** The new Act 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 existing procedural requirements in section 21F of the PRA should be retained.
- R74** The new Act should make express provision for a lawyer to use audio-visual technology to witness a partner signing a contracting out or settlement agreement.
- R75** Section 21E of the PRA and the Property (Relationships) Model Form of Agreement Regulations 2001 should be repealed.
- R76** A court should continue to have the power to give effect to a contracting out or settlement agreement that is void for non-compliance with the procedural requirements under the new Act. When deciding whether to give effect to a non-compliant agreement, the new Act should direct a court to have regard to the same matters that are relevant when deciding whether to set aside an agreement for serious injustice.
- R77** A court should have the power to set aside a contracting out or settlement agreement wholly or 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.
- R78** The new Act should direct the court to have regard to the best interests of any minor or dependent children of the relationship in deciding whether to set aside a contracting out or settlement agreement for serious injustice or to give effect to a contracting out or settlement agreement that fails to comply with the procedural requirements under the new Act.

CHAPTER 14: TIKANGA MĀORI

- R79** The framework of the new Act should continue to accommodate and respond to matters of tikanga Māori.
- R80** The Government should consider providing remedies in relation to family homes built on Māori land through Te Ture Whenua Māori Act 1993.
- R81** Taonga should be defined in the new Act within a tikanga Māori construct, but the definition should exclude land.
- R82** The new Act should ensure that taonga cannot be classified as relationship property in any circumstances and that a court cannot make orders requiring a partner to relinquish taonga as compensation to the other partner.
- R83** The Family Court should be able to appoint a person to make an inquiry into matters of tikanga Māori and report to the Court.
- R84** Family Court judges should receive education on tikanga Māori.
- R85** The Government should give further consideration 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 15: PROPERTY ORDERS

- R86** A court should retain under the new Act the broad powers to implement a final division of relationship property under section 25 of the PRA and the general ancillary powers under section 33 of the PRA.
- R87** The new Act should be drafted in a way that resolves the current inconsistencies in how the PRA rules provide for powers to be exercised by the court.

R88

The new Act should make express provision in a stand-alone provision for a court to order interim distributions of property. The court should be able to:

- a. make interim distributions in respect of any property it has determined is relationship property; and
- b. require a partner to pay a sum of money or transfer property that is their separate property to the other partner to account for the relationship property they retain in their possession.

R89

A court should have the power under the new Act to make orders in relation to the division of superannuation scheme or KiwiSaver entitlements, and those orders should be binding on the scheme manager regardless of the provisions of any other Act or rules governing the scheme.

R90

The new Act should make express provision for the implementation of a division of KiwiSaver entitlements and should permit the partners to instruct a KiwiSaver scheme manager to:

- a. transfer a specified amount from one partner's KiwiSaver account to the other partner's KiwiSaver account; or
- b. directly pay a specified amount from one partner's KiwiSaver account to the other partner if the other partner is ineligible to join KiwiSaver.

R91

An instruction under R90 should be binding on the KiwiSaver scheme manager without the need for a court order provided the partners have agreed to the instruction under a contracting out or settlement agreement executed in accordance with the new Act.

R92

A court should have broad powers under the new Act to make interim restraining orders, replacing section 43 of the PRA. The powers and the principles on which the court should exercise them should be consistent with the court's powers to make interlocutory injunctions under rules 182–184 of the Family Court Rules 2002. The court should have the power to waive the requirement that the applicant give an undertaking as to damages or otherwise order that a partner should not be liable for damages.

R93

It should be an offence under the new Act, punishable by a term of imprisonment not exceeding three months or a fine not exceeding \$2,000, for one partner to:

- a. sell, charge or dispose of any family chattels; or
- b. remove from the family home or homes any of the family chattels that are household appliances or effects or that form part of the furniture of that home or those homes;

without the leave of the court or the written consent of the other partner when relationship property proceedings are pending or where one partner has given notice to commence pre-action procedures under the new Act (see R100).

R94

A court should have powers under the new Act to grant an occupation order at any time in respect of:

- a. the family home, regardless of whether it is relationship property or separate property;
- b. property held on trust, when:
 - i. either or both partners or any child of the relationship are beneficiaries of the trust (including discretionary beneficiaries); or
 - ii. either or both partners are trustees of the trust; or
- c. any other premises forming part of the relationship property.

R95

The new Act should expressly refer to the court's powers to award occupation rent when appropriate in the circumstances as a condition of any occupation order.

CHAPTER 16: RESOLUTION

R96

The Government should develop a comprehensive information guide that explains the new Act and provides information about the different options for resolving relationship property matters.

R97

The Government 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.

R98

The Government 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.

R99

The Government should reconsider the current policy settings for the provision and funding of legal advice on relationship property matters in order to ensure the appropriate availability of affordable legal advice.

R100 Voluntary out of court dispute resolution for relationship property matters should be promoted by:

- a. including in the new Act endorsement of voluntary out of court dispute resolution to resolve relationship property matters;
- b. introducing new pre-action procedures in the Family Court Rules 2002 that will provide a clear process for partners to follow when attempting to resolve relationship property matters out of court; and
- c. requiring applicants to court to acknowledge in court application forms that they have received information about the pre-action procedures and the availability of dispute resolution services.

R101 The Government should consider extending a voluntary modified Family Dispute Resolution service or other form of publicly funded dispute resolution service to relationship property matters in light of the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms and the Government's response to those recommendations.

R102 A Family Court Rules Committee should be established for the purpose of developing new procedural rules for relationship property matters to be included as a sub-part of the Family Court Rules 2002 and issuing guidance on the rules as required.

R103 The new procedural rules should include case management procedures tailored to the needs of relationship property proceedings.

R104 The new Act and the new procedural rules should grant the Family Court broad powers to appoint a person to make an inquiry into any matter that would assist the Court to deal effectively with the matters before it.

R105 The new Act should make express provision for the Family Court to impose costs and other consequences for non-compliance with procedural requirements.

R106 The new procedural rules and guidance issued on the rules should address:

- a. the imposition of costs and other consequences of non-compliance with procedural requirements; and
- b. the exercise of the Court's discretion to make costs orders that are not for the purpose of penalising non-compliance.

R107 A separate scale of costs for relationship property proceedings should be established.

R108 The Government should consider reducing the application and hearing fees for relationship property proceedings.

R109 The Government should collect data on the progress and resolution of relationship property proceedings in the Family Court in order to monitor whether the Family Court is adequately resourced to deal appropriately with relationship property proceedings.

R110 The new Act should include an express duty of disclosure on partners.

R111 The new procedural rules for relationship property matters (see R102) should include:

- a. a prescribed process for complying with the duty of disclosure prior to making an application to the Family Court as part of the new pre-action procedures; and
- b. the procedure for initial and subsequent disclosure in relationship property proceedings.

R112 The new Act should make express provision for the Family Court to impose costs and other consequences for non-compliance with disclosure obligations.

R113 The new procedural rules and guidance issued on the rules should address the imposition of costs and other consequences for non-disclosure.

CHAPTER 17: JURISDICTION OF THE COURTS

- R114** When hearing and determining an application under the new Act, the Family Court should have jurisdiction to hear and determine any related matter within the general civil and equitable jurisdiction of the District Court pursuant to sections 74 and 76 of the District Court Act 2016. This should include jurisdiction to grant any remedy pursuant to section 84 of the District Court Act. However, the financial limit on the District Court's jurisdiction should not apply.
- R115** The new Act should retain the existing provisions for the transfer of proceedings and rights of appeal to the High Court to enable the High Court to continue to exercise a supervisory role in relationship property proceedings.
- R116** When hearing and determining an application under the new Act, the Family Court should have jurisdiction to make any order or give any direction available to it under the new Trusts Act (replacing the Trustee Act 1956) as proposed under clause 136 of the Trusts Bill 2017 (290-2).
- R117** The power to transfer proceedings to the High Court under clause 136(6) of the Trusts Bill 2017 (290-2) should be subject to the requirements relating to the transfer of proceedings in the new Act.
- R118** The Government should monitor the outcome of applications relating to the transfer of proceedings to the High Court and the outcome of appeals from Family Court decisions in order to ensure the High Court's supervisory role in relation to relationship property matters remains appropriate.
- R119** Parties to relationship property proceedings should have a right of appeal to the High Court in respect of any interlocutory decision made under the new Act that relates to interim distributions of property, occupation, tenancy and furniture orders, transfers of proceedings to the High Court, notices of claim, restraining dispositions of property or orders for disclosure made in relation to dispositions to a trust or company. Parties should also have a right of appeal in respect of a decision relating to disclosure under the Family Court Rules 2002.
- R120** Parties to relationship property proceedings should be able to appeal any other interlocutory decision to the High Court with the leave of the Family Court or District Court.
- R121** The Family Court Rules Committee (see R102) should issue guidance on how applications for leave to appeal are determined.
- R122** Part 2 of the Domestic Actions Act 1975 should be repealed.

CHAPTER 18: CREDITORS' INTERESTS

R123 Unless otherwise provided in the new Act, secured and unsecured creditors of a partner should have the same rights against that partner and that partner's property as if the new Act had not been passed.

R124 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 new Act. 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 as recommended by the Law Commission in 2001.

R125 The new Act 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.

R126 When a partner is adjudicated bankrupt, the Official Assignee should have powers under the new Act in respect of agreements, dispositions or other transactions between the partners that have the effect of defeating the rights of creditors. These powers should be consistent with the Official Assignee's powers under the insolvent transactions regime in the Insolvency Act 2006.

R127 An application by the Official Assignee to set aside an agreement, disposition or transaction should displace any claims by other creditors that the agreement, disposition or other transaction has the effect of defeating creditors' rights.

R128 An application by the Official Assignee to set aside an agreement, disposition or transaction should be made in the High Court.

R129 A court should not be able to order recovery for creditors from a partner who receives property under a settlement 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. altered their position in the reasonably held belief that the transfer of property was valid and would not be cancelled.

CHAPTER 19: CROSS-BORDER ISSUES

R130 Section 7 of the PRA should be repealed, and the new Act should provide that, in the absence of a valid foreign law agreement, the law to be applied to property disputes between partners shall be the law of the country to which the relationship had its closest connection.

R131 The new Act should provide a presumption that the country to which a relationship had its closest connection is the country where the partners last shared a common residence unless either partner satisfies a court that the relationship had its closest connection with another country.

R132 Where the new Act applies under R130, all of the partners' property, including movable and immovable property situated outside New Zealand, should be subject to the new Act's rules of classification and division.

R133 The court's broad ancillary powers to give effect to a division of relationship property under R86 should expressly include the power, in relation to property situated outside New Zealand, to order a partner to transfer the property or pay a sum of money to the other partner.

R134 Section 7A of the PRA should be repealed, and the new Act should not apply to property that is subject to a valid foreign law agreement.

R135 A foreign law agreement should include any agreement where:

- a. the partners expressly agree that the law of another country is to apply to some or all of their property;
- b. it is apparent from the agreement that the partners intended the law of another country to apply to some or all of their property; or
- c. the partners make an agreement in accordance with the law of another country with respect to the status, ownership and division of some or all of their property.

R136 The partners should be able to make a foreign law agreement at any time.

R137

A foreign law agreement will only be valid if it:

- a. is in writing;
- b. is signed by both partners; and
- c. meets the legal requirements of a valid agreement under the law of the country that is applied under the agreement (the nominated country) or under the law of the country with which the relationship has its closest connection, subject to R138.

R138

If a relationship has no connection to the nominated country and New Zealand is the country with which the relationship had its closest connection, a foreign law agreement must meet the legal requirements of a valid agreement under New Zealand law.

R139

Regardless of R130 or R134, the new Act should apply to the extent that a court is satisfied that applying the law of another country or giving effect to a foreign law agreement would be contrary to public policy, having regard to a number of specified considerations.

R140

The first instance jurisdiction of the Family Court should be extended to include applications that involve the application of the law of another country under R130 or R134.

CHAPTER 1

Introduction

- 1.1 Dividing property when relationships end is often a challenging task and one that typically comes at a time of emotional upheaval. 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 and emotional recovery of partners and their children.
- 1.2 The Property (Relationships) Act 1976 (PRA) sets out the rules that govern how property owned by either or both partners is divided when a relationship ends. It applies to marriages, civil unions and de facto relationships. The policy of the PRA is the just division of property, and this policy is given effect primarily through the rule that each partner is entitled to share equally in property connected to the relationship (relationship property) while retaining their property that is kept separate from the relationship (separate property). There are, however, a range of exceptions to this general rule that recognise the diversity of relationships and infinite variety of different circumstances that can arise.¹
- 1.3 The Law Commission was asked to review the PRA, which is now over 40 years old, to determine whether it is still operating appropriately and effectively. This report sets out our findings and makes recommendations for change.

OUR REVIEW

- 1.4 Our review of the PRA has been wide-ranging. The terms of reference are set out in Appendix 1 and required consideration of the PRA rules and how relationship property matters are resolved in practice.
- 1.5 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 1980 or the social security regime in the Social Security Act 1964. Nonetheless, the PRA cannot be considered in isolation from these regimes, and some of our recommendations relate to or may affect these regimes. In Chapter 10, we address the maintenance regime and recommend its repeal. In Chapter 12, we discuss the child support regime and recommend a review of the effectiveness of child support in meeting children's needs and setting the level of financial support to be provided by parents for their children.

¹ For an overview of how the Property (Relationships) Act 1976 operates in practice, see Law Commission *Dividing relationship property – Time for change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 3.

OUR PROCESS

- 1.6 In October 2017, we published our Issues Paper,² following extensive research and preliminary consultation with community groups, government organisations and academic and practitioner experts. The Issues Paper was divided into 13 parts and sought feedback on a wide range of different issues. To aid consultation, we also prepared a Consultation Paper, which summarised the key issues identified in the Issues Paper for members of the public. The content of the Consultation Paper was published on a consultation website, through which people could tell us their own story about how the PRA has affected them or answer any of the consultation questions online.
- 1.7 At the same time, we published a Study Paper,³ which explored the social context of our review and how New Zealand has changed over the last 40 years. The Study Paper described the significant demographic changes that have taken place since the PRA was first enacted and set out what we know about how relationships and families are formed, how they operate and what happens when relationships end in contemporary New Zealand.
- 1.8 The Commission received 313 submissions on the Issues Paper and Consultation Paper. They 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 entities, law firms, dispute resolution service providers and community organisations. The key themes from consultation are addressed in Chapter 2.
- 1.9 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, the Judges of the Family Court and the Māori Land Court and other experts.

The Preferred Approach Paper

- 1.10 We published our Preferred Approach Paper⁴ in November 2018. Given the breadth and depth of issues arising out of this review, we concluded that a paper that set out our preferred approach on key matters would help us refine our recommendations and provide an opportunity for further focused consultation. The Preferred Approach Paper made 71 proposals for reform on key matters such as the need for a new statute to apply to relationships ending on separation and the need to give further consideration to the rules that should apply to relationships ending on death within a broader review of succession law. We also made proposals in the key areas of classification and division of property, the types of relationships the PRA should cover, reform of section 15 (compensation for economic disparity), trust property, children's interests, contracting

² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017).

³ Law Commission *Relationships and families in contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

⁴ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018).

- out and settlement agreements, tikanga Māori, the resolution of PRA disputes and creditors.
- 1.11 We received 100 submissions on the Preferred Approach Paper, which included 57 submissions from members of the public, 34 submissions from individual legal practitioners, judges, academics and other experts and nine submissions from organisations including government and community organisations.
- 1.12 Since publication of the Preferred Approach Paper, we have finalised our policy decisions on the matters addressed in that paper, informed by the consultation response. We have also addressed matters that were not covered in the Preferred Approach Paper, drawing on the consultation response to the Issues Paper, and with the benefit of further consultation and external review from individual academic and practitioner experts. These new matters include the classification of debt, the treatment of specific items of property and debt, eligibility of specific relationship types, adjustments to equal sharing, property orders, jurisdiction of the courts and cross-border issues.
- 1.13 Throughout this process, we have been supported 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.
- 1.14 We have also had the benefit of assistance from Parliamentary Counsel in drafting proposed legislative provisions reflecting our recommendations relating to the classification of property and trusts.

MATTERS ADDRESSED IN THIS REPORT

- 1.15 This report is the culmination of a three year review. We make 140 recommendations addressing a wide range of issues.
- 1.16 Our recommendations do not address every aspect of the PRA and its operation. Many aspects of the current law remain satisfactory and should continue. Our approach has been to make formal recommendations only where we consider that reform of the current law is required or where we think it is helpful to positively endorse the current law on key aspects of the relationship property regime.
- 1.17 In developing these recommendations, we have recognised that reform can be achieved in a variety of ways and that legislation is not an exclusive solution.⁵ In considering each issue, we have therefore also taken into account:⁶
- (a) whether the courts should be left to develop and determine the law on the issue;⁷

⁵ See Lord Toulson "Democracy, Law Reform and the Rule of Law" in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) 127; David Ormerod "Reflections on the Courts and the Commission" in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) 326; and Ellen France, Judge of the Supreme Court of New Zealand "Something of a Potpourri: A Judge's Perspective on Law Reform" (address to the Law Commission's 30th Anniversary Symposium, Wellington, 3 November 2016).

⁶ See Law Commission *The Second Review of the Evidence Act 2006: Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [1.18]–[1.33].

⁷ This recognises that the constitutional role of interpreting the provisions of legislation and applying those provisions to the particular facts of the case rests with the courts: Philip A Joseph *Constitutional and Administrative Law in New*

- (b) whether the issue might be resolved through increased use of existing provisions in the PRA;
 - (c) whether, instead of legislative reform, the issue could be addressed through greater education of the public and professionals; and
 - (d) whether the issue is a broader policy problem that might benefit from separate examination.
- 1.18 We also recognise that it is important when making law reform proposals to ensure, as far as practicable, that they do not have unintended consequences. Where we have not identified significant practical issues with the current law, the potential for introducing unintended consequences may weigh against proposing reform.
- 1.19 This report is divided into 19 chapters. Following on from this chapter, we look at:
- (a) the history of the PRA and the need for a new Relationship Property Act (the new Act) (Chapter 2);
 - (b) how property should be classified under the new Act (Chapter 3);
 - (c) how debt should be classified under the new Act (Chapter 4);
 - (d) the classification of specific items of property and debt, including chattels of special significance, ACC and private insurance payments, family gifting and lending and student loans (Chapter 5);
 - (e) how the new Act should apply to marriages, civil unions and de facto relationships (Chapter 6);
 - (f) whether the new Act should apply to specific relationship types, including relationships involving young people, LGBTQI+ relationships, contemporaneous relationships, multi-partner relationships and domestic relationships (Chapter 7);
 - (g) how relationship property should be divided under the new Act, including the general rule of equal sharing, the exception for extraordinary circumstances and the relevance of misconduct (Chapter 8);
 - (h) how partners' property interests, including their entitlement to an equal share in relationship property, should be adjusted in different circumstances (Chapter 9);
 - (i) how partners should share the economic advantages and disadvantages arising out of the relationship or its end (Chapter 10);
 - (j) what should happen to property held on trust (Chapter 11);
 - (k) the role of children's interests under the new Act (Chapter 12);
 - (l) the rules that should govern partners' ability to contract out of the new Act and enter into settlement agreements (Chapter 13);
 - (m) how the new Act should accommodate and respond to tikanga Māori (Chapter 14);
 - (n) the orders a court should be able to make to implement a final division of relationship property, grant interim distributions of property, divide superannuation

Zealand (4th ed, Brookers, Wellington, 2014) at [2.4.3] and [21.2.2]–[21.2.3]. In doing so, the courts are able to resolve issues of interpretation and develop the law in a way that promotes the legislation's purpose and principles and ensures it works as Parliament intended.

- and KiwiSaver entitlements, protect property prior to division and grant a partner the right to occupy or possess property (Chapter 15);
- (o) how relationship property matters under the new Act should be resolved in practice (Chapter 16);
 - (p) the jurisdiction of the courts to hear and decide disputes under the new Act (Chapter 17);
 - (q) how the interests of creditors should be affected by the new Act (Chapter 19); and
 - (r) what should happen when one or both partners have a connection with another country, or own property in another country (Chapter 20).

Our terminology and approach to anonymisation of court decisions

- 1.20 Three types of relationships are at the centre of the PRA: marriages, civil unions and de facto relationships. For readability, we use the term "relationship" 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 report takes place after a relationship ends, but for simplicity, we will continue to refer to "partners" rather than "former partners".
- 1.21 The PRA also uses the terms "child of the marriage", "child of the civil union" and "child of the de facto relationship". These terms have separate but largely identical definitions in section 2 of the PRA. In this report, we refer to "child of the relationship" to mean any child of the marriage, civil union or de facto relationship.
- 1.22 Many court decisions under the PRA are anonymised through the use of fictitious names or the use of parties' initials. Some decisions are not anonymised yet are still subject to publication restrictions.⁸ To address this, we have replaced the names of parties with initials when our discussion of the facts of a case includes sensitive information that could identify vulnerable individuals.



⁸ Property (Relationships) Act 1976, s 35A; and Family Court Act 1980, ss 11B–11D.

CHAPTER 2

A new Relationship Property Act

IN THIS CHAPTER, WE CONSIDER:

the history of the PRA and the need for a new Relationship Property Act to regulate the division of property between partners on separation and, in particular:

- the purpose and principles that should govern the new Act;
- the need for greater public awareness of the PRA and any new Act; and
- the need for a separate Act for relationships ending on death.

HISTORY OF THE PRA

2.1 In order to understand why the PRA functions in the way it does, it is helpful to consider briefly how the law governing the division of property at the end of a relationship has evolved.¹

The doctrine of matrimonial unity and its impact on Māori women

2.2 The law New Zealand inherited from England deemed a husband and wife to be one legal person, and that person was the husband. This was known as the doctrine of matrimonial unity, and it meant that most of the wife's property rights were acquired by the husband on marriage.² The husband, in return for the ownership and control of property the wife brought into the marriage, had an obligation to maintain the wife and children that endured even if the husband and wife ceased living together.³

¹ We discuss the history of the Property (Relationships) Act 1976 in greater depth in Law Commission *Dividing relationship property – Time for change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [2.2]–[2.42].

² See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [1.4].

³ A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 241–242.

- 2.3 This was in stark contrast to the role of women in traditional Māori society. They were nurturers and organisers, valued within their whānau, hapū and iwi.⁴ Both men and women had the capacity to hold property.⁵ Marriage "did not alter this reality".⁶ A woman retained ownership of land that was hers prior to marriage, and decisions regarding it were the woman's to make, subject to whānau and hapū interests.⁷
- 2.4 The role of Māori women in society was gradually undermined in the period of colonisation that followed the signing of the Treaty of Waitangi.⁸ When English law was applied to Māori women, their status became the same as their English counterparts.⁹ Māori customary marriage was eroded by the English Laws Act 1858 and successive marriage laws that required Māori to conform more closely to the legal requirements for establishing marriage under English law. By the 1950s, customary marriages were no longer legally recognised.¹⁰ The relationship of women with the land was also challenged by the colonial concepts of individual land ownership and the role of men as property owners.¹¹ The Native Land Act 1873 provided that husbands should be party to all deeds executed by married Māori women.¹² Husbands, on the other hand, were free to dispose of their Māori wives' land interests without their wife being a party to the deed.¹³ Legislation enacted during this period also moved land ownership into individual (usually male) ownership rather than guardianship, again reducing Māori women's control.¹⁴

⁴ Law Commission *Justice: The Experiences of Māori Women – Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

⁵ Angela Ballara "Wāhine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 *The New Zealand Journal of History* 127 at 133–134. See also Law Commission *Justice: The Experiences of Māori Women – Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 15; and Judith Binney and Gillian Chapman *Ngā Mōrehu The Survivors* (Oxford University Press, Auckland, 1986) at 25–26.

⁶ Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 *International Journal of Law, Policy and the Family* 327 at 330. See also Law Commission *Justice: The Experiences of Māori Women – Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22.

⁷ Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 *International Journal of Law, Policy and the Family* 327 at 330; and Angela Ballara "Wāhine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 *The New Zealand Journal of History* 127 at 134.

⁸ Law Commission *Justice: The Experiences of Māori Women – Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11; and Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29.

⁹ Law Commission *Justice: The Experiences of Māori Women – Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 17.

¹⁰ At 22. See the Māori Purposes Act 1951, s 8(1) and the Māori Affairs Act 1953, s 78.

¹¹ At 11.

¹² This followed unsuccessful attempts by Pākehā husbands to "gain control of the lands of their Māori wives" by challenging a provision of the Native Lands Act 1869 that enabled married Māori women to deal with their land as if "feme sole" (an unmarried woman). See Angela Ballara "Wāhine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 *The New Zealand Journal of History* 127 at 134.

¹³ Law Commission *Justice: The Experiences of Māori Women – Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 21.

¹⁴ At 21–22.

The separation of property system

2.5 The Married Women's Property Act 1884 brought significant reform in New Zealand. It repealed the doctrine of matrimonial unity inherited from England and replaced it with a "separation of property" system. While the previous law deemed husband and wife to be one legal person (the husband), the effect of the Married Women's Property Act was to treat husband and wife virtually as strangers.¹⁵ The Act looked at property as his or hers rather than "theirs".¹⁶ It required a court to divide property according to each spouse's entitlements under general property law principles. More often than not, the husband was the legal owner of all the couple's property because the property was acquired in his name and had been paid for from his earnings. The Act did little for married women who had remained homemakers, earned no income and had no opportunity to contribute financially to the purchase of property.¹⁷ On separation, many women were left without any rights to the property acquired and used in the course of the marriage.

The Matrimonial Property Act 1963 – recognising non-monetary contributions to property

2.6 In the second half of the 20th century, concern grew at the way the law disadvantaged women. There was increasing recognition that a wife may have supported her husband for many years in a way that enabled him to earn income and acquire property. In response, the Matrimonial Property Act 1963 was enacted. It retained the separation of property system but with a "superimposed judicial discretion" that enabled a court to make orders overriding the spouses' strict legal and equitable interests in the property.¹⁸ When making those orders, a court was required to have regard to the contributions the husband and wife made to the property in dispute, whether "in the form of money payments, services, prudent management, or otherwise".¹⁹ The philosophy of the 1963 Act was to produce an outcome that recognised a wife's role in the family at a time when marriage was still a defining structure of society and a wife's role was still largely in the home.

2.7 Despite the 1963 Act's new focus, a number of problems with the Act's practical application emerged over the next decade. In particular, there were complaints that the approach of requiring a spouse to show specific contributions to identified items of property still caused difficulties for married women.²⁰

¹⁵ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 3.

¹⁶ Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee* (Department of Justice, June 1972) at 3.

¹⁷ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 4.

¹⁸ Matrimonial Property Act 1963, s 5(3); and A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 248.

¹⁹ Section 6(1).

²⁰ See Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee* (Department of Justice, June 1972); and NV Douglas "Women's Rights Committee: June 1975" [1975] IV AJHR I13.

The Matrimonial Property Act 1976 – A new deal

- 2.8 To address the problems identified with the 1963 Act, Parliament enacted the Matrimonial Property Act 1976. When the Bill was introduced to Parliament, the Minister of Justice explained in a White Paper that the legislation embodied the concept of "marriage as an equal partnership between two equal persons and as the basis on which our present society is built".²¹ Spouses were not treated as strangers but as partners in a common enterprise.²²
- 2.9 The Matrimonial Property Act 1976 enabled the court to look at the marriage assets as a whole and relate the contributions of the husband and wife to them rather than to specific items of property. The Act did this by introducing the concept of "matrimonial property". Broadly speaking, matrimonial property encompassed the family home, the family chattels and all other property the husband or wife acquired after the marriage except by inheritance or gift.²³ It was this matrimonial property that was subject to equal division between the husband and wife.²⁴ Separate property, in contrast, belonged solely to the husband or wife and was not eligible for sharing. All property owned by either spouse that did not come within the definition of matrimonial property was separate property.
- 2.10 In the years following its enactment, the general rule of equal sharing of matrimonial property became accepted in New Zealand as the new norm.²⁵ The Matrimonial Property Act 1976 was recognised as "social legislation" that provided a "fair and practical formula" for resolving property matters when marriages came to an end.²⁶

The 2001 amendments and the new Property (Relationships) Act 1976

- 2.11 In 1988, a Working Group reviewed the Matrimonial Property Act 1976. The Group made several key recommendations to extend the regime.²⁷ They included that the Act should apply to de facto couples, and the Act should apply the same rules of property division when a spouse died.
- 2.12 Although not acted on immediately, the Working Group's recommendations were implemented in 2001 as reforms to the Matrimonial Property Act 1976. The Act was renamed the Property (Relationships) Act. It was extended to cover de facto

²¹ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 3.

²² 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 156.

²³ See explanation of matrimonial property in AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 6.

²⁴ Section 11 of the Matrimonial Property Act 1976 established a general rule that the family home and chattels would be divided equally between the spouses. The balance of the matrimonial property would be divided equally unless a spouse's contributions to the marriage partnership had "clearly been greater than that of the other spouse" (s 15), in which case, the balance was divided in shares according to each spouse's contributions.

²⁵ See JM Krauskopf and CJ Krauskopf "Sharing in Practice: The effects of the Matrimonial Property Act 1976" (1988) 10 *Fam Law Bull* 140; and John Priestley "Whence and Whither? Reflections on the Property (Relationships) Act 1976 by a Retired Judge" (2017) 15 *Otago LR* 67 at 74.

²⁶ *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580 per Woodhouse J.

²⁷ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988).

relationships, both same-sex and opposite-sex. A new part was added to the PRA to provide for the division of relationship property if one partner died. The general rule of equal sharing was extended to apply to all matrimonial property (renamed "relationship property"). New sections 15 and 15A were introduced to achieve greater substantive equality by permitting compensation for economic disparity between the partners caused by their division of functions in the relationship. Changes were also made to the PRA to recognise the particular significance of taonga and heirlooms.

- 2.13 The 2001 amendments were the last time significant changes were made to New Zealand's relationship property law other than the inclusion of civil unions in 2005.²⁸

THE NEED FOR REFORM IS CLEAR

- 2.14 The PRA is social legislation. It has both shaped and reflected societal values in the way people enter, conduct and leave relationships. In particular, it reflects 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 observed:²⁹

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.

- 2.15 It is important that the PRA continues to keep pace with changes in New Zealand's social context and reflects the reasonable expectations of New Zealanders. In our view, the PRA is no longer fit for purpose for 21st century New Zealand.

The changing social context

- 2.16 New Zealand has undergone a period of significant social change since the PRA was first enacted. We explored these changes in detail in our Study Paper.³⁰
- 2.17 New Zealand is now more ethnically diverse. The Māori, Pacific and Asian populations have each more than doubled since 1976.³¹ In 2013, one in seven people identified as Māori.³² Children today are also almost 10 times more likely to identify with more than one ethnic group compared to older New Zealanders.³³ The population is ageing and at significantly different rates across ethnic groups, which will continue to drive ethnic

²⁸ Civil Union Act 2004; and Property (Relationships) Amendment Act 2005.

²⁹ Peter Boshier and others "The Role of the State in Family Law" (2013) 51 Family Court Review 184 at 190. See also Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 259 where Atkin observes that "relationship property law cannot be value-free" and that we should therefore "not avoid the debate about values".

³⁰ Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017).

³¹ Ian Pool and Natalie Jackson "Population change – Key population trends" (5 May 2011) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>; and Statistics New Zealand *2013 QuickStats about culture and identity* (April 2014) at 6.

³² Statistics New Zealand *2013 QuickStats about Māori* (December 2013) at 5.

³³ In 2013, 22.8 per cent of children under 15 identified with more than one ethnic group, compared to just 2.6 per cent of adults aged 65 and over: Statistics New Zealand *2013 QuickStats about culture and identity* (April 2014) at 7–8.

- diversity in the future.³⁴ Religious identity is also changing. Fewer people identify as Christian, while almost half the population report that they have no religion.³⁵
- 2.18 These population shifts have coincided with changing patterns of partnering, family formation, separation and repartnering.³⁶ What it means to be partnered has changed significantly since the 1970s, when the paradigm relationship involved a marriage between a man and a woman in which children were raised and wealth accumulated over time. Now, fewer people are marrying and more people are living in de facto relationships.³⁷ In 2016, 46 per cent of all births were to parents who were not married (or in a civil union).³⁸ There is also greater recognition and acceptance of relationships that sit outside the 1970s paradigm, including same-sex relationships.³⁹ More relationships end in separation,⁴⁰ and increasing rates of separation are driving a rise in repartnering,⁴¹ which is leading to an increase in stepfamilies. There has also been a significant increase in single parent families, with the proportion of single parent households almost doubling since 1976.⁴²
- 2.19 These social changes have undoubtedly influenced public values and expectations, and increasing diversity in relationships and families affects what a "just" division of property on separation looks like today. Relationships are no longer "one size fits all", and the law must change to reflect this reality.

³⁴ Statistics New Zealand *National Population Projections: 2016(base)–2068* (19 October 2016) at 5 and 7; and Statistics New Zealand *2013 QuickStats about culture and identity* (April 2014) at 8.

³⁵ Statistics New Zealand *2013 QuickStats about culture and identity* (April 2014) at 27–30.

³⁶ Data is not routinely collected in New Zealand for the specific purpose of investigating family characteristics and transitions. As a result, there are some significant gaps in our knowledge. We do not know, for example, how many relationships end in separation or how many people repartner and enter stepfamilies. For a discussion of these limitations, see Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Introduction.

³⁷ In 2013, 22 per cent of people who were partnered were in a de facto relationship, compared to 8 per cent in 1986. In contrast, the percentage of partnered people who are married has fallen from 92 per cent in 1986 to 76 per cent in 2013: Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at ch 1 Figure 1b, citing Statistics New Zealand *Population Structure and Internal Migration* (1998) at 10; Statistics New Zealand *Population Structure and Internal Migration* (2001) at 52; and Statistics New Zealand "Partnership status in current relationship and ethnic group (grouped total responses) by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006 and 2013 Censuses" <nzdotstat.stats.govt.nz>.

³⁸ In 1976, only 17 per cent of children were born out of marriage: Statistics New Zealand "Live births by nuptiality (Maori and total population) (annual-Dec)" (May 2017) <www.stats.govt.nz>.

³⁹ In 2013, 8,328 people recorded that they lived with a same-sex partner, up from 5,067 in 2001: Statistics New Zealand *2013 Census QuickStats about families and households – tables* (November 2014).

⁴⁰ For example, in 2016, the divorce rate was 8.7 (per 1,000 existing marriages and civil unions), compared to 7.4 in 1976: Statistics New Zealand "Divorce rate (total population) (annual-Dec)" (June 2017) <www.stats.govt.nz>. This does not include de facto separations, for which no information is collected.

⁴¹ In 2016, remarriages accounted for 29 per cent of all marriages, compared to 16 per cent in 1971: Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

⁴² Single parent households comprised 9 per cent of all New Zealand households in 2013, up from 5 per cent in 1976: Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at ch 5 Figure 5a, citing Statistics New Zealand "Household composition, for households in occupied private dwellings, 2001, 2006 and 2013 Censuses (RC, TA, AU)" <nzdotstat.stats.govt.nz>; and Arunachalam Dharmalingam, Ian Pool and Janet Sceats *A Demographic History of the New Zealand Family from 1840: Tables* (Auckland University Press, 2007) at 17.

Borrin Foundation research on public attitudes and values

- 2.20 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*.⁴³ The Borrin Survey is the first time research of this nature has been carried out in New Zealand.
- 2.21 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.
- 2.22 Results of the Borrin Survey are referred to throughout this report where relevant.
- 2.23 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 January 2021.⁴⁴ 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,⁴⁵ but comparable research has not previously been carried out in New Zealand.

Key themes from consultation on our review of the PRA

- 2.24 Consultation at all stages of our review provided valuable insights into the way the PRA works for New Zealanders. We refer to the results of consultation throughout this report. Consultation identified some key themes.

Equal sharing of pre-relationship property after three years is unfair

- 2.25 Under the PRA, the family home and family chattels are shared equally in all marriages, civil unions and de facto relationships of three years or more. The operation of this rule in relation to property owned by one partner before the relationship began 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

⁴³ 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).

⁴⁴ Michael and Suzanne Borrin Foundation "Relationship property division research" <www.borrinfoundation.nz>; University of Otago Children's Issues Centre, "Research Activities" University of Otago <www.otago.ac.nz>.

⁴⁵ See, for example, Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014).

civil union. Most submitters were primarily concerned with the family home. We address this theme in Chapter 3.

The PRA fails to effectively address economic disparity

- 2.26 Section 15 of the PRA allows a court to compensate one partner where their income and living standards after separation are likely to be significantly lower than the income and living standards of the other partner and the disparity is because of the effects of the division of functions within the relationship.
- 2.27 The need to reform section 15 was a strong theme in submissions from individual practitioner and academic experts and organisations, as well as from some members of the public. Submitters generally agreed that section 15 had failed to achieve a just outcome that recognises the reality of what one partner has gained and one partner has 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 10.

Partners should not be able to avoid the PRA through the use of a trust

- 2.28 Most submitters who commented on trusts said that trusts 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 11.

The PRA should give more priority to children's interests

- 2.29 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. However, 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 1991 and the Care of Children Act 2004. We address this theme in Chapter 12.

The PRA does not facilitate inexpensive, simple and speedy resolution

- 2.30 Many submitters told us that resolution of PRA disputes is expensive and slow, that power and information imbalances between partners impair access to justice and that people want more freedom to resolve relationship property matters themselves. We address this theme in Chapter 16.

Better awareness of and education about the PRA is needed

- 2.31 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 the need for better education about the PRA below.

A NEW RELATIONSHIP PROPERTY ACT

RECOMMENDATIONS

R1

A new statute, the Relationship Property Act (the new Act), should be enacted as the principal source of law applying to the division of property when relationships end on separation.

R2

The new Act should retain a rules-based regime of deferred property sharing that is based on the theory that each partner is entitled to share in the fruits of the family joint venture.

R3

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

R4

The new Act should include a revised statement of principles to guide the achievement of the purpose of the Act. The principles should address the following concepts:

- a. A just division of property recognises tikanga Māori.
- b. All forms of contribution to the relationship are to be treated as equal.
- c. Relationship property is to be shared equally, unless special circumstances apply.
- d. The Act applies in the same way to relationships that are substantively the same.
- e. Economic advantages or disadvantages arising from the relationship or its end are to be shared.
- f. The best interests of any child of the relationship is a primary consideration under the Act.
- g. Partners are free to make their own agreements about the status, ownership and division of property, subject to safeguards.
- h. Questions arising under the Act should be resolved as inexpensively, simply and speedily as is consistent with justice.

2.32 Our recommendations in this report are intended to achieve a property sharing regime that meets the reasonable expectations of New Zealanders when a relationship ends on separation. Our recommendations have been informed by what we have learned about New Zealanders' attitudes, values and expectations of property sharing through consultation and the results of the Borrin Survey. They are also informed by what we know about New Zealand's changing social context, summarised above.

2.33 We address our recommendations relating to general issues arising from our review below.

A new relationship property statute is required

- 2.34 We recommend that the PRA should be repealed and replaced with a new statute to apply to relationships that end on separation (the new Act). The new Act should be titled the Relationship Property Act because this name is simple, clear and reflects the key subject matter of the statute. We address relationships that end on the death of a partner at paragraphs 2.74–2.80 below.
- 2.35 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 43 years, the PRA is an unwieldy and unnecessarily complex statute that does not meet modern standards of legislative drafting.
- 2.36 The new Act should:
- (a) reflect our recommendations in this report;
 - (b) adopt relationship and gender neutral terms, wherever possible;⁴⁶ and
 - (c) modernise and simplify the language of the provisions as far as possible, in a way that does not affect their established meaning.
- 2.37 Few submitters commented on our proposal to repeal the PRA and replace it with a new statute. The New Zealand Law Society (NZLS), the Auckland District Law Society (ADLS) and several practitioners supported the proposal. ADLS also noted that consideration would need to be given to appropriate transitional provisions. We agree that transitional provisions would be necessary but do not address this matter in this report. The need for transitional provisions, and the form they take, is dependent on the Government's response to our recommendations.

The new Act should be the principal source of law applying to division of property when relationships end on separation

- 2.38 Section 4 of the PRA currently provides that, instead of the rules of common law and of equity, the Act applies to transactions between partners regarding property and, where the PRA provides, transactions between either or both partners and third parties.⁴⁷ There is still scope for the common law and equity to apply in limited circumstances.⁴⁸

⁴⁶ See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [4.54]–[4.56]. Few submitters commented on our proposal to adopt relationship and gender neutral terms, although it was supported in submissions from the New Zealand Law Society, one practitioner and two members of the public. Another practitioner proposed that, for simplicity, the Property (Relationships) Act 1976 should use "marital" and "spouse" to describe all relationships.

⁴⁷ Property (Relationships) Act 1976, s 4(1). In addition, s 4(4) provides that, if any question relating to relationship property arises in proceedings between spouses or partners or between either or both of them or any other person and such proceedings are not under the Act, the question must be decided as if it had been raised in proceedings under the Act.

⁴⁸ For example, in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.61], we noted the courts have upheld claims between partners for breach of fiduciary duty (*M v M* (1996) 15 FRNZ 15 (CA)), negligent statement and deceit (*K v K* [2008] NZFLR 30 (HC)), specific performance (*Wallis v Wallis* (1990) 6 FRNZ 645 (HC)), conversion and trespass (*[LC] v B* [2012] NZHC 898) and shareholder remedies under the Companies Act 1993 (*B v F* [2012] NZHC 722, [2012] NZFLR 661).

The PRA also draws on wider legal concepts, such as the definition of property. The PRA is therefore best described as the "principal source of law" for determining the division of property between partners⁴⁹ or as a partial code.⁵⁰

- 2.39 We recommend the new Act should continue to be the principal source of law for the division of property when relationships end on separation. To the extent that issues are dealt with under the new Act, it should "predominate" over other law, as is currently intended by section 4.⁵¹

Retaining a rules-based regime of deferred property sharing

- 2.40 Jurisdictions around the world recognise the need for special rules of property division when relationships end but differ on what form these rules should take.⁵² New Zealand, Canada and most European jurisdictions adopt a rules-based approach. Within these rules-based regimes, a range of different approaches exist. New Zealand operates a regime of deferred property sharing, because until a court makes orders to divide property, the partners may deal with or dispose of their property as if the PRA did not exist.⁵³ Other jurisdictions that New Zealand often compares itself with (Australia, England and Wales, Scotland and Ireland) operate discretionary regimes under which a court has discretion to adjust the partners' property interests on separation.⁵⁴
- 2.41 The debate on the merits of rules-based versus discretionary regimes is longstanding. Rules-based regimes typically provide greater certainty and predictability of outcomes in what can be a highly contested area of family law, while discretionary regimes allow for outcomes more tailored to the partners' individual circumstances. The disadvantage of a discretionary approach, however, is that the law is less predictable, which can hinder efficient resolution of property disputes and lead to protracted and expensive litigation.⁵⁵
- 2.42 We think a rules-based deferred property sharing regime continues to be appropriate for New Zealand. We place significant weight on the desirability of certainty and predictability, which in turn promotes people's ability to make decisions without having to go to court. The new Act should 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.

⁴⁹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [1.23].

⁵⁰ Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR4.01].

⁵¹ *Official Assignee v Williams* [1999] 3 NZLR 427, [1999] NZFLR 906 (CA) at [20].

⁵² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [3.34]–[3.40].

⁵³ Except as otherwise expressly provided in the Property (Relationships) Act: s 19.

⁵⁴ Family Law Act 1975 (Cth); Matrimonial Causes Act 1973 (UK); Family Law (Scotland) Act 1985; and Family Law (Divorce) Act 1996 (Ireland). The Australian Law Reform Commission has recently recommended retaining judicial discretion to divide property interests in a way that is just and fair in each case: Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [7.7].

⁵⁵ See Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [3.1]–[3.12]; and 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. See also Ira Mark Ellman "The Theory of Alimony" (1989) 77 Cal L Rev 1.

The theory of the family joint venture should underpin the new Act

- 2.43 The rules of the PRA sit within a broader framework of policy, theory and principles.⁵⁶ The policy of the PRA is the just division of property at the end of a relationship. This policy is underpinned by several theories that explain why division pursuant to the rules of the PRA is a just division.⁵⁷
- 2.44 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 in section 1N and implicit in its operative provisions) then form the basis for the PRA's rules.
- 2.45 Few submitters commented on the theories underpinning the PRA. NZLS and Professor Nicola Peart agreed that the PRA strikes the right balance between the theories of entitlement, compensation and need. Peart considered that, for the purposes of certainty, entitlement is the better theory and that it appropriately recognises the modern concept of marriage and equivalent relationships as a partnership of equals rather than a relationship of dependence.
- 2.46 We consider that an entitlement to share the fruits of the family joint venture should be the central underpinning theory of the new Act. This is based on the theory that a "qualifying relationship", being a marriage, civil union or de facto relationship that satisfies the eligibility criteria,⁵⁸ is a family joint venture to which the partners contribute equally but often 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 of the family joint venture.⁵⁹ This theory underpins our key recommendations about what property partners should share when a relationship ends.⁶⁰
- 2.47 We consider that the theory of compensation should no longer play a role in explaining what property should be shared when relationships end. Accordingly, our

⁵⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [3.1]–[3.12].

⁵⁷ 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.

⁵⁸ In Chapter 6, we recommend that a de facto relationship is a qualifying relationship for the purposes of the new Act if it satisfies the definition of de facto relationship currently 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 the court considers it just to make an order for division or (c) the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division.

⁵⁹ The notion of a family joint venture or similar concepts as underpinning relationship property law is well established. See Ira Mark Ellman "The Theory of Alimony" (1989) 77 Cal L Rev 1; Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 259; and *Kerr v Baranow* 2011 SCC 10, [2011] 1 SCR 269 at [61] where the Supreme Court of Canada said "[t]here is nothing new about the notion of a family joint venture in which both parties contribute to their overall accumulation of wealth".

⁶⁰ See recommendations in Chapters 3, 10 and 11.

recommendations relating to Family Income Sharing Arrangements in Chapter 10 move away from requiring one partner to compensate the other when the division of functions during the relationship results 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.

- 2.48 The theory of need may continue to play a role in the new Act in relation to children's interests given our recommendations in Chapter 12 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 and statement of principles

- 2.49 We recommend a new statutory purpose and statement of principles to guide the achievement of the purpose of the new Act. The purpose and principles of the PRA are currently set out in sections 1N and 1M:

1M Purpose of this Act

The purpose of this Act is—

- (a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship;
- (b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership;
- (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

- (a) the principle that men and women have equal status, and their equality should be maintained and enhanced;
- (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal;
- (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship;
- (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

- 2.50 The significance of the purpose and principles is well understood, particularly for social legislation, such as the PRA. They are often referred to in judgments under the PRA as an important part of the statutory context.⁶¹

⁶¹ As Woodhouse J observed in *Martin v Martin* [1979] 1 NZLR 97 (CA) at 99:

The primary purpose [of the Property (Relationships) Act 1976] 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

A new statutory purpose

- 2.51 The purpose of the new Act should be to achieve a just division of property between partners when a relationship ends on separation.
- 2.52 In our view, the PRA's purpose statement is an unhelpful mix of concepts. The equal contribution of partners in section 1M(b), for example, is reiterated as a principle in section 1N(b). Section 1M(c) refers to a just division of *relationship property*, but in fact the overarching policy of the PRA is broader. In effect, section 1M(c) explains *how* the PRA achieves its broader objective of a just division of property at the end of relationships. Section 1M(c) is also confusing as it refers to taking account of the interests of children, but children's interests are not a principle of the PRA under section 1N.
- 2.53 The purpose statement requires reform to conform to modern drafting requirements for legislation.⁶² Importantly, the purpose statement should reflect the policy objective of the legislation so that the policy objective is clearly defined and discernible.⁶³
- 2.54 Few submitters commented on our proposed new purpose provision, but those who did supported it, including NZLS and ADLS.

A new statement of principles

- 2.55 We recommend that the new Act should include a new statement of principles to guide the achievement of the purpose of the Act.
- 2.56 Principles provisions perform an important signalling function by setting out the public policy outcomes the statute aspires to facilitate, as well as promoting accessibility and transparency in the law. 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.⁶⁴

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.

See also *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [143], [317] and [325]; *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [15]–[16]; and *M v B* [2006] 3 NZLR 660 (CA).

⁶² 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 the Property (Relationships) Act 1976.

⁶³ 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.

⁶⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [4.18]. See Law Commission *A New Interpretation Act: To Avoid "Prolivity 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 [1.93].

- 2.57 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.⁶⁵ 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.⁶⁶
- 2.58 Few submitters commented on this issue, but those who did, including NZLS and ADLS, agreed that a new statement of principles was required.
- 2.59 In light of our recommendations in this report and having regard to the results of consultation and the Borrin Survey, we have concluded that a new statement of principles is necessary to reflect the reasonable expectations of New Zealanders and to properly guide the achievement of the new Act's purpose.
- 2.60 The new statement of principles should reflect the following concepts:⁶⁷
- (a) **A just division of property recognises tikanga Māori.** It should be explicit in the new Act that a just division of property should recognise tikanga Māori. This supports our recommendation in Chapter 14 that the framework of the new Act should continue to accommodate and respond to matters of tikanga Māori, particularly through the operative provisions in relation to Māori land and taonga.
 - (b) **All forms of contribution to the relationship are to be treated as equal.** The performance of unpaid domestic and childcare responsibilities should be treated as of equal value to financial contributions to the relationship. Given the division of functions within families along traditional gender roles is still common in New Zealand,⁶⁸ this also promotes the equal status of men and women. We consider it is appropriate that the new Act continues to recognise that an entitlement based on non-financial contributions is "not to be regarded as a matter of grace or favour, or as a reward for good behaviour, but as plain justice".⁶⁹ This is reinforced by the

⁶⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [3.9]–[3.11].

⁶⁶ At [4.13].

⁶⁷ We do not consider the principle that men and women have equal status in s 1N(a) of the Property (Relationships) Act 1976 (PRA) needs to be retained in the new Relationship Property Act. We consider this concept is beyond any doubt in both New Zealand public policy and law and no longer requires specific articulation as a principle. In the Issues Paper, we also discussed whether the concept of a single, accessible and comprehensive statute regulating the division of property when partners separate and the concept that misconduct is generally irrelevant to property division should be expressed as principles: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [3.11] and [4.18]. We are satisfied, however, that the concept of a single, accessible and comprehensive statute regulating the division of property when partners separate is sufficiently clear from the provisions of the PRA itself (including s 4) and does not require prioritisation in a principles section. We are also satisfied that the concept that misconduct is generally irrelevant to property division is clear from s 18A of the PRA. In Chapter 8, we recommend some clarifications to the role of misconduct and that the Government should consider the relevance of family violence to the division of property at the end of a relationship under the PRA in the context of its wider response to family violence.

⁶⁸ Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at ch 6.

⁶⁹ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10.

wide definition of contributions to the relationship in section 18 of the PRA, which we are satisfied remains sound.⁷⁰

- (c) **Relationship property is to be shared equally unless special circumstances apply.** This principle recognises that a just division of property will usually reflect the assumed equal contributions made by both partners. It embodies the general rule of equal sharing, which is the cornerstone of the PRA. The reason for introducing equal sharing in the Matrimonial Property Act 1976 remains as powerful today as it did then: the "great advantages of reintroducing certainty, putting husband and wife in an equal bargaining position should the marriage break up, and being consistent with broad social justice".⁷¹ Nonetheless, the new Act must continue to have some exceptions that act as essential safety valves. With the diversity of human relationships and behaviour, it would be unrealistic to expect that a statute could set a single rule for every circumstance.
- (d) **The Act applies in the same way to relationships that are substantively the same.** This is consistent with the concept of equality as expressed in anti-discrimination laws and reflects the shift in family law policy towards greater recognition of a wide range of family relationships.⁷² This principle guides the eligibility criteria in the PRA and the rules applying to marriages, civil unions and de facto relationships. While implicit in the relevant operative provisions, such an important premise of the PRA should be explicit in the principles provision.
- (e) **Economic advantages or disadvantages arising from the relationship or its end are to be shared.** The existing principle in section 1N(c) that "a just division of relationship property has regard to the economic advantages or disadvantages" arising from the relationship or its end was introduced in 2001 amid concerns that an equal division of relationship property does not always produce substantive equality between the partners.⁷³ While we have concluded that section 15, the provision intended to give effect to this principle, has failed to provide an effective and accessible remedy for most New Zealanders, the concerns that led to its introduction in 2001 remain significant. Accordingly, we recommend a principle that focuses on the sharing of economic advantages and disadvantages that arise from the relationship or its end.
- (f) **The best interests of any child of the relationship is a primary consideration under the Act.** That a just division of relationship property should take into account the interests of any children of the relationship appears in section 1M of the PRA.

⁷⁰ For example, in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [199] per Glazebrook J: "I would further accept that s 18 supports Mr Goddard's argument that the entire premise of the PRA is to treat all contributions within the relationship as equal." In Chapter 8, we recommend clarifying that the care of any child of the relationship, which is a contribution to the relationship under s 18(1)(a), includes the care of any former child of the relationship.

⁷¹ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 7.

⁷² Mark Henaghan "Legally defining the family" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 1 at 5. This reflects the right to freedom from discrimination on the grounds of marital status and family status enshrined in s 19(1) of the New Zealand Bill of Rights Act 1990 and s 21 of the Human Rights Act 1993.

⁷³ See, for example, the discussion in Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4–15.

Section 26 of the PRA also recognises the interests of children. However, while these provisions recognise that the interests of children of the relationship may be sufficiently important to warrant some degree of priority over their parents' property entitlements, in practice children's interests have seldom been prioritised in this way. This principle seeks to achieve a better balance between partners' property entitlements and children's interests following parental separation by elevating children's "best interests" to a "primary consideration"

- (g) **Partners are free to make their own agreements about the status, ownership and division of property, subject to safeguards.** While our recommendations in this report are intended to align the law more closely to public values and expectations, there will still be couples who will prefer to divide their property in a different way. The freedom of partners to make their own agreements about their property remains an "integral feature of [the PRA's] public legitimacy"⁷⁴ and should be expressly recognised in the statement of principles in the new Act. Importantly, the principle concerns relationship autonomy rather than individual autonomy. A person should not be able to unilaterally contract out of their obligations under the new Act. They must do so by way of agreement with their partner. Safeguards should continue to ensure that both partners enter agreements with informed consent and the rights of third parties are not prejudiced. Agreements settling the partners' property matters at the end of a relationship must be made on the same basis if they are to be enforceable in a court.
- (h) **Questions arising under the Act should be resolved as inexpensively, simply and speedily as is consistent with justice.** Inherent in this principle is a preference for people to resolve property matters out of court where that is consistent with justice. Avoiding court is generally in the interests of not only the partners but also any children of the relationship. Predictable outcomes encourage partners to resolve property matters out of court. Therefore, straightforward rules of classification and division of property, as opposed to rules involving an exercise of discretion, are consistent with this principle.⁷⁵ However, situations will inevitably arise that were not contemplated by the statute. It is also inevitable that recourse to the courts will be necessary in some cases. In order for property matters to be resolved inexpensively, simply and speedily in court, a court must be properly resourced and court procedures need to be efficient and easy to follow. This principle promotes meaningful access to justice for those partners who are unable to resolve their property matters without assistance.

2.61 Consideration should be given to the most effective way to draft these principles, having regard to legislative design best practice. In particular, consideration should be given to whether any principles should be articulated separately in relation to a specific Part of the new Act.

⁷⁴ *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

⁷⁵ 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 158.

The clean break concept should not be a principle of the new Act

- 2.62 We do not recommend that the clean break concept should be expressed as a principle of the new Act.
- 2.63 A clean break in the context of the PRA is generally understood to mean that partners should be able to reach a final division of their relationship property and then continue with their respective lives without any ongoing demands on their property from their former partner.⁷⁶
- 2.64 The PRA does not contain any explicit reference to the clean break concept.⁷⁷ It is notably absent from the purpose and principles of the PRA and from the legislative background materials. However, this has not prevented the courts and commentators from implying a clean break principle under the PRA regime.⁷⁸
- 2.65 We discussed the clean break concept in the Issues Paper and Preferred Approach Paper but did not expressly seek feedback on it.⁷⁹ Nonetheless, several submitters commented on it. NZLS submitted that, while it was not wedded to the clean break concept, there was a "definite financial and emotional advantage to the parties" in the certainty of lump sum orders over periodic payments. Law firm Meredith Connell considered that any reform should not encourage a departure from the clean break concept, which it regarded as an important feature of the PRA. One practitioner considered that the clean break concept has been unnecessarily emphasised as a cornerstone of the PRA regime. They observed that the concept can be very hard on the partner who has the care of the children and who is often required to sell a home to ensure a clean break. It can also be very hard on a business or farm owner who is required to pay out half the market value of the property. That practitioner considered

⁷⁶ Caldwell says that the clean break principle is premised on the notion that the parties will use their respective shares of the relationship property to start afresh. Its purpose is to achieve financial finality and to assist the parties to self-determine and become self-sufficient: 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 394.

⁷⁷ Contrast, for example, to the maintenance regime in the Family Proceedings Act 1980, which gives effect to the clean break concept by requiring partners to assume responsibility for their own needs, within a reasonable time period, at the end of a relationship: Family Proceedings Act, s 64A. See also the discussion of the maintenance regime in the Issues Paper: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [19.51]–[19.58].

⁷⁸ See *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at 286 and n 364, where Arnold J states: "The clean break principle is not identified in the Property (Relationships) Act 1976 (the PRA), but is nevertheless seen to be an important underlying premise of the Act." In *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), the Court of Appeal noted at 269 that:

The Act proceeds on the premise that on the breakdown of marriage the matrimonial property should be divided and adjustments made between the spouses and that they should then be free to go their separate ways without any competing continuing demands on the property of each other.

See also *M v B* [2006] 3 NZLR 660 (CA) and *Haldane v Haldane* [1981] 1 NZLR 554 (CA). Caldwell says that there can be no doubt that the statutory regime as a whole is firmly grounded on the philosophy that "there should be a clean break between the parties as soon as practicable, with each able to take up their future life independently of the other": 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 394. See also Bill Atkin "Economic disparity – how did we end up with it? Has it been worth it?" (2007) 5 NZFLJ 299 at 302.

⁷⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [4.10(c)] and [19.11]–[19.12]; and Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at [5.92] and [7.35].

that there can be no clean break when there are children of the relationship, as the partners remain financially responsible and obliged to meet their needs. So long as that responsibility continues, there is no particular reason to require an early and final division of property. The Office of the Children's Commissioner questioned whether the statute should expressly exclude the clean break concept when there are minor or dependent children of the relationship.

2.66 While the clean break concept has an understandable attraction,⁸⁰ in our view, it is but one factor that is relevant to the overarching purpose of the property sharing regime, which is a just division of property between partners. The new Act should achieve this purpose through providing a clear, certain and efficient way for couples to unwind their financial affairs at the end of their relationship, thereby facilitating a clean break, but only when that achieves a just result.

2.67 Clean break should not, however, be a goal of the new Act in and of itself. In some cases, a clean break will not achieve a just division of property.⁸¹ Ongoing use of property or future periodic payments may be necessary, particularly when giving effect to the principle that economic advantages or disadvantages arising from the relationship or its end are to be shared and the principle that the best interests of any child of the relationship is a primary consideration under the Act. As BD Inglis has observed:⁸²

In a family which has been founded on the expectation of commitments into the foreseeable future, why should we say there must be a 'clean break' simply because one of the parties wants to end those future commitments? In some cases a clean break will be desirable; in others not: it all depends on the facts and the personalities in the individual case.

2.68 It would be desirable to explain the limited role the clean break concept has in furthering the purpose of the PRA in the background materials to the new Act.⁸³ This would help avoid the clean break concept being inappropriately adopted in future as a gloss on the new Act.

⁸⁰ Caldwell notes that "there is no available evidence to suggest that community thinking would favour anything other than a clean financial and psychological break taking place between former lovers and partners": 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.

⁸¹ Hammond J in *M v B* [2006] 3 NZLR 660 (CA) at [262] expressed reservations about the clean break principle, stating that:

... care has to be taken not to press the clean-break principle too far. One of the difficulties with formal equality approaches to relationship property and maintenance was the notion that women ought to be able to remain financially independent of former husbands after divorce could be too readily invoked to castigate dependent women in the very name of those equality principles.

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 326, Henaghan says:

... the application of the clean break principle in family finance disputes has meant that overall fairness, in terms of each party receiving an equal share of all the 'fruits' of their partnership, is compromised.

Margaret Casey in "Mitigating the Painful Effects of a Clean Break" (paper presented to New Zealand Law Society Family Law Conference, October 2013) 225 at 234 writes that:

We speak of "closure", "letting go" and "moving on" and encourage our clients to face the reality of living a life independent of the former partner. But there is no doubt for some parties independence is not achieved by a clean break.

⁸² B D Inglis "The Family Court: Progress and Change" (1988) 14 NZ Recent Law Review 18 at 22.

⁸³ Such as the explanatory note to the Bill.

RAISING PUBLIC AWARENESS OF THE PRA AND THE NEW ACT

RECOMMENDATION

R5

The Government should consider ways to improve public awareness of and education about the PRA and the new Act, if enacted.

- 2.69 Consultation on the Issues Paper and Preferred Approach Paper highlighted a clear need for greater public awareness of and education about the PRA. One member of the public told us that they had never heard of the PRA until a claim was made against him. Another said that most people seem oblivious of the PRA and the chance they might lose property to a new partner. Another submitter said using less legalese would make the law more accessible to the public.
- 2.70 ADLS submitted that there should be a public education programme that includes secondary school students and involves all government departments. ADLS also said that there should be an intensive public education programme to inform the public of the principles of the PRA and of their right to contract out of the PRA. One practitioner observed that the publicity given to the inclusion of de facto relationships in 2001 was successful. Perpetual Guardian supported a public awareness programme, a professional development programme and introducing legal basics (including relationship property and succession law) into the secondary school syllabus. Several submitters also supported the provision of better information about rights and obligations under the PRA to partners on separation. We discuss these submissions in Chapter 16.
- 2.71 The need for greater public awareness of and education about the PRA was also reflected in the results of the Borrin Survey. That survey 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.⁸⁴ The need for greater public awareness and education will be even greater should the recommendations we make in this report be accepted.
- 2.72 We recommend that the Government consider ways to improve public awareness of the PRA or the new Act if enacted. This should include consideration of:⁸⁵
- (a) a one-off public education campaign, which could be timed to coincide with the implementation of the recommendations in this report, if accepted;

⁸⁴ 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].

⁸⁵ The Independent Panel appointed by the Government in August 2018 to examine parenting and guardianship matters following the 2014 family justice reforms similarly recommended an information strategy be developed to provide quality, accessible information on parenting and guardianship matters and an ongoing public awareness campaign to encourage parents to resolve their issues as early as possible and provide information on the services available and how to access them: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendation 25. We discuss the Independent Panel further in Chapter 16.

- (b) education in secondary school programmes and for professionals such as financial planners, business advisers and chartered accountants;
 - (c) the provision of information at different points of interaction with government departments, such as when applying for a marriage or civil union licence, when applying for state benefits or Working for Families Tax Credits and when applying for New Zealand residency;
 - (d) introducing requirements on registered professionals or organisations such as real estate agents and banks to provide some form of prescribed information to clients when buying or selling property, applying for credit or opening joint bank accounts; and
 - (e) producing and providing information online, in Family Courts around New Zealand and to community organisations such as Citizens Advice Bureau and Community Law Centres.
- 2.73 In Chapter 16, we make several recommendations that are intended to improve access to information about the PRA or the new Act if enacted. This includes the development of a comprehensive information guide that explains the law and provides information about the different options for resolving relationship property matters.

A SEPARATE STATUTE FOR RELATIONSHIPS ENDING ON DEATH

RECOMMENDATIONS

- R6** The rules that apply to relationships ending on death should be the subject of further consideration within a broader review of succession law.
- R7** The Minister Responsible for the Law Commission should ask the Law Commission to undertake a review of succession law as a matter of priority in the Law Commission's next annual programme.

- 2.74 We recommend 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.
- 2.75 As we explained in 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.⁸⁶ 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;

⁸⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 36.

- (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.
- 2.76 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.
- 2.77 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.⁸⁷ 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 also likely assist those advising on estate planning and those administering estates.
- 2.78 Submissions we received on the Issues Paper and Preferred Approach Paper 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.
- 2.79 NZLS, Perpetual Guardian and Professor Peart were concerned about the risk of a gap in the law if the new Act were to be introduced in relation to division of property on separation while the current provisions of the PRA relating to division of property on death were to carry on. Perpetual Guardian's preferred response was also for a new succession statute to be created at the same time as any changes to the PRA are implemented. Its alternative response was to "band aid" the problematic provisions that are causing well-known issues within the PRA relating to division of assets on death. NZLS similarly submitted that sections 75, 76, 87, 88 and 95 of the PRA should be amended now to address and clarify the current operational problems with those sections without having to await the outcome of a broader review of succession law. Peart suggested that the Law Commission should prepare a separate statute for relationships ending on death that gives effect to the changes proposed on separation to the extent they apply on death and address the conceptual incoherence. One practitioner preferred the current death provisions in the PRA to remain as while they are not perfect, they are known and workable.

⁸⁷ A similar proposal was made by the Law Commission 20 years ago in its report *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

2.80 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.⁸⁸ We therefore recommend 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.⁸⁹ 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.⁹⁰

⁸⁸ 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].

⁸⁹ Law Commission Act 1985, s 7.

⁹⁰ 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) 467 at 487–490.

CHAPTER 3

Classifying property

IN THIS CHAPTER, WE CONSIDER:

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

- whether the definition of property is appropriate;
- the basis for classifying relationship property and separate property;
- whether gifts and inheritances should be treated differently to other types of separate property;
- how increases in the value of separate property and income and gains on separate property, should be classified; and
- how the rules of classification in sections 8–10 of the PRA can be modernised and simplified.

THE DEFINITION OF PROPERTY**Background**

3.1 The PRA does not comprehensively define property. Instead, it provides that property includes:¹

- (a) real property;
- (b) personal property;
- (c) any estate or interest in any real property or personal property;
- (d) any debt or any thing in action;
- (e) any other right or interest

3.2 The PRA's definition of property is therefore broad and inclusive. In *Clayton v Clayton [Vaughan Road Property Trust]*, the Supreme Court emphasised the need to interpret the meaning of property in a manner that reflects the PRA's statutory context.² The Court said that, because the PRA is social legislation, the definition of property is broader than traditional concepts, including rights and interests even if they are not

¹ Property (Relationships) Act 1976, s 2 definition of "property". An owner, in respect of any property, is defined in s 2 to mean the person who, apart from the Act, "is the beneficial owner of the property under any enactment or rule of common law or equity".

² *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].

rights and interests in property.³ However, it remains to be seen whether the Supreme Court's decision will have wider implications for what is considered property under the PRA.⁴

Issues

- 3.3 In the Issues Paper, we identified two potential issues with the PRA's definition of property.⁵
- 3.4 First, we noted that the definition of property excludes wider economic resources, such as a partner's income-earning capacity⁶ and most interests in trust property.⁷ Not accounting for wider economic resources at the end of the relationship may fail to achieve equal division of the true value attributable to the relationship. We noted, however, that broadening the definition of property risked confusion and would create complex questions in each case (such as how to identify what proportion of an economic resource is relationship property and what proportion is separate property). We suggested that it might be preferable to recognise and account for wider economic resources in other ways, such as through amendments to section 15 to address economic disparity and a specific remedy for property held on trust.
- 3.5 Second, we questioned whether the definition of property can accommodate new and emerging types of property, such as virtual currencies, digital accounts or libraries, intellectual property rights and other forms of intangible or digital property.⁸ We expressed a view that the definition and, in particular, the catch-all "any other right or interest" is wide enough to capture all sorts of intangible things. However, the PRA's definition of property does not explain how or why something should be treated as property. We questioned whether it provides partners, lawyers and judges with sufficient guidance on whether new forms of property are indeed property for the purposes of the PRA. We also asked whether the definition of property should be amended to define property in greater detail.

³ At [38]. Contrast with the earlier case of *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279, where the Court of Appeal considered that a conventional understanding of property applied in the context of the Property (Relationships) Act 1976.

⁴ In *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, the Supreme Court held that Mr Clayton's powers under the trust deed (the powers to appoint and remove beneficiaries, distribute any of the trust property to any one beneficiary, including himself, and bring the trust to an end) were a right that was captured within the definition of property under the Property (Relationships) Act 1976. This case is discussed in further detail in Chapter 11.

⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [8.11]–[8.21].

⁶ In *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), the Court of Appeal held that the personal skills of an individual do not come within the concept of property contained in the Property (Relationships) Act 1976.

⁷ A vested or contingent interest in a trust constitutes property, but a discretionary beneficial interest does not. See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [20.31]–[20.34]. At n 4, we noted that powers to control a trust may also constitute property. However, many 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 under the Property (Relationships) Act 1976. Therefore, trust property will not usually be subject to division under the Act.

⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [8.16]–[8.21]. For a discussion on digital information as property, see ch 5 in David Harvey *Collisions in the Digital Paradigm: Law and Rule Making in the Internet Age* (Hart Publishing, Oxford, 2017).

Approach in comparable jurisdictions

- 3.6 In jurisdictions that operate a discretionary regime (Australia, England and Wales, Scotland and Ireland), a court can take into account the wider economic resources of the partners when making orders to divide their property.⁹ However, jurisdictions that adopt a rules-based relationship property regime, similar to New Zealand, tend to rely on conventional definitions of property.¹⁰

Results of consultation

- 3.7 We received few submissions on the definition of property. Of the submissions received, most focused on the two particular issues of income-earning capacity and interests in trust property.
- 3.8 Members of the National Council of Women of New Zealand, one practitioner and one member of the public favoured treating income-earning capacity as an item of property. However, the New Zealand Law Society (NZLS) and Professor Nicola Peart supported reform of section 15 to address economic disparity instead of amending the definition of property. Peart also cautioned against comparisons with Australia and England and Wales given the significant differences in these regimes and their focus on meeting financial need rather than entitlements. No submitter favoured expanding the definition of property to include trust property, with submitters favouring other remedies to respond when the trust holds property that ought to be shared between the partners.
- 3.9 NZLS submitted that the current definition of property in the PRA should be retained and that the courts should decide on a case-by-case basis whether emerging forms of property are captured by the PRA. Professor Peart made a similar submission, observing that, if the definition of property is not broadly conceived, it will get out of date very quickly. Perpetual Guardian also noted that too much detail in the definition may hinder the ability of the courts to allow for emerging forms of property. However, one practitioner submitted that, while the existing definition should be retained, specific items of property should be specified, such as cryptocurrency. Another practitioner did not agree that it should be left to the courts to determine whether the PRA applies to emerging forms of property. That practitioner considered it would be preferable for the definition to provide greater certainty "so that cases will not be won simply on the ability of lawyers' advocacy skills or the judge's mood". The practitioner submitted that the definition should be expanded to include digital accounts. This should include accounts for created media (such as photos on Facebook or Dropbox), accounts for the

⁹ Family Law Act 1975 (Cth), ss 75 and 79; Matrimonial Causes Act 1973 (UK), ss 24 and 25(2)(a); Family Law (Scotland) Act 1985, s 11(5)(d); and Family Law (Divorce) Act 1996 (Ireland), s 20(2)(a). See, for example, *Hall v Hall* [2016] HCA 23, (2016) 90 ALJR 695; and *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246. However, in the recent case of *Waggott v Waggott* [2018] EWCA Civ 727, [2019] 2 WLR 297, the Court held that earning capacity is not capable of being treated as a matrimonial asset to which a principle of sharing can be applied.

¹⁰ In Ontario, for example, "property" means "any interest, present or future, vested or contingent, in real or personal property": Family Law Act RSO 1990 c F.3, s 4(1). The American Law Institute also considered that a special meaning of "property", different from its meaning in other areas of law, is neither necessary nor desirable. It observed that the most frequent occasion for debate over the definition involves the law's treatment of earning capacity and goodwill but that the treatment of these items should be determined by a specific policy choice rather than by the definition of property: American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 4.03, comment (b).

family business or income-earning accounts (such as YouTube channels) and accounts for media consumption (such as iTunes or Netflix).

Conclusions

RECOMMENDATION

R8 The definition of property in the new Act should retain the definition of property from the PRA.

- 3.10 We consider that the definition of property in the Relationship Property Act (the new Act) should retain the existing definition of property from the PRA. In particular, we do not recommend amending the definition of property to include wider economic resources. We consider that our recommendations for reform to respond to economic disparity (in Chapter 10) and in relation to property held on trust (in Chapter 11) will address the specific issues identified above. We have not identified any other issues with excluding wider economic resources from the definition of property that warrant reform.
- 3.11 We do not recommend listing specific items of property in the definition of property. In our view, the courts are best placed to determine, on a case-by-case basis, whether new and emerging forms of property ought to be captured by the new Act. We note, however, the concerns raised by some submitters that greater guidance on new and emerging forms of property is needed. Lawyers advising on relationship property matters need to ensure their familiarity with property that is subject to the property sharing regime. Education for all New Zealanders (discussed in Chapter 2) and the information guide (discussed in Chapter 16) should also address the types of covered by the new Act (including emerging types of property and, in particular, the appropriate sharing of digital accounts). The information guide may usefully contain a checklist of property to be considered.

THE BASIS FOR CLASSIFICATION

Background

- 3.12 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 or adjustments available under the PRA applies.¹¹ Separate property is generally excluded from division.¹²
- 3.13 Relationship property is defined in section 8 of the PRA. The types of property defined as relationship property reflect three approaches to classification:

¹¹ Property (Relationships) Act 1976, ss 13–18C. As discussed in Chapters 9 and 10.

¹² Subject to the court's power, in some limited circumstances, to make orders in respect of separate property: ss 15A, 18B and 18C.

- (a) **Property acquired or produced by either partner during the relationship** is relationship property under a "fruits of the relationship" approach to classification.¹³
 - (b) **The family home and family chattels** are relationship property, whenever acquired, under a "family use" approach to classification.¹⁴
 - (c) **Property acquired for the common use or common benefit of both partners** is relationship property under a "family acquisitions" approach to classification.¹⁵
- 3.14 Separate property is defined broadly in section 9(1) as all property that is not relationship property. This includes, subject to the exceptions discussed below, 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.¹⁶
- 3.15 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 (section 9(4)) 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 or 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 items that would ordinarily be relationship property but that the PRA provides for specifically. 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).
- 3.16 Separate property will not always remain separate property. When separate property is used by the partners as the family home or a family chattel, the family use approach results in that property being classified as relationship property.¹⁷ Similarly, when pre-relationship property is used to acquire new property for the partners' common use or common benefit, the new property is relationship property under the family acquisitions approach.¹⁸
- 3.17 The PRA also recognises other ways in which separate property can be converted into relationship property:
- (a) When a 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

¹³ Section 8(1)(e).

¹⁴ Sections 8(1)(a)–(b).

¹⁵ Sections 8(1)(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.

¹⁶ Sections 9(2)–(3) and 10(1)(b)–(c).

¹⁷ Sections 8(1)(a)–(b).

¹⁸ Sections 8(1)(d) and (ee).

relationship property under section 10(2). We discuss gifts and inheritances at paragraphs 3.90–3.103 below.

- (b) When separate property, other than 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, that separate property will become relationship property, either by general operation of the rules of classification¹⁹ or by specific operation of section 9A(3).
- (c) When new items of property are acquired during the relationship using a mixture of separate property and relationship property, the new item of property will be relationship property, and the separate property used to acquire the new property will lose its character as separate property.²⁰
- (d) 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). We discuss increases in the value of separate property at paragraphs 3.104–3.125 below.

The conceptual basis for classifying property as relationship property or separate property

- 3.18 The PRA adopts three approaches to classification (described at paragraph 3.13 above). The fruits of the relationship approach is based on the theory that a qualifying relationship is a family joint venture to which the partners contribute equally although perhaps in different ways. The equal contribution of each partner entitles them to share in the "fruits" of the family joint venture, being the property acquired or produced by either or both of the partners during the relationship. This theory is embedded in the statutory purpose and principles of the PRA.²¹
- 3.19 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.²²
- 3.20 The basis for classifying property under the family use approach is unclear.²³ It might be that the partners' use of the family home and family chattels signals their intention to

¹⁹ 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".

²⁰ This is because the courts have interpreted s 9(2) as applying only when property is acquired *wholly* out of separate property. Property acquired out of mixed funds is treated as relationship property under s 8(1)(e): *Allan v Allan* (1990) 7 FRNZ 102 (HC) at 109 per Tipping J. See also *Martin v Martin* [2015] NZHC 1823, [2015] 30 FRNZ 568 at [28].

²¹ Sections 1M(b) and 1N(b).

²² Sections 1M(b), 1N(b) and 18(2).

²³ 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

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.

- 3.21 Robert Fisher QC 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".²⁴ Fisher argues that, once equal sharing was extended beyond the family home and chattels to all items of relationship property in 2001,²⁵ the reason for the family use approach disappeared.²⁶

Issues

- 3.22 A key issue identified in this review relates to the family use approach to classification and how it requires partners to share pre-relationship, gifted and inherited property simply because it is used by them as the family home or a family chattel. As we explore below, this can result in unjust outcomes and is inconsistent with public attitudes and expectations as to what property should be shared when relationships end.

The risk of unjust outcomes

- 3.23 The family use approach can result in unjust outcomes where the family home or chattels were owned by one partner before the relationship began or were received by one partner as a gift or inheritance during the relationship. It might also be considered to lead to unjust outcomes where the family home or chattels were purchased during the relationship using one partner's pre-relationship, gifted or inherited property. In that case, the family home or chattels might also be classified as relationship property under the family acquisitions approach to classification.

(UK), 2017) 329 at 337–340. See also Law Reform Commission of British Columbia *Property Rights on Marriage Breakdown* (Working Paper No 63, July 1989) at 13–15.

²⁴ 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.

²⁵ 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 were 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.

²⁶ 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.

- 3.24 Whether the family use approach results in an unjust outcome in any given situation will be influenced by a range of factors:
- (a) **The value of the property subject to division.** The family home represents the biggest asset for most New Zealand households.²⁷ Some chattels can also be significant in value, such as artwork or expensive motor vehicles, although this is less common. The greater the net value of the property that is (or is attributable to) one partner's pre-relationship, gifted or inherited property, the more likely the other 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.²⁸ 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.²⁹
 - (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 have 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 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 might also be greater if the other partner is

²⁷ Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at 48.

²⁸ Property (Relationships) Act 1976, s 2H.

²⁹ 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 nine 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 the family 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.

able to retain 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. 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.

3.25 The risk of unjust outcomes can be 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.³⁰ However, it is questionable whether this sets 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".³¹ 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.

The measures for mitigating the risk of unjust outcomes are no longer effective

3.26 As enacted, the Matrimonial Property Act 1976 mitigated the risk of unjust outcomes through several exceptions to equal sharing, which remain in the PRA today. These exceptions no longer present an effective response to the issue.

3.27 Section 14 provides that, 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. Instead, that property is divided in accordance with the contribution of each spouse to the marriage.³² However, this rule rarely applies because amendments to the PRA in 2001 extended the regime to de facto relationships. Under these amendments, the start date of a marriage is deemed to

³⁰ See cases discussed at n 29 above.

³¹ 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 *Property Rights on Marriage Breakdown* (Working Paper No 63, July 1989) at 14.

³² A mirror provision applies in respect of civil unions: Property (Relationships) Act 1976, s 14AA. De facto relationships of less than three years' duration are normally excluded from the Act, unless special circumstances apply (s 14A).

be the start date of any preceding de facto relationship.³³ Because most marriages are preceded by a period of living in a de facto relationship,³⁴ the likelihood of section 14 applying is low. Our review of cases since 2001 identified on average one reported case per year that resulted in unequal sharing under section 14.³⁵

- 3.28 Section 16 enables a court to 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. However, this does not apply if one partner brought the family home into the relationship and the other partner had different types of pre-relationship property, such as savings and investments, nor does it apply if one partner brought the family home into the relationship and the other partner had no property. Its application is therefore quite limited.
- 3.29 Finally, section 13 of the PRA provides a general exception to equal sharing for extraordinary circumstances that make equal sharing repugnant to justice. 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 from the rule as an extraordinary circumstance.³⁶

The changing social and legal context has increased the risk of unjust outcomes

- 3.30 Changes in the social and legal context since the Matrimonial Property Act 1976 was first enacted have increased the risk of unjust outcomes under the family use approach. The changing social context is explored in detail in our Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī*.³⁷
- 3.31 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 life³⁸ and are more likely to separate and repartner.³⁹ As a result, situations where one or

³³ Sections 2B–2BAA.

³⁴ Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at 17.

³⁵ 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).

³⁶ See *Martin v Martin* [1979] 1 NZLR 97 (CA) at 110–112.

³⁷ Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017).

³⁸ In 2016, the median age at first marriage was 30 for men and 29 for women, compared to 23 for men and 21 for women in 1971, when the marriage rate peaked: Statistics New Zealand "Marriages, Civil Unions and Divorces: Year ended December 2016" (information release, 3 May 2017) at 5.

³⁹ 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: Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (Including Civil Unions) (Annual–Dec)" (May 2017) <www.stats.govt.nz>. 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 repartnered within five years of separation had entered into a de facto relationship rather than remarrying: Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 238–239. That study also found that, within two years of separation from a first marriage, 30 per cent of women had repartnered and that women

- both partners bring property into a relationship (such as a house) might be more common.
- 3.32 The extension of the PRA to de facto relationships in 2001 also increased the risk of unjust 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.⁴⁰ 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.⁴¹ This suggests that people may be reaching the qualifying period for a qualifying relationship under the PRA without appreciating the property consequences.
- 3.33 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 2013,⁴² with 65 per cent of households owning their own home in 2013.⁴³ 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.⁴⁴ 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.⁴⁵ 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.
- 3.34 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 to enter the property market.⁴⁶ 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.

who separated later in the study period (1950–1995) were increasingly more likely to repartner (at 238–239). While this study is now over 20 years old, it indicates that repartnering has become increasingly common in New Zealand.

⁴⁰ See the discussion on the differences between early stage de facto relationships and marriages and civil unions in Chapter 6.

⁴¹ 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].

⁴² Statistics New Zealand *Changes in home-ownership patterns 1986–2013: Focus on Māori and Pacific people* (June 2016) at 18.

⁴³ Statistics New Zealand *2013 Census QuickStats about housing* (March 2014) at 12. This includes households where the home was held in a family trust.

⁴⁴ 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. This includes households where the home was held in a family trust.

⁴⁵ Families Commission *The Kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, June 2008) at 87 and 97.

⁴⁶ Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 52.

- 3.35 These factors point to a greater need today 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.

Public attitudes and expectations of sharing

- 3.36 The changing social context will 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 for 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.⁴⁷
- 3.37 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.⁴⁸ However, 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.⁴⁹ 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.
- 3.38 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.⁵⁰ However, 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.⁵¹ 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 on issues with the family use approach

- 3.39 Dissatisfaction with the family use approach was a strong theme from consultation. It was raised in 33 per cent of submissions on the Issues Paper⁵² and in 38 per cent of

⁴⁷ 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 and 43.

⁴⁸ At 37.

⁴⁹ At 37.

⁵⁰ At 35.

⁵¹ At 35.

⁵² 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.

submissions on the Preferred Approach Paper.⁵³ Dissatisfaction with the family use approach was also raised in five public consultation meetings and eight practitioner and academic expert meetings. Most submitters were concerned specifically with how the PRA results in automatic equal sharing of the family home.

3.40 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". Fisher 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.

3.41 Many submitters pointed to the factors identified at paragraph 3.24 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 it covers. 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.

3.42 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 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.

3.43 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.

3.44 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.

3.45 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

⁵³ 27 submissions from members of the public, nine submissions from individual practitioner and academic experts and two submissions from organisations.

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.

Approach in comparable jurisdictions

- 3.46 In developing our recommendations, we have considered approaches to classification in comparable jurisdictions. We note, however, that each comparable regime sits within its own legal, social and societal context, which will differ from the New Zealand experience. Our discussion below focuses on jurisdictions that adopt a rules-based relationship property regime. Other jurisdictions that New Zealand often compares itself with (Australia, England and Wales, Scotland and Ireland) operate discretionary regimes under which a court has discretion to adjust the partners' property interests on separation.⁵⁴ These jurisdictions, other than Scotland (discussed below), do not classify property in their legislation.
- 3.47 Approaches to classification in comparable rules-based jurisdictions 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. Sharing property on the basis of family use or the partners' intentions at the time of acquisition fall somewhere in between.
- 3.48 While there is widespread acceptance that the fruits of the relationship should be shared when relationships end,⁵⁵ many jurisdictions define relationship property more broadly. In Canada, several provinces adopt a family use approach, providing that the family home is always shared, whenever acquired.⁵⁶ In Scotland, pre-relationship property is shared if it was acquired for the partners' use as the family home or chattels.⁵⁷

⁵⁴ Family Law Act 1975 (Cth); Matrimonial Causes Act 1973 (UK); Family Law (Scotland) Act 1985; and Family Law (Divorce) Act 1996 (Ireland). The Australian Law Reform Commission has recently recommended retaining judicial discretion to divide property interests in a way that is just and fair in each case: Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [7.7].

⁵⁵ 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.

⁵⁶ In Canada, 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 (The 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). 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: Law Reform Commission of Nova Scotia *Final Report: Division of Family Property* (September 2017). That recommendation has not been adopted to date.

⁵⁷ The definition of matrimonial property excludes property acquired by way of gift or succession from a third party but includes property acquired before the marriage "for use by them as a family home or as furniture or furnishings for such home": Family Law (Scotland) Act 1985, s 10(4). See also 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.

- 3.49 Other jurisdictions rely solely on a fruits of the relationship approach to classification. In Europe, there appears to be a growing consensus that pre-relationship property, gifts and inheritances should not be shared, regardless of how they are used.⁵⁸ 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.⁵⁹ No European country now follows a universal model, the Netherlands being the last country to shift towards a fruits of the relationship approach in 2018.⁶⁰
- 3.50 In Canada, provinces with more recent relationship property legislation have moved away from a family use approach to varying degrees. In British Columbia, reforms in 2011 replaced the previous family use approach with a fruits of the relationship approach under which pre-relationship property and gifts and inheritances are excluded from division, although any increase in their value is shared.⁶¹ This was preferred over a family use approach as it seemed "to better fit with people's expectations about what is fair".⁶² Similar rules of classification apply in Alberta.⁶³ In Manitoba, pre-relationship property is excluded from division unless the property was acquired in specific contemplation of the relationship.⁶⁴ Any increase in the value of pre-relationship property is shared.⁶⁵ Gifts and inheritances designed to benefit only one partner are excluded, including any increase in value or income derived from the gifted property unless the income or increase in value is used to purchase a family asset.⁶⁶
- 3.51 The Law Reform Commission of Nova Scotia has also recently recommended adopting a more limited family use approach. Specifically, it recommended excluding the value of pre-relationship property from division, observing that:⁶⁷
- 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.
- 3.52 The Law Reform Commission of Nova Scotia also pointed to the changing social context and considered that excluding pre-relationship property should encourage settlement because it accords more with people's sense of fairness.⁶⁸ It rejected calls for giving the family home special status, observing that this leads to anomalies and can have adverse

⁵⁸ 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: 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 478–479.

⁵⁹ At 449.

⁶⁰ BE Reinhartz "New Matrimonial Property Law in the Netherlands" (paper presented to International Society of Family Law Conference, Amsterdam, 2017) at 2.

⁶¹ Family Law Act SBC 2011 c 25, ss 84(2)(g) and 85.

⁶² Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation 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 No 63, July 1989).

⁶³ Matrimonial Property Act RSA 2000 c M-8, s 7(2).

⁶⁴ The Family Property Act CCSM 2017 c F25, ss 4(2) and 4(2.3).

⁶⁵ Section 4(3).

⁶⁶ Section 7.

⁶⁷ Law Reform Commission of Nova Scotia *Final Report: Division of Family Property* (September 2017) at 122.

⁶⁸ At 122–123.

consequences especially in second or third relationships.⁶⁹ It also recommended that all increases in the value of pre-relationship property be shared,⁷⁰ consistent with the British Columbian approach. The Commission did not, however, recommend abolishing the family use approach entirely. It considered that gifts and inheritances should continue to be shared where they are used for the benefit of both partners or their children.⁷¹ 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.⁷² 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.⁷³

- 3.53 The American Law Institute, an independent organisation in the United States that develops proposals for law reform initiatives, also recommended a fruits of the relationship approach as a starting point, commenting that this:⁷⁴

... reflects a 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).

- 3.54 Significantly, however, the Institute also recommended that a portion of separate property should be reclassified as relationship property at the dissolution of a "long-term marriage".⁷⁵ The Institute explained 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.⁷⁶ The Institute did 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.⁷⁷
- 3.55 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-

⁶⁹ At 128–129.

⁷⁰ At 125.

⁷¹ At 141–143.

⁷² At 142.

⁷³ At 142.

⁷⁴ American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 4.03, comment (a).

⁷⁵ At § 4.12.

⁷⁶ At § 4.12, comment (a).

⁷⁷ At § 4.12, comment (b).

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

- 3.56 In the Issues Paper, we identified two broad options for reform as being to:
- (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]).
- 3.57 We also considered addressing concerns with the family use approach in other ways, such as 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.
- 3.58 Many submitters on the Issues Paper were in favour of moving away from a family use approach. 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 the relationship ends. Most members of the public were concerned specifically with the family home. Several practitioner and academic experts also favoured moving away from a family use approach, including Fisher and Professor Peart. One practitioner 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 that currently exists. However, these submitters acknowledged that this would be a radical change to the current approach.
- 3.59 At the same time, some submitters felt that eliminating the family use approach altogether might not be appropriate where there are dependent children of the relationship and the non-owning partner is the primary caregiver. Others considered there would need to be reinforcement of economic disparity compensation and the power to use property to meet family support obligations. Some submitters preferred retaining the family use approach to classification and addressing the problem in other ways, such as through a change to the eligibility rules for qualifying relationships or to the existing exceptions to equal sharing.

Results of consultation on the Preferred Approach Paper

- 3.60 Ultimately, in the Preferred Approach Paper, we proposed limiting the family use approach to family chattels and classifying all other property, including the family home, on the basis of a fruits of the relationship approach and a family acquisitions approach to classification. Under our proposals, the family home would be separate property if it was acquired before the relationship was contemplated or was acquired as a gift or inheritance. However, if that home is sold and a new family home acquired during the

relationship, that new home would be relationship property. We also proposed classifying all increases in the value of the family home as relationship property, which we discuss below.

- 3.61 NZLS, nine practitioner and academic experts and 16 members of the public expressed support for our proposals in the Preferred Approach Paper.⁷⁸ NZLS qualified its support on the basis that our proposals would be implemented as part of the suite of reforms put forward in our Preferred Approach Paper, including, in particular, our proposals for Family Income Sharing Arrangements (FISAs), which are discussed in Chapter 10. The most common reasons given by submitters in support of the proposals were that they were fairer, especially in relation to family homes brought into a relationship by one partner, were more appropriate for contemporary patterns of shorter relationships and multiple relationships over a lifetime and reflected common sense.
- 3.62 The Auckland District Law Society (ADLS), two practitioner and academic experts and seven members of the public supported our proposal to abolish the family use approach to the family home but did not think the proposals went far enough. Professor Peart and Professor Margaret Briggs and several members of the public thought that the family home would lose its separate property status too quickly under the family acquisitions approach. Briggs observed that a partner may sell the family home and acquire a new one for many different reasons, such as needing to move to a new town, accommodating a disability or because there was a natural disaster. None of these circumstances suggests an intention that the house should lose its separate property status. Peart did not see how the same intent, to use a family home for the partners' common use or common benefit, should have opposite consequences depending on whether the home was brought into the relationship by one partner or acquired during the relationship. Peart also questioned how the proposed rules would be interpreted and applied in practice. These submitters tended to prefer a pure fruits of the relationship approach under which partners could trace their separate property contributions into new acquisitions during the relationship, such as the purchase of a new family home. Some of these submitters also raised concerns about how increases in the value of the family home are classified, which we discuss below at paragraph 3.118.
- 3.63 Professor Mark Henaghan and Professor Bill Atkin did not support our proposals, as they were concerned that abolishing the family use approach would fail to provide for the primary caregiver of children in situations where the family home is the other partner's separate property. Atkin preferred dealing with the issue through exceptions to equal sharing (section 13 and a revised section 16). One practitioner thought the court should retain discretion to grant the non-owning partner more property when there had been minimal increase in value during the relationship. Two members of the public did not support our proposal. One person did not think it was appropriate to adopt a "one size fits all" approach to classification. Another person was concerned that the proposal would leave the non-owning partner with nothing, even if they had principal care of the

⁷⁸ This included one member of the public who supported our proposals for relationships of less than 20 years, after which the full value of the family home should be treated as relationship property. Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P5.

children of the relationship. However, this submission did not consider the effect of our FISA proposals, which are discussed in Chapter 10. That member of the public also noted that, if the home was classified as separate property, there would be a power and control imbalance, as the owning partner could take the attitude "this is my house and my rules".

- 3.64 Few submitters commented specifically on our proposal to retain the family use approach for family chattels. Professor Briggs agreed with the proposal on the basis that most chattels are not major items and it would be too impractical to adopt a different approach for chattels. Professor Peart thought that retaining the family use approach for family chattels for pragmatic reasons may be justifiable but only if the definition of family chattels excludes not only taonga and heirlooms but also items of special significance, such as art, antiques and pets acquired before the relationship began or by gift or inheritance during the relationship. ADLS observed that, in the relatively rare circumstances where chattels are of a significant value, reliance on contracting out or falling within another exception may be appropriate, but it considered an education programme to warn the public of this risk would be beneficial. We discuss chattels of special significance in Chapter 5.
- 3.65 Several submitters noted the need, when buying and selling property, for partners to obtain legal advice on the implications of the transaction under our proposals. NZLS and Professor Peart noted that partners may be contractually committed to a purchase before they can take legal advice. A practitioner proposed that there should be a three month grace period after a transaction before classification changed to give a partner "time to get out of the relationship if they don't like the consequences once they have advice".

Conclusions

RECOMMENDATIONS

- R9** Property owned by either or both partners should be classified as relationship property if it:
- a. was acquired 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.
- R10** Homesteads should continue to be treated as a discrete item of property, distinct from the part of the land not used wholly or principally for the purposes of the household. Homesteads should be classified and divided under the same rules that apply to family homes.
- R11** The definition of family chattels should be limited to chattels used wholly or principally for family purposes.

- 3.66 We recommend that, at the end of a relationship, partners share all property that was:
- (a) acquired by either partner for the partners' common use or common benefit;
 - (b) acquired by either partner during the relationship, excluding gifts and inheritances; or
 - (c) used as a family chattel.
- 3.67 This retains the current family acquisitions and fruits of the relationship approaches to classification but limits the family use approach to family chattels only.
- 3.68 Our recommendations are reflected in the draft classification provisions set out in Appendix 2, which have been prepared with the assistance of Parliamentary Counsel. At the end of this chapter, we include a commentary on the individual clauses of these provisions.

A limited family use approach

- 3.69 We recommend abolishing the family use approach in respect of the family home for the same reasons discussed in our Preferred Approach Paper.⁷⁹ Our view is that it is no longer appropriate to require partners to divide the family home 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 when the family home was owned by one partner before the relationship or was a gift or inheritance. In neither of these situations has the family home been acquired through the efforts of either partner during the relationship or 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.
- 3.70 We do not, however, recommend abolishing the family acquisitions approach and relying purely on a fruits of the relationship approach. Under a pure fruits of the relationship approach, partners would be able to retain the original value of any separate property they contribute to the relationship, even if that property is used to purchase new assets for the partners' common use or common benefit. We do not favour this 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 and expectations when property is acquired for their common use or common benefit rather than the source of funds used. We think this is appropriate. It reflects the reality that, over time, partners will make a range of decisions and contributions to the relationship in reliance on their continued use and enjoyment of property acquired for their

⁷⁹ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aranga i Mariu ai* (NZLC IP44, 2018) at [2.90]–[2.95].

common use or common benefit. It would be unfair to prioritise contributions of separate property over other contributions made to the relationship.⁸⁰

- (b) Second, relying solely on a fruits of the relationship approach would be more difficult for partners to apply in practice. 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 attributable to that separate property contribution and how any subsequent increase in value 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. 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. Fisher argues that a tracing exercise and robust estimations in place of precise calculation could be readily applied.⁸¹ In any event, the partners will likely require expert assistance, which will increase costs and delay resolution of relationship property matters.
- (c) Third, we are concerned that other aspects of a pure fruits of the relationship approach would not accord with people's values and expectations, such as 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.⁸² 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.

3.71 We have also considered addressing concerns with the family use approach by amending other rules in the PRA, such as the rules of division or the eligibility criteria. While some submitters were in favour of these options, especially the option of a longer qualifying period, these options do not directly address the central issue, which is the unfairness of the family use approach. We prefer addressing the issue directly through a change in approach to classification rather than providing an indirect remedy that might provide relief in some but not all situations.

3.72 We set out below what our recommendations mean for different types of property.

⁸⁰ This is reflected in the Borrin Survey, which found that, while 72 per cent of respondents thought a partner who uses their pre-relationship savings as a deposit on a family home the partners purchase together should get that deposit back if the relationship ends after four years, only 26 per cent still thought that partner should get their deposit back if the other partner paid for most of the mortgage payments and living expenses: 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 35.

⁸¹ 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.

⁸² 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 The Family Property Act CCSM 2017 c F25, s 11(1).

The family home

3.73 Under our recommendations, 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 be treated as a distinct item of relationship property – see paragraphs 3.104–3.125 below.

Family homes owned before the relationship was contemplated or received as a gift or inheritance

3.74 When the family home was one partner's pre-relationship property or was a gift or inheritance, the value of the home when the relationship began or when the gifted or inherited property was received (original value) should be classified as the owning partner's separate property.

3.75 Any debt (including mortgage debt) incurred before the relationship was contemplated for the purposes of acquiring, improving or maintaining the family home should be classified as the owning partner's personal debt. If this debt is reduced through the application of relationship property (for example, by using the partners' income to pay the mortgage), the owning partner should be obliged to compensate the non-owning partner for an amount equal to half the reduction in principal debt. Any debt incurred after the relationship began should be classified according to the existing rules that apply to the classification of debt, currently found in section 20 of the PRA. This means, in effect, that the partners share the growth in equity of any family home during the relationship.

3.76 The owning partner should have the burden of proving that the original value of the family home should be treated as their separate property. When the family home is pre-relationship property, the owning partner would 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.

3.77 In Chapter 2, we recommend that the Government should consider ways to improve public awareness of and education about the new Act. This could include requirements on registered professionals such as real estate agents to provide some form of prescribed information to clients when buying or selling property. That information could raise awareness of the need to retain records in order to establish when the home was acquired and its original net value at the time the relationship began. Relevant records might include bank statements, loan statements, property valuations and sale and purchase records.

3.78 We appreciate that treating the original value of family homes brought into the relationship by one partner will, in some cases, reduce the size of the relationship

property pool. This might result in the non-owning partner receiving significantly less on separation. As some submitters pointed out, this would be undesirable if the non-owning partner was also the primary caregiver of the couple's children after separation. However, our recommended changes to classification must be viewed as part of a broader package of reforms recommended in this report. Our recommendations for FISAs in Chapter 10, in particular, will enable partners to continue to share their income for a limited period of time in certain circumstances, including if they have children together. The combined effect of our 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 into later in life, there will be less relationship property because of our recommendations for classification. In longer relationships, however, the partners are likely to have acquired more relationship property and meet the criteria for FISAs. For those relationships, there is a greater amount of property to be divided among the partners when they separate.

- 3.79 These recommendations 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. We discuss occupation orders in Chapters 12 and 15.

Family homes acquired in contemplation of the relationship

- 3.80 When the family home was acquired in contemplation of the relationship, for example, while the partners were dating, it will be relationship property under the family acquisitions approach because the home was acquired for the partners' common use or common benefit. This is a common feature in other jurisdictions and minimises the risk of disputes over relationship start dates.
- 3.81 This retains the existing family acquisitions approach enshrined in section 8(1)(d), although it will now have wider application as it will apply to property acquired for use as the family home.⁸³ The benefit of retaining the existing rule is that its application has been well established in case law, which addresses concerns raised in submissions (see paragraph 3.62).⁸⁴ We expect that case law to continue to apply under our recommendations.

Family homes acquired during the relationship

- 3.82 When a 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 new Act.

⁸³ Currently, s 8(1)(d) of the Property (Relationships) Act 1976 does not normally apply to acquisitions of property for use as the family home, as s 8(1)(a) will apply instead.

⁸⁴ See, for example, *B v C* HC Auckland CIV-2011-404-1005, 4 October 2011 for a discussion of the meaning of "in contemplation of". See also *McKay v Smith* HC Invercargill CIV-2005-425-153, 22 June 2005; and *Sloss v Sloss* [1989] 3 NZLR 31 (CA) for a discussion of the common use or common benefit test. The effect of acquiring property for the partners' common use or common benefit is also addressed in *Foote v Rea* HC Tauranga CIV-2009-470-521, 19 May 2010; and *L v P* [2008] NZFLR 401 (HC).

- 3.83 Some submitters were concerned that, under this approach, property could lose its separate property status too easily if a home that is separate property is sold during the relationship and a new home is purchased with the proceeds (see paragraph 3.62). In principle, new acquisitions of property during the relationship are distinguishable from property one partner brings into the relationship because new acquisitions are made with the relationship in mind. When a new family home is acquired, the owning partner has made a purchase of property for the partners to use as their principal family residence.⁸⁵ At a practical level, acquisitions of property during the relationship are also distinguishable from acquisitions made before the relationship was contemplated because there is the opportunity during a relationship for partners to contract out.
- 3.84 However, we recognise the risk of unfairness if a partner does not appreciate the consequences of purchasing a new home during the relationship using their separate property. We propose addressing this risk by improving public awareness of and education about the new Act (see paragraph 3.77 above). This must include the implications of purchasing new property for the partners' common use or common benefit, such as a family home. 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. As some submitters noted, people might enter into contractually binding agreements to buy and sell residential property before they obtain legal advice. We therefore recommend that the Government consider requiring real estate agents to provide this information. We do not recommend a grace period as proposed by one submitter (see paragraph 3.65), as we consider that, if a relationship did end within months of one partner acquiring a new family home from separate property, this could be grounds for an exception to equal sharing for extraordinary circumstances, currently found in section 13.

Family homes that are homesteads

- 3.85 There should continue to be special provision for family homes that are homesteads. A homestead is defined as a family residence situated on an unsubdivided part of land that is not used wholly or principally for the purposes of the household, such as a family home situated on a farm.⁸⁶ Section 12 currently entitles the partners to share equally in "a sum of money equal to the equity of either spouse or partner or both of them in the homestead". This is inconsistent with the way in which the PRA divides other items of property. We do not consider that the focus on the equity of the homestead rather than the asset itself serves any useful purpose. We therefore recommend that the new Act adopt an amended version of this provision so that:
- (a) homesteads should continue to be treated as a discrete item of property, distinct from the remainder of the land not used wholly or principally for the purposes of the household; and
 - (b) homesteads should be classified and divided in the same way as any family home under our recommendations.

⁸⁵ Property (Relationships) Act 1976, s 2 definition of "family home".

⁸⁶ Section 2 definition of "homestead", para (a).

The family chattels

- 3.86 We recommend that family chattels continue to be classified as relationship property whenever acquired. This is already subject to several exceptions, including where the family chattel is an heirloom or taonga.⁸⁷ In Chapter 5, we also recommend a new exception for chattels of special significance.
- 3.87 There is less call for reform of the family use approach as it applies to family chattels, because chattels 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 family chattels can have significant value, such as art and antiques, we consider that the existing exceptions and our recommendation regarding chattels of special significance in Chapter 5 largely address any perceived problems with the family use approach to classifying family chattels. We also note that contracting out or reliance on the exception to equal sharing currently found in section 13 may provide a suitable remedy in rare cases where valuable items are not otherwise excluded from the definition of family chattels.⁸⁸
- 3.88 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 its disadvantages. It provides a bright-line test that does not require anything beyond a current valuation of the chattels, and treating all family chattels as relationship property to be shared equally deters arguments over what are generally assets of low value, promoting efficient settlement of disputes.
- 3.89 We do, however, recommend that the definition of family chattels should be limited to chattels "used wholly or principally for family purposes", consistent with a family use approach. The current definition captures all household furniture, appliances, effects, equipment and articles but does not specify that these must have been used by the partners during the relationship. This is in contrast to subsection (a)(iv) of the definition of family chattels, which includes only those motor vehicles, caravans, trailers, or boats "used wholly or principally ... for family purposes". The inconsistency means, for example, household items that are inherited by one partner but are not actually used by the couple during the relationship (perhaps because they are in storage or are on loan to a third party) would be considered relationship property. This inconsistency should be addressed in the new Act.

GIFTS AND INHERITANCES

Background

- 3.90 Gifts and inheritances are treated differently to other types of separate property under the PRA, including pre-relationship property. 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.

⁸⁷ Section 2 definition of "family chattels", para (c).

⁸⁸ See, for example, *S v S* [2012] NZFC 2685.

- 3.91 Section 10(2) provides specific 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)).

Issues

- 3.92 In the Issues Paper, we observed that whether gifts and inheritances should be treated differently to other types of separate property is fundamentally a value judgement.⁸⁹ 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,⁹⁰ but the same can be equally said of pre-relationship property.
- 3.93 Several practical issues arise as a result of the PRA's special treatment of gifts and inheritances. In particular:
- (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 8.⁹¹
 - (b) When a gift or inheritance increases in value, the PRA does not specify whether section 9A(1) or section 9A(2) applies. 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.⁹² We discuss section 9A further below.

Approach in comparable jurisdictions

- 3.94 A range of different approaches are taken to the classification of gifts and inheritances in comparable jurisdictions. In some jurisdictions, such as Scotland, British Columbia and Alberta, gifts and inheritances are treated in the same way as pre-relationship

⁸⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [10.61].

⁹⁰ *S v W* [2006] 2 NZLR 669 (HC) at [52].

⁹¹ 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.

⁹² In *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1, one partner inherited land from their father and so it would have been separate property under s 10 of the Property (Relationships) Act 1976. 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.

property.⁹³ Other jurisdictions treat gifts and inheritances differently. In Ontario and Manitoba, increases in value of pre-relationship property are shared but increases in the value of gifts and inheritances are excluded.⁹⁴ The Law Reform Commission of Nova Scotia has also recently recommended adopting different rules for gifts and inheritances. As noted at paragraph 3.52 above, the Commission recommended pre-relationship property be excluded from division but that gifts and inheritances (including any increase in their value) be shared where they are used for the benefit of both partners or their children.⁹⁵

Results of consultation

- 3.95 In the Issues Paper, we asked whether gifts and inheritances should continue to be treated differently to other types of separate property.⁹⁶ We received submissions from 22 members of the public. 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 in the same way as gifts and inheritances.
- 3.96 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 felt it was unfair to treat a gift or inheritance as separate property when both partners treated it as "theirs" and acted 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, if the recipient separates from their partner in the future, the 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.
- 3.97 NZLS observed, in its submission on the Issues Paper, 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 (when separate property becomes relationship property) applied to all forms of separate property. NZLS expressed a preference for adopting the intermingling rule in section 10(2) for all separate property over any conversion test based on family use. One practitioner, in contrast, did not think that intermingling should convert gifts and inheritances into relationship property. They considered that gifts and inheritances are always identifiable

⁹³ Family Law (Scotland) Act 1985, s 10(4) (definition of matrimonial property excludes both pre-relationship property and gifts and inheritances); Family Law Act SBC 2011 c 25, ss 84(2)(g) and 85; and Matrimonial Property Act RSA 2000 c M-8, s 7(2).

⁹⁴ Family Law Act RSO 1990 c F.3, s 4(1) definition of "net family property" and s 4(2); and The Family Property Act CCSM 2017 c F25, ss 4 and 7 (increases in the value of gifts and inheritances are excluded unless it can be shown that the increase was intended to benefit both partners).

⁹⁵ Law Reform Commission of Nova Scotia *Final Report: Division of Family Property* (September 2017) at 141–143.

⁹⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 203.

and traceable, and in any event, it is always possible to estimate the respective proportions of relationship property and separate property. However, they saw no reason why section 9A should not apply to gifts and inheritances in the same way as to other types of separate property.

- 3.98 ADLS, in its submission on the Preferred Approach Paper, submitted that gifts and inheritances should be treated differently to both relationship and other separate property and observed that the provisions of section 10 operate effectively. It submitted that an education campaign would make a significant difference to achieving justice and fairness, particularly in respect of the use of inherited monies to reduce a mortgage over the family home. ADLS suggested, as a solution, providing for a "short order" contracting out agreement specifically addressing the use of inherited funds for the reduction of a mortgage. We discuss this in Chapter 13.
- 3.99 Professor Peart was concerned that treating gifts and inheritances in the same way as other types of separate property would mean that gifts and inheritances could lose their separate property status too easily. For example, an inheritance used to buy a beach house for family holidays would be classified as relationship property under the family acquisitions approach to classification. Peart noted this would not necessarily be the case under the existing section 10.

Conclusions

RECOMMENDATION

R12

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. All forms of separate property should be subject to the same rules as to when separate property becomes relationship property.

- 3.100 We recommend that the same rules should apply to all forms of separate property. The primary concern with the family use approach as it relates to gifts and inheritances is addressed in our recommendation regarding the basis for classification above. The family home will no longer be classified as relationship property if acquired as a gift or inheritance, although any increase in value of the family home will be relationship property under our recommendations discussed below.
- 3.101 We also note that, under our proposed classification provisions, there is no equivalent rule to section 8(1)(c) (all property owned jointly or in common in equal shares by the partners is relationship property). Our view is that property should not be classified purely on the basis of legal ownership, but rather classification should depend on whether 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). This approach resolves the uncertainty about whether gifts and inheritances lose their separate property identity when they are used to acquire property in the partners' joint names. The court should have the ability to trace separate property funds that have been placed in a joint bank account with relationship property

funds, provided the owning partner can prove that it would be reasonable and practical to identify the separate property funds.⁹⁷ Co-ownership will, however, be strong evidence that the property is relationship property under a family acquisitions or fruits of the relationship approach.

- 3.102 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 recommend 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.
- 3.103 We do not, therefore, see any justifiable basis for continuing to treat gifts and inheritances differently to other forms of separate property. Applying the same rules to all forms of separate property 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 that are attributable to the relationship will also be shared as relationship property.

INCREASES IN THE VALUE OF SEPARATE PROPERTY

Background

- 3.104 Increases in the value of separate property and any income or gains derived from separate property are usually treated as separate property and are excluded from division.⁹⁸
- 3.105 However, increases in value and income or gains that are attributable to the relationship are treated as a separate item of relationship property under section 9A.⁹⁹ Different rules of division apply depending on whether the increase in value, income or gains were attributable to the actions of the non-owning partner or the application of relationship property:
- (a) When any increase in the value of separate property, or any income or gains derived from separate property, was attributable wholly or in part to the *application of relationship property*, the increase in value (or income or gains) is relationship property and is shared equally.¹⁰⁰
 - (b) When any increase in the value of separate property, or any income or gains derived from separate property, was attributable wholly or in part, directly or indirectly, to the *actions of the other partner*, the increase in value (or income or gains) is relationship property but the share of each partner in that item of

⁹⁷ *Allan v Allan* (1990) 7 FRNZ 102 (HC) at 108; *Gough v Gough* (1996) 14 FRNZ 660 (CA); *Buys v Buys* HC Palmerston North AP23/98, 7 October 1998; and *Moir v Moir* [2007] NZCA 379 (leave to appeal decision).

⁹⁸ Property (Relationships) Act 1976, s 9(3).

⁹⁹ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [25].

¹⁰⁰ Property (Relationships) Act 1976, s 9A(1). See *Mead v Graham-Mead* [2015] NZHC 825.

relationship property is determined in accordance with the contribution of each partner to the increase in value (or income or gains).¹⁰¹

- 3.106 Section 15A is also relevant. It enables a court to order compensation when any increase in value of separate property is attributable wholly or in part, directly or indirectly, to the actions of the owning partner during the relationship. A court can only award compensation if it is also satisfied that, after the relationship, the owning-partner's income and living standards are likely to be significantly higher than the other partner's as a result of the division of functions within the relationship.
- 3.107 Where there has been no increase in the value of separate property, a partner may have a claim under section 17, which enables a court to order compensation where a partner's actions or the application of relationship property has sustained the other partner's separate property.

Issues

- 3.108 There are several problems with the current rules:
- (a) 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.¹⁰² 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.¹⁰³ 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.¹⁰⁴
 - (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.¹⁰⁵ 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.¹⁰⁶
 - (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

¹⁰¹ Section 9A(2). See *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

¹⁰² 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.

¹⁰³ 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.

¹⁰⁴ 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).

¹⁰⁵ See, for example, *J v K* [2013] NZFC 823, [2014] NZFLR 127.

¹⁰⁶ See, for example, *V v V* [2007] NZFLR 350 (FC).

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, the result being that the evaluation of the partners' relative contributions is likely to be "a matter of general impression".¹⁰⁷

- (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 wealth generated through the partners' joint and several efforts during the relationship as relationship property, such as income generated by the partners.¹⁰⁸ 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, section 15A does not appear to have ever been successfully applied in practice.¹⁰⁹
- (e) Increases in value attributable to the application of the other partner's separate property are not directly captured by section 9A. Limited case law and commentary suggest that the application of separate property in these circumstances will constitute "the actions" of the non-owning partner for the purposes of section 9A(2),¹¹⁰ but it is preferable that this is made explicit.

Approach in comparable jurisdictions

3.109 A range of different approaches exist in comparable jurisdictions.

3.110 In Canada, most provinces treat all increases in the value of separate property as relationship property to be shared equally, including any inflationary gains.¹¹¹ In these jurisdictions, only the original value of the separate property as at the beginning of the relationship or the date of acquisition of any gift or inheritance is excluded from division.

¹⁰⁷ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [46]; and *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 at [114].

¹⁰⁸ 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.

¹⁰⁹ 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 Malmanche v de Malmanche* [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).

¹¹⁰ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [11.46]; *Oakley v Oakley* (1980) 3 MPC 127 (HC); and *Hight v Hight* (1996) 15 FRNZ 129 (HC).

¹¹¹ Ontario, British Columbia, Alberta, Manitoba (pre-relationship property only), Prince Edward Island, Nunavut and the Northwest Territories. See Family Law Act RSO 1990 c F.3, ss 4–5; Family Law Act SBC 2011 c 25, ss 84(2)(g) and 85; Matrimonial Property Act RSA 2000 c M-8, s 7(2); The Family Property Act CCSM 2017 c F25, s 4(3); Family Law Act RSPFI 1988 c F-2.1, ss 4 and 6; and Family Law Act SNWT (Nu) 1997 c 18, ss 35–36. This was also recently recommended by the Law Reform Commission of Nova Scotia in *Final Report: Division of Family Property* (September 2017) at 123. Arguments have been made to exclude inflationary gains in the past, but we are not aware of any jurisdiction adopting such an approach. 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 No 63, July 1989) at 82–83.

The circumstances relating to the acquisition of the property might, however, be a relevant consideration in deciding whether to depart from equal sharing.¹¹²

- 3.111 The American Law Institute recommended that increases in the value of separate property be treated as relationship property only to the extent they are attributable to the efforts of either partner during the relationship.¹¹³ It considered that treating all increases in value as relationship property could provide an unjustified windfall to the non-owning partner, particularly if separate property increases in value disproportionately during a short marriage or reflects general inflation, and may be particularly inappropriate in respect of assets that are held for reasons other than investment.¹¹⁴ However, the Institute also recommended making provision for a portion of increases in value to be treated as relationship property after a long marriage for the same reasons given at paragraph 3.54 above.
- 3.112 In Scotland and most European countries, all increases in the value of separate property are separate property.¹¹⁵ However, Scotland operates as a discretionary regime under which a court may make an order for financial provision that is not limited to the partners' relationship property. In addition to the principle under Scottish law that relationship property should be shared equally is the principle that "fair account should be taken of any economic advantage derived by either person from contributions by the other".¹¹⁶ This enables a court to make orders reflecting the non-owning partner's contributions to separate property.¹¹⁷

Options for reform

- 3.113 In the Issues Paper, we identified three possible options for reforming the rules relating to increases in value in sections 9A(1) and 9A(2):¹¹⁸
- (a) **Option 1:** Replace sections 9A(1) and 9A(2) with a single contributions test under which increases in the value, income or gains attributable wholly or in part, directly or indirectly, to the application of relationship property or the contributions of the non-owning partner are shared between the partners on the basis of the contribution of each partner to the relationship.

¹¹² In Nova Scotia, for example, 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). We discuss the different approaches to departing from equal sharing in Chapter 8.

¹¹³ American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 4.04.

¹¹⁴ At § 4.04, comment (a).

¹¹⁵ Jens M Scherpe "A comparative overview of the treatment of non-matrimonial assets, indexation and value increases" (2013) 25 CFLQ 61 at 67–68 and 70–72.

¹¹⁶ Family Law (Scotland) Act 1985, s 9(1)(b).

¹¹⁷ See discussion in 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 103–104 and 147–150.

¹¹⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [10.30]–[10.41]. Options 1 and 2 are based on options identified 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.

- (b) **Option 2:** Replace sections 9A(1) and 9A(2) with a narrow causation test under which only the increase in value, income or gains that is attributable directly or indirectly to the application of relationship property or the actions of the non-owning partner is relationship property. We noted that this could be broadened to include increases in value attributable to the actions of the owning partner, removing the need for section 15A. This would be consistent with the approach recommended by the American Law Institute.
- (c) **Option 3:** Treat all increases in value of separate property as relationship property. This would be consistent with the approach adopted in most Canadian provinces.

Results of consultation

- 3.114 We received few submissions on the Issues Paper that addressed 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).¹¹⁹ Four submitters did not think increases in the value of separate property should ever be shared.
- 3.115 In the Preferred Approach Paper, we proposed adopting Option 2.¹²⁰ NZLS, ADLS, Professor Peart, one practitioner and two members of the public expressed support for our proposal. However, Professor Atkin and one practitioner thought that all increases in value, including any inflationary increases, should be shared when there has been an application of relationship property or contributions by the non-owning partner. That practitioner was concerned that excluding inflationary increases in value would disadvantage some non-owners, particularly in the case of family farms.
- 3.116 Professor Peart noted that our draft classification provisions did not clarify whether the actions and application of relationship property can be direct and indirect in relation to the separate property concerned. Professor Atkin also submitted that the draft provisions should expressly include direct or indirect actions of the partners.
- 3.117 In the Preferred Approach Paper, we also proposed treating all increases in the value of the family home when it is separate property as relationship property, including any inflationary gains.¹²¹ NZLS, seven academic and practitioner experts and six members of the public supported our proposal. ADLS was divided. Some of its members were concerned that the proposal would increase the number of people required to contract out of the PRA, would mean a home is no longer used as an investment vehicle and would give no value to the use of capital. Some ADLS members were also concerned that the proposal would be a disincentive to purchasing a home. Other members, however, pointed to the benefits of the proposal being a simple rule that would provide a level of certainty for the non-owning partner. ADLS noted it was unable to arrive at an

¹¹⁹ 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".

¹²⁰ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P8.

¹²¹ P9.

adequate alternative proposal. One member of the public submitted that decreases in value should be treated in the same way and that the family home should be defined in a way that excluded parts of the home not used for family purposes, such as a granny flat that is rented out.

- 3.118 Fisher and Professor Peart expressed concern with our proposal to treat all increases in the value of the family home as relationship property. They thought that the normal rules on increases in value should apply to the family home. Fisher's concern was that the proposals would not avoid the need to rely on contracting out, trusts or the allocation of funds to separate property uses. Peart was concerned this proposal would make major inroads into the fruits of the relationship approach and did not think the loss of separate property status could be realistically attributed to the contributing partner's intention. Similar views were also expressed by six members of the public. Professor Atkin, in contrast, preferred a more general presumption that any increase in value of separate property is relationship property, removing the need for a specific provision for the family home.

Conclusions

RECOMMENDATIONS

R13

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

R14

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.

- 3.119 We recommend replacing sections 9A(1) and 9A(2) with a single provision in the new Act that treats any increase in the value of separate property, or any income 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. Increases in value will be attributable to the relationship if they are attributable directly or indirectly to the application of relationship property, the application of the other partner's separate property or 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), which we recommend be retained in the new Act.
- 3.120 We recommend including increases in value attributable to the actions of the owning partner, which is not explicitly captured in section 9A(2). This is 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).¹²² A consequence of this approach is that section 15A becomes redundant, and we therefore recommend its repeal.

- 3.121 The owning partner should not be required to share increases in value that have no connection to the relationship. This means that increases in value attributable to market inflation will not normally be shared (except in relation to the family home, discussed below) 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.¹²³
- 3.122 These recommendations are consistent with Option 2 in the Issues Paper, which we think is fairer and will be easier to apply in practice than Options 1 and 3. Option 1 (dividing increases in value that are attributable to the relationship on the basis of the partners' contributions to the relationship) may produce unfair results when contributions to the *relationship* do not reflect the contributions made to the *increase in value*. Dividing property on a contributions basis under Option 1 would also be difficult in practice for the reasons identified at paragraph 3.108(c). Meanwhile, Option 3 (all increases in value are classified as relationship property) might be seen as unfair when increases in value have no connection to the relationship.

Increases in the value of the family home

- 3.123 We recommend making special provision for when the family home is separate property. Any increase in the value of separate property while it is being used as the family home should always be treated as being attributable to the relationship and classified as relationship property.¹²⁴ This means that partners would share both inflationary and non-inflationary increases in value. This is for the following reasons:
- (a) A home brought into the relationship by one partner is different from 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

¹²² 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 that increases its value: *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [44].

¹²³ This was the case in *Rose v Rose*, where, as explained at [50], 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.

¹²⁴ That is, any increase in value of the family home is treated as an independent item of property that is notionally severed from the underlying separate property, consistent with the existing approach to increases in value attributable to the relationship under s 9A: *Rose v Rose* at [25].

and maintain the home, or the non-owning partner might work on the home or contribute to improvements that maintain or increase the home's value. Treating all increases in the value of the family home as relationship property 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.

- 3.124 Any increase in value that occurs while the separate property is being used as the family home should retain its relationship property status even if the separate property stops being used as the family home during the relationship. If the separate property family home is sold during the relationship, the entire sale proceeds will normally be treated as relationship property unless the owning partner can show that it is both practical and reasonable to trace the separate property funds.¹²⁵
- 3.125 We recognise that, in some cases, dividing the increase in value and compensating the non-owning partner for half the reduction in debt (see paragraph 3.75) 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 principal caregiver of children and the sale of the home would result in relocation away from their community. However, the potential unfairness could be addressed through occupation orders or orders postponing vesting (discussed further in Chapter 12).¹²⁶ 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.

MODERNISING THE CLASSIFICATION PROVISIONS

Issues

- 3.126 We have identified the construction of the classification rules in sections 8–10 of the PRA as an issue. They are criticised as being "opaque and confusing" and "possibly the most complex in the world".¹²⁷
- 3.127 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,¹²⁸ the PRA does the opposite. The definition of relationship property in

¹²⁵ *Gough v Gough* (1996) 14 FRNZ 660 (CA). See also *Allan v Allan* (1990) 7 FRNZ 102 (HC) at 108–109; *Martin v Martin* [2015] NZHC 1823 at [28]; *Moir v Moir* [2007] NZCA 379 (leave to appeal decision); and *Buys v Buys* HC Palmerston North AP23/98, 7 October 1998. We expect this interpretation to continue under our proposed classification provisions, as new s 9(3) would continue the existing rule in s 9(2).

¹²⁶ In Chapter 10, we also discuss how potential claims for occupation rent by the non-resident partner might be offset against an entitlement to a Family Income Sharing Arrangement.

¹²⁷ 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.

¹²⁸ 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 by them as a family home or as furniture or plenishings for such a 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

section 8 comprises a list of 12 different types of property. In effect, they add up to all property owned by either or both partners at the end of the relationship. Property that was owned before the relationship or was a gift or inheritance will not be included (unless it is converted into relationship property under the family use approach).

- 3.128 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 gifts and inheritances, which are, in any event, specifically identified as separate property in section 10(1).
- 3.129 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 paragraph 3.93 above. Another issue is the circularity between sections 8(1)(e) and 9A(3),¹²⁹ giving rise to two possible interpretations, as the Court of Appeal observed in *Geddes v Geddes*.¹³⁰
- 3.130 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.¹³¹ Rather than requiring the applicant in relationship property 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. Professor 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.¹³² As the owning partner will inevitably be in the best

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).

¹²⁹ 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 ed, LexisNexis) at [11.55].

¹³⁰ *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: at 310 per Casey J.

¹³¹ 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 that has existed or that exists and that "[n]otions of onus of proof fit uncomfortably within this legislative regime". However, in the earlier case of *Allan v Allan* (1990) 7 FRNZ 102 (HC), Tipping J suggested at 105 that there is an onus on the party seeking to exclude property from the definition of relationship property to demonstrate on the facts that s 9 applies.

¹³² 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.

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.¹³³

Results of consultation

- 3.131 Several submitters commented on the draft classification provisions included in the Preferred Approach Paper.¹³⁴ Professor Briggs supported the draft provisions, in particular, the starting point that all property is relationship property. Briggs commented that there are too many exceptions in the current provisions and that they are difficult to navigate. Briggs also supported clarifying that the onus should be on the owning partner to prove any property is their separate property. Professor Atkin identified a number of technical improvements that should be made to the draft provisions, including clarification of how property acquired after a relationship ends should be classified.
- 3.132 ADLS urged general caution in attempts at modernising legislation, noting that defined words and phrases that have been interpreted by the courts have great value to lawyers and their clients as it provides for certainty. It did not, however, express any particular concerns with the draft classification provisions except as otherwise identified in this chapter.
- 3.133 ADLS and NZLS supported our proposal to place the burden of proving property is separate property on the owning partner.

Conclusions

RECOMMENDATIONS

- R15** The new Act should include new classification provisions that give effect to R9–R14 and modernise and simplify the law.
- R16** The burden of proof of establishing whether property is separate property should be on the owning partner.

- 3.134 We recommend that the definitions of relationship property and separate property be redrafted to reflect our recommendations in this chapter to modernise the provisions, reflecting contemporary approaches in comparable jurisdictions, and to simplify the law so that it is clear and accessible.
- 3.135 New classification provisions should provide clear 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.

¹³³ See, for example, Family Law Act RSO 1990 c F.3, s 4(3); Family Law Act SBC 2011 c 25, s 85(2); The Family Property Act CCSM 2017 c F25, s 23; and The 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* (ebook ed, Thomson Reuters, March 2019 update) at § 4.06.

¹³⁴ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aranga i Mariu ai* (NZLC IP44, 2018) at 57–60.

This is consistent with the approach taken in most comparable jurisdictions and, we think, clearly places the burden of proof on the partner who will have ready access to the information required to establish that property is separate property on the balance of probabilities.

- 3.136 We recommend the use of examples in the new classification provisions 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.
- 3.137 These recommendations are reflected in the draft classification provisions set out at the end of this chapter and in Appendix 2, which have been prepared with the assistance of Parliamentary Counsel.
- 3.138 We acknowledge ADLS's concern at paragraph 3.132 above about modernising the legislation, and note that the draft provisions retain, to the greatest extent possible, the language used in the current classification provisions. We intend that the draft classification provisions will preserve the current approach to classification except where we specifically recommend reform elsewhere in this chapter. The draft classification provisions are largely consistent with the draft provisions included in our Preferred Approach Paper, although some minor changes have been made to address technical issues, including clarifying when the classification exercise can take place, how property acquired after separation should be classified and how gifts between partners ought to be classified. These changes retain the current law in respect of these matters. We have also made minor changes to improve the operation of our proposed section 10, which sets out when property is not separate property.

DRAFT CLASSIFICATION PROVISIONS AND COMMENTARY

Nature of relationship property and separate 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; 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 acquired by the partner after the relationship ended;
- (c) was a gift to the partner from the other partner, not being property that is used for the benefit of both partners;
- (d) 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;
- (e) 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;
- (f) 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.

Clause 8 continues the current rule that the partners must be the beneficial owners of any relationship property (section 2 definitions of "owner" and "property" to be retained).

The starting point is that all property will be relationship property unless a partner can prove that property fits the definition of separate property. See clause 11 regarding the onus of proof.

Clause 9 defines separate property.

Clause 9(1) continues the rule in section 8(1)(b) that family chattels will always be classified as relationship property. An amendment is also proposed to the section 2 definition of "family chattel" to apply only to chattels used wholly or principally for family purposes and to exclude chattels of special significance.

Clauses 9(1)(a) and (b) continue the rule in section 9(4) that the property a partner acquires before or after the relationship will be separate property. See clause 10 for exceptions to this rule.

Clause 9(1)(c) continues the rule in section 10(3).

Clause 9(1)(d) continues the rule in section 10(1)(a).

Clauses 9(1)(e) and (f) establish new rules that personal injury payments under the Accident Compensation Act 2001 or under an insurance policy will generally be separate property. The property will be relationship property if it compensates for loss of income that would have been earned during the relationship.

Clause 9(2) continues the rule in section 9(3).

- (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 is not 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:
- (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:
- (c) property acquired after the relationship ended that—
 - (i) is income or gains derived from relationship property; or
 - (ii) is proceeds from the sale or other disposition of relationship property; or
 - (iii) the court considers just in the circumstances to treat as relationship property:
- (d) any increase in the value of separate property that is the family home:
- (e) any increase in the value of separate property of a partner, or any income or gains derived from separate property of a partner, attributable directly or indirectly to—
 - (i) the application of relationship property; or
 - (ii) the application of any separate property of the other partner; or
 - (iii) the actions of either or both of the partners:

Clause 9(3) continues the rule in section 9(2).

Under clause 9(4), property that is separate property under clause 9 may lose its separate property status if any of the rules in clause 10 apply.

Clause 10 applies the same rules to all forms of separate property, eliminating the separate rules for gifts and inheritances currently found in section 10.

Clauses 10(a) and (b) continue the rules in sections 8(1)(d) and (ee) that property acquired out of separate property should be relationship property if it is acquired before or during the relationship with the intention of being for the common use or common benefit of the partners.

Clause 10(c) incorporates the rule in section 8(1)(l) regarding income or gains from relationship property and the court's discretion under section 9(4) to treat property acquired after separation as relationship property.

Clause 10(d) establishes a new rule that applies when the family home was one partner's separate property. The effect of this provision is that the value of the separate property family home when the relationship began (or when the home was acquired if it was a gift or inheritance under clause 9(1)(d)) will be the owning partner's separate property. Increases in value on that family home during the relationship will be relationship property. A family home acquired during the relationship using separate property will be classified as relationship property under clause 10(b).

Clause 10(e) is modelled on sections 9A(1) and (2). It classifies increases in value on a partner's separate property as relationship property to the extent the increase in value is attributable directly or indirectly to the application of relationship property, separate property or the actions of either or both partners.

Clause 10(f) continues the rule in section 9A(3).

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

Clause 11 establishes a new rule that a partner who claims property is their separate property must satisfy the court on the balance of probabilities that the property fits the definition of separate property.



CHAPTER 4

Classifying debt

IN THIS CHAPTER, WE CONSIDER:

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

- whether the definition of relationship debt is appropriate;
- whether improperly obtained relationship debts should be treated differently;
- the role of the court where relationship debts exceed the partners' relationship property; and
- whether reform is necessary to reflect our recommendations in respect of classification of the family home in Chapter 3.

THE DEFINITION OF RELATIONSHIP DEBT

4.1 The classification of debts can be equally as important as the classification of property under the PRA. This is because the value of the relationship property to be divided between the partners is calculated by first ascertaining the total value of the relationship property and then by deducting from that total any relationship debts owed by either or both partners.¹

Background

4.2 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 or to the extent they have been incurred:

- (a) by the spouses or partners jointly; or
- (b) in the course of a common enterprise carried on by the spouses or partners, whether alone or together with another person; or
- (c) for the purpose of acquiring, improving, or maintaining relationship property; or
- (d) for the benefit of both spouses or partners in the course of managing the affairs of the household; or

¹ Property (Relationships) Act 1976, s 20D.

(e) for the purpose of bringing up any child of the marriage, civil union, or de facto relationship.

- 4.3 Section 20(2) provides that, for a debt to be a relationship debt under category (c) above, it is not necessary that, at the time when the debt was incurred, the property for which it was incurred was relationship property. All that is required is that the property later becomes relationship property. This means if a person incurs a mortgage debt in order to purchase a home before they enter into a relationship and the home becomes the family home and is therefore relationship property, the mortgage debt is similarly classified as a relationship debt.
- 4.4 A personal debt is defined broadly as any debt that is not a relationship debt or to the extent it is not a relationship debt.²
- 4.5 The classification of the particular property over which a debt is secured is irrelevant when classifying the debt. Instead, each debt must be examined in isolation to determine whether it fits the description of a relationship debt or personal debt. How a debt is classified for the purpose of dividing property between the partners does not alter any liability the debtor partner owes to creditors or any rights of security.³ The rights of creditors are discussed in Chapter 18.
- 4.6 The classification of relationship and personal debts reflects the policy that partners should share the burden of those debts associated with the two of them or their household but should not share the burden of each other's purely personal debts.⁴

Issues

- 4.7 We have not identified any issues with the general policy behind the treatment of debts under the PRA. Just as partners should share the property produced by the family joint venture, so too should they share the burden of any debt used to benefit the family joint venture.
- 4.8 We have, however, identified several potential issues with different aspects of the definition of relationship debt.
- 4.9 First, classifying all debts that are incurred jointly as relationship debts may be unfair in situations where debt is ostensibly incurred jointly but in reality it is incurred to support the private activities of only one partner.⁵ In Chapter 3, we recommend departing from the rule that jointly owned property should always be classified as relationship property. We explained that property should not be classified purely on the basis of legal ownership. Instead, classification should depend on whether property was acquired for the partners' common use or common benefit. In light of these recommendations, it may be appropriate to make similar amendments to the definition of relationship debt.
- 4.10 Second, it is not clear on the face of the PRA who has the burden of proof in relation to the classification of debts. Commentators suggest, and the cases confirm, that the

² Section 20.

³ Pursuant to ss 20A and 46.

⁴ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [15.5].

⁵ At [15.11]. The authors note that, in some cases, the courts have looked at the substance of the debt and not the form, presumably to avoid an unfair result.

burden is on the partner who is contending the debt is a relationship debt.⁶ It would, however, be desirable to clarify where the burden lies in the statute itself.

- 4.11 Third, the definition of relationship debt focuses on the purpose for which the debt was originally incurred, which may be unfair in situations where the debt is ultimately used for a different purpose.⁷ Examples might include where debt is incurred for a personal purpose but is subsequently used to pay off a relationship debt, or where debt is incurred for a relationship purpose but is gambled away by one partner. There is, however, little evidence that this is causing problems in practice. We expect that this is likely due to the fact that the courts will look at how a debt is used in order to determine the purpose for which the debt was incurred in the first place.⁸

Approach in comparable jurisdictions

- 4.12 Approaches to debt in comparable jurisdictions vary.⁹ Some jurisdictions divide relationship property on a global basis, similar to New Zealand, by deducting debts from the total value of relationship property to arrive at a net value of property for division.¹⁰ Other jurisdictions impose a specific obligation on each partner to share the burden of certain debts alongside an entitlement to share the value of relationship property.¹¹ The presence of debts can also be a relevant factor in determining whether to depart from equal sharing of relationship property.¹²
- 4.13 Comparable jurisdictions also take different approaches to defining the debts that are shared between the partners. Often this will depend on the approach to classification. In jurisdictions that adopt a fruits of the relationship approach, all debts incurred during the relationship are shared on the basis that partners should share all gains as well as all losses occurring during the relationship.¹³ In jurisdictions that adopt a family use

⁶ At [15.10]; *Castle v Castle* [1980] 1 NZLR 14 (CA) at 28; and *C v C* [2004] NZFLR 992 (DC) at [60].

⁷ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 220–221.

⁸ Parallels can be drawn to how a court determines whether property is acquired for the partners' common use or common benefit under s 8. In *McKay v Smith* HC Invercargill CIV-2005-425-153, 22 June 2005, the Court held at [33] that, although "the purpose of common use or common benefit must exist at the time of acquisition", the actual use to which property is later put will often be the only evidence from which the intention or purpose at the time of acquisition can be ascertained.

⁹ As we explain in Chapter 3, Australia, England and Wales, Scotland and Ireland operate discretionary regimes under which a court has discretion to adjust the partners' property interests on separation. These jurisdictions, other than Scotland, do not classify debt in their legislation. See Family Law Act 1975 (Cth); Matrimonial Causes Act 1973 (UK); and Family Law (Divorce) Act 1996 (Ireland).

¹⁰ In Canada, this is often referred to as an equalisation model and is adopted in the provinces of Ontario, Manitoba, Prince Edward Island and Nunavut and the Northwest Territories. Property is also divided on a global basis in Scotland: Family Law (Scotland) Act 1985, s 10(1).

¹¹ For example, in British Columbia, on separation, each spouse is "equally responsible for all family debt": Family Law Act SBC 2011 c 25, s 81. In New Brunswick, the law imposes on each partner in relation to the other "the burden of an equal share of the marital debts": Marital Property Act RSNB 2012 c 107, s 2.

¹² For example, in Nova Scotia, a court may order the unequal division of property if satisfied that equal division would be unfair or unconscionable, taking into account the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred: Matrimonial Property Act RSNS 1989, s 13(b). Grounds for departing from equal sharing are discussed in greater detail in Chapter 8.

¹³ For example, "family debt" in British Columbia includes all financial obligations incurred during the relationship (and obligations incurred after separation for the purpose of maintaining family property): Family Law Act SBC 2011 c 25, s 86. In Manitoba, net property is calculated by deducting all liabilities of a spouse other than those related to exempt assets: The Family Property Act CCSM 2017 c F25, s 11(1). In Scotland, all debts incurred before the marriage so far as

approach, the debts that are shared are often limited to debts acquired for a family purpose.¹⁴

Results of consultation

4.14 We did not seek submissions on the definition of relationship debt in either the Issues Paper or the Preferred Approach Paper, and no submitter raised material issues with the definition except in relation to improperly obtained relationship debts, which are discussed below.

Conclusions

RECOMMENDATIONS

R17

Debts incurred by either or both partners should be classified as relationship debts to the extent the debts have been incurred:

- a. for the common use or common benefit of the partners;
- b. in the course of a common enterprise carried on by the partners, whether alone or together with another person;
- c. for the purpose of acquiring, improving or maintaining relationship property; or
- d. for the purpose of bringing up any child of the relationship.

R18

The burden of proof of establishing whether a debt is a relationship debt should be on the partner contending the debt is a relationship debt.

4.15 We recommend that the Relationship Property Act (the new Act) should adopt an amended version of the definition of relationship debt in the PRA by replacing the reference to debts incurred by the partners jointly with a new provision for debts that have been incurred for the common use or common benefit of the partners. This will ensure that debts are classified in a manner consistent with property under our recommendations in Chapter 3 and addresses the risk of unfairness where jointly incurred debts are in fact incurred for a personal purpose. We also recommend removing the reference to debts incurred for the benefit of both partners in the course of managing household affairs, currently found in section 20(1)(d) of the PRA. It is unnecessary to retain this narrower category of relationship debt if a broader category of debts incurred for the partners' common use or common benefit is adopted.

they relate to matrimonial property and any debts incurred during the marriage are deducted from the value of matrimonial property: Family Law (Scotland) Act 1985, s 10(2). This is also the approach in Ontario: Family Law Act RSO 1990 c F.3, s 4(1) definition of "net family property".

¹⁴

In New Brunswick, "marital debts" means debts incurred "for the purpose of facilitating, during cohabitation, the support, education or recreation of the spouses or one or more of their children" or "in relation to the acquisition, management, maintenance, operation or improvement of marital property": Marital Property Act RSNB 2012 c 107, s 1.

- 4.16 We also recommend expressly providing in the new Act that the burden of proof is on the partner contending a debt is a relationship debt. This retains the court's current approach, which is appropriate as the partner who is seeking to share the burden of the debt with the other partner would have the best access to information about the debt. This is consistent with our rationale for imposing a burden of proof on the owning partner to prove that property is their separate property, discussed in Chapter 3.
- 4.17 We do not recommend reform to address situations where a debt is used for a different purpose than it was originally incurred for (discussed at paragraph 4.11 above). No submitter identified this as a problem, and reforming the definition of relationship debt to address this potential issue would risk creating new problems. For example, defining relationship debts based on how they are used would be inappropriate as not all debts will be conventional loans under which a sum of money is borrowed. Some debts will include tax liabilities, and it is not clear how a tax liability is "used". An alternative option could be to give the court discretion when classifying debts if a debt is used for a different purpose to that for which it was originally incurred. However, there are significant disadvantages in giving the court discretion when classifying debts. It would create uncertainty as to how the court will exercise its discretion, may lead to an increase in disputes and litigation and creates a risk of unintended consequences, such as the court exercising its discretion for a different unanticipated purpose. Although these risks could be mitigated by providing guidance within the provision on how the court should exercise its discretion, these disadvantages cannot be avoided completely.

IMPROPERLY OBTAINED RELATIONSHIP DEBTS

Background

- 4.18 If a debt meets the description of a relationship debt under section 20, the court has no discretion to treat that debt as a personal debt.¹⁵ Relationship debts will be deducted from the total value of relationship property regardless of the circumstances in which the debt was incurred.¹⁶

Issues

- 4.19 The court's lack of discretion to take into account the circumstances in which debts are incurred means that a debt can be classified as a relationship debt to be shared between the partners even if the debt was improperly obtained. This might include situations where the debt was incurred by one partner without the other partner's knowledge or by one partner on imprudent terms, for example, to support a failing business venture.

¹⁵ For example, in *M v M* HC Auckland HC99/97, 20 November 1997, a partner stole funds and applied them to the affairs of the household and bringing up the couple's child. The High Court held that the theft and whether the other partner knew about the source of the funds were immaterial. The essential question was whether the money was used for the purposes specified in s 20 of the Property (Relationships) Act 1976. Likewise, in *W v F* [2003] NZFLR 415 (HC), a partner dishonestly drew on a current account in a family company and applied those funds towards the construction of a home and other family expenditure. The partner concealed the drawings from the other partner. The High Court nonetheless held the debt was a relationship debt.

¹⁶ *W v F* [2003] NZFLR 415 (HC) at [37].

- 4.20 A further issue might also arise where one partner has been coerced or pressured by the other partner into incurring a personal debt. The debt may disadvantage the partner in several possible ways. For example, the debt may be incurred on disadvantageous terms or the amount borrowed may be used by the other partner for personal expenditure. According to one recent report, placing a debt in one partner's name is a potential form of economic abuse, and such abuse is not well understood.¹⁷
- 4.21 Section 13 may provide relief where the circumstances in which a relationship debt was incurred amount to extraordinary circumstances that make equal sharing repugnant to justice.¹⁸ For example, section 13 has been successfully relied on in situations where one partner incurred a \$15,000 bank loan by forging his partner's signature without their knowledge¹⁹ and where one partner misappropriated money from a law firm's trust account, which resulted in the family home being sold to repay the stolen funds.²⁰ When section 13 applies, a court determines each partner's share in the relationship property in accordance with their contribution to the relationship.
- 4.22 However, section 13 will not always provide relief in respect of improperly obtained relationship debts. In *S v W*, the Family Court and the High Court on appeal declined to apply section 13, even though the husband had incurred a sizeable debt that they concealed from the wife.²¹ That debt was classified as a relationship debt as it had been applied to the acquisition of relationship property, household expenditure and the payment of school fees.²² The borrowing had allowed the family to continue a high standard of living and enabled the wife to amass significant savings.²³ The High Court held that, because the borrowing had been applied for relationship purposes, it did not meet the section 13 threshold of extraordinary circumstances making equal sharing repugnant to justice.²⁴
- 4.23 In addition, section 13 is directed at adjusting each partner's shares in relationship property. Where a relationship debt has eroded the pool of relationship property, section 13 may be unable to provide relief to the other partner.²⁵
- 4.24 Given the limitations of section 13, it may be preferable to give a court discretion to reclassify improperly obtained relationship debts as personal debts or to deduct only part of the relationship debt from the total value of the relationship property under section 20D.

¹⁷ Sandra Milne, Susan Maury and Pauline Gulliver *Economic Abuse in New Zealand: Towards an understanding and response* (Good Shepherd, Abbotsford, 2018) at 8.

¹⁸ The operation of s 13 is discussed in greater detail in Chapter 8.

¹⁹ *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006.

²⁰ *Pickering v Pickering* [1994] NZFLR 201 (CA). See also *K v R* [2018] NZHC 3032, [2018] NZFLR 841, where one partner's conviction for fraud was a relevant factor in the Court's decision to apply s 13.

²¹ *S v W* [2013] NZHC 1809, leave to appeal refused in *S v W* [2014] NZHC 333 and, on the debt issue, confirmed in *S v W* [2014] NZCA 199.

²² *S v W* [2013] NZHC 1809 at [48]–[59].

²³ At [48], citing the Family Court judgment, *S v W* [2012] NZFC 7209.

²⁴ *S v W* [2013] NZHC 1809 at [80].

²⁵ In *W v F* [2003] NZFLR 415 (HC) at [37], the Court held that, because the husband's dishonest and covert drawings on the family company were relationship debt, there was negligible relationship property after deduction of that indebtedness under s 20D.

Results of consultation

- 4.25 Few submitters on the Issues Paper and Preferred Approach Paper made submissions or shared personal experiences in relation to improperly obtained relationship debts. However, this was not identified as a specific area of concern in the Issues Paper or Preferred Approach Paper, so the low number of submissions may not necessarily reflect the extent of the issue.
- 4.26 The New Zealand Law Society (NZLS) identified the issue of improperly obtained relationship debts in its submission on the Preferred Approach Paper. It said there are situations where the lack of discretion under section 20 as to what is a relationship debt may cause injustice. For instance, where a party has unilaterally incurred a relationship debt, it might be appropriate for such a debt to be classified as personal or for some adjustment to be available in favour of the other party.

Conclusions

- 4.27 While we recognise the potential risk of unfairness when a relationship debt is improperly obtained, we do not recommend reform to give a court discretion to reclassify improperly obtained relationship debts as personal debts or to deduct only part of the relationship debt from the total value of relationship property. This is for several reasons.
- 4.28 First, it would be inconsistent with the general policy of the PRA and our recommendations in relation to misconduct. As we recommend in Chapter 8, one partner's misconduct should not affect property entitlements under the new Act unless their misconduct is gross and has significantly affected the extent or value of the relationship property. When one partner's conduct in improperly obtaining a relationship debt meets this threshold, a remedy will be available under the general exception to equal sharing for extraordinary circumstances currently found in section 13.²⁶ To provide a separate remedy for situations where improperly obtained relationship debts do *not* meet this threshold would be inconsistent with the PRA's approach and our recommendations in relation to other types of misconduct, such as dissipation of relationship property through excessive expenditure during the relationship.²⁷
- 4.29 Second, relying on the exception to equal sharing currently found in section 13 to provide a remedy in appropriate situations is, we think, appropriate. Under that exception, a court will make its decision having regard to all the circumstances of the case rather than simply looking at a debt or debts in isolation. As *S v W* demonstrates (discussed at paragraph 4.22), there may well be circumstances that weigh against granting relief when a relationship debt is improperly obtained.
- 4.30 Third, a specific remedy would introduce an undesirable level of discretion into the classification exercise, reducing certainty and increasing the risk of disputes, inconsistent with the principle of inexpensive, simple and speedy resolution. Given the wide range of situations in which a debt might be improperly obtained, it would be difficult to design a statutory remedy that provides clear guidance to partners, lawyers

²⁶ See Chapter 8 for a discussion on s 13 and our recommendations to clarify the relevance of misconduct under that exception.

²⁷ Dissipation of relationship property is discussed in Chapter 9.

and the court as to what types of debts and in what circumstances the court should exercise the remedy. Discretion would be necessary, which would invite partners to dispute the proper classification of debts incurred throughout the relationship.

WHEN RELATIONSHIP DEBT EXCEEDS RELATIONSHIP PROPERTY

Background

- 4.31 The PRA does not expressly provide for situations of net indebtedness where the total value of relationship debts exceeds the total value of relationship property under section 20D.
- 4.32 In earlier cases, the courts had held that there was no jurisdiction under the PRA to divide net indebtedness.²⁸ This was on the basis that the purpose of section 20D is to ascertain the value of relationship property that may be divided. If no property exists, section 20D cannot apply.
- 4.33 However, in more recent cases, courts have reached the opposite view.²⁹ In *C v W [Relationship Property]*, the Family Court interpreted section 20D as giving the court power to intervene irrespective of the extent of the partners' assets and liabilities so that one partner could be ordered to make a monetary payment to the other to ensure that there has been a just division of their property rights.³⁰ This interpretation was endorsed by the High Court in *Tapuae v Mawson*.³¹ The Court observed that interpreting the concept of "net value" in section 20D to include an overall deficit overcomes the problem.³²

Issues

- 4.34 In some situations, a couple's relationship debt may exceed their relationship property. It is problematic if the PRA does not address these situations. While the approach in more recent cases appears sound, there is merit in clarifying the extent of a court's powers in situations of net indebtedness in the new Act. For example, section 13, in particular, refers to the sharing of "property or money". It is unclear whether section 13 could be applied to divide relationship debt in unequal shares.

Results of consultation

- 4.35 We did not receive many submissions addressing situations of net indebtedness. However, Canterbury Community Law Centre told us that a big issue for its clients is how to apportion debt liability between partners, especially where there is little or no relationship property.

²⁸ *Green v Green* [1994] NZFLR 423 (DC); *Eves v Eves* (2004) 23 FRNZ 1048 (FC); and *G v G* HC Wellington CIV-2005-485-1676, 4 August 2006.

²⁹ *C v W [Relationship Property]* [2007] NZFLR 1132 (FC); *Williamson v Todd* (2009) 27 FRNZ 760 (FC); and *Tapuae v Mawson* HC Napier CIV-2009-441-464, 10 December 2009.

³⁰ *C v W [Relationship Property]* [2007] NZFLR 1132 (FC) at [79]–[84].

³¹ *Tapuae v Mawson* HC Napier CIV-2009-441-464, 10 December 2009.

³² At [22].

- 4.36 Both NZLS and the Auckland District Law Society (ADLS) supported reform to address situations of net indebtedness. NZLS said that the absence of any specific provision for the court to determine responsibility for debts can be a source of injustice, particularly where a relationship debt is in one partner's name and there is insufficient relationship property to allow for a fair net division of assets and liabilities. ADLS said that often the debt is accumulated in the name of one partner to a relationship despite the debt being for relationship purposes. The partner in whose name the debt stands is particularly vulnerable as their financial position means they are unable to fund litigation. ADLS supported allowing for simple equal division of debts incurred during the relationship for relationship purposes and enabling a partner left saddled with relationship debt to obtain contributions from the other partner.

Conclusions

RECOMMENDATION

R19

A court should have jurisdiction to make orders dividing relationship debts in circumstances where the total value of relationship debts exceeds the total value of relationship property.

- 4.37 A court should be able to make orders under the new Act in situations of net indebtedness to ensure a just division of all of the partners' relationship property *and* relationship debt (or the net value of their relationship property). We therefore recommend clarification of the powers of the court in situations of net indebtedness (where the total value of relationship debt exceeds the total value of relationship property). In particular:
- (a) a court should have the power to make orders determining shares in or dividing relationship debts;
 - (b) the rules that apply to the division of relationship property should also apply (with any necessary modification) to the division of relationship debts, including, in particular, the exception to equal sharing for extraordinary circumstances currently found in section 13; and
 - (c) a court should have all the ancillary powers currently available under section 33 as may be necessary to give effect to any order made in relation to the division of relationship debts.

CLASSIFICATION OF DEBTS IN CONNECTION WITH THE SEPARATE PROPERTY FAMILY HOME

Background

- 4.38 In Chapter 3, we said that partners should share the growth in equity in the family home if it was owned by one partner before the relationship was contemplated or was received as a gift or inheritance from a third party (the separate property family home). This means sharing increases in the market value of the separate property family home as well as sharing any reduction in debts, including mortgage debt. In relation to debts, we said in Chapter 3 that:

- (a) debt incurred before the relationship began to acquire, improve or maintain the separate property family home should be classified as the owning partner's personal debt;
 - (b) if personal debt in connection with the separate property family home is reduced through the application of relationship property (for example, by using the partners' income to pay the mortgage), the owning partner should be obliged to compensate the non-owning partner for an amount equal to half the reduction in principal debt; and
 - (c) debt incurred after the relationship began should be classified according to the ordinary rules that apply to the classification of debt currently found in section 20 of the PRA.
- 4.39 It is necessary to consider whether this can be achieved through the existing PRA provisions relating to debt or whether reform is required.

Issues

- 4.40 There are two issues with how the PRA's existing debt provisions would give effect to our approach to debt in connection with the separate property family home.
- 4.41 First, the current definition of relationship debt under section 20(2) includes any debt incurred for the purpose of acquiring, improving or maintaining relationship property, including debts incurred *before* that property becomes relationship property. Under our recommendations in Chapter 3, if a separate property family home increases in value during the relationship, that increase would be relationship property. It may therefore be open to a court to classify a debt incurred before the relationship as a relationship debt on the basis that a portion of the separate property family home later becomes relationship property. NZLS noted that one consequence of our recommendations in relation to classification may be that, on separation, a partner could be liable for relationship debt secured over a family home that was one partner's separate property. That liability could be greater than their share in the increase in value of the family home, leaving them in a net indebtedness situation. NZLS suggested that amending section 20 to address such situations could be a possible solution.
- 4.42 Second, in Chapter 3 we say that compensation should normally be limited to half the reduction in principal debt. This reflects our view that the non-owning partner should not normally be compensated for the payment of interest on the principal debt.³³ Interest is a carrying charge is incurred so that the property can be used before having fully paid for it. In this context it can be treated as analogous to rent, which is a consumable item that is not accounted for on separation. This should, however, be subject to a limited discretion if, for example, the owning partner incurred debt on imprudent terms with excessive rates of interest. While section 20E provides for compensation where personal debt is satisfied from relationship property, it is a broad compensatory power and provides no guidance on the level of compensation.

³³

A similar approach is recommended in American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 4.06, comment (c).

Conclusions

RECOMMENDATION

R20

The new Act should make express provision for debt incurred in connection with a family home that is separate property, providing that:

- a. a debt incurred by one partner before the relationship began to acquire, improve or maintain the home is that partner's personal debt; and
- b. any repayment of that personal debt using relationship property or the other partner's separate property should entitle the other partner to compensation for an amount equal to half the reduction in principal debt or some other amount that a court considers just in the circumstances.

4.43 We recommend that express provision be made to clarify the treatment of debts in connection with a separate property family home. We think it is desirable to clarify, in the new Act, how partners should share debts incurred before a relationship in connection with a separate property family home. This goes some way to addressing NZLS's concerns.

4.44 Debts incurred during the relationship in connection with the separate property family home should be classified in the ordinary way, so no amendment to the existing rules is necessary.

CHAPTER 5

Classifying specific items of property and debt

IN THIS CHAPTER, WE CONSIDER:

issues with classifying specific items of property and debt and, in particular:

- chattels of special significance;
- ACC and private insurance payments;
- family gifting and lending; and
- student loans.

CHATTELS OF SPECIAL SIGNIFICANCE**Background**

- 5.1 The PRA classifies all family chattels as relationship property, whenever acquired, under a family use approach to classification.¹ This includes any family chattels that are acquired as a gift or inheritance from a third party.²
- 5.2 The definition of family chattels is broad. It includes household furniture, household appliances, articles of household or family use or amenity, articles of household ornament, motor vehicles and household pets.³
- 5.3 In 2001, the definition of family chattels was amended to exclude heirlooms and taonga. This was in response to an earlier recommendation of a Working Group established to review the Matrimonial Property Act 1976.⁴ The Working Group noted the special nature of heirlooms and taonga and observed that other property acquired by gift or inheritance that does not fall within the definition of family chattels is separate property

¹ Property (Relationships) Act 1976, s 8(1)(b). The family use approach to classification is discussed in Chapter 3.

² Section 10(4).

³ Section 2 definition of "family chattels".

⁴ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988).

under section 10.⁵ Its opinion was that the special nature of heirlooms and taonga outweighed their nature as family chattels.⁶

- 5.4 The PRA does not define heirlooms or taonga. However, case law has established that, in order to be an heirloom, an item of property must:⁷
- (a) be passed down from one generation to another in accordance with some special family custom;
 - (b) have unique characteristics or be of particular importance; and
 - (c) have been in the partner's family for generations.
- 5.5 Examples of property the courts have held to be heirlooms include furniture,⁸ a clock⁹ and a painting¹⁰ when those items had been in the partners' families for generations.
- 5.6 Case law does not provide a conclusive definition of taonga, although the Family Court has held that taonga should be defined within a tikanga Māori construct.¹¹
- 5.7 Heirlooms and taonga are excluded from the definition of family chattels but are not excluded from the PRA. This means they fall to be classified as either relationship property or separate property under the other rules of classification in sections 8–10. Heirlooms will typically be separate property under section 10 as they will have been acquired as a gift or inheritance from a third person. Taonga will also likely be separate property under section 10 unless they were created or acquired (other than by third party gift or inheritance) by a partner during the relationship.¹²
- 5.8 Heirlooms and taonga that are separate property will not normally be shared between the partners. They are, however, subject to other rules in the PRA under which separate property or a portion of its value can become relationship property¹³ or can be used to compensate the other partner.¹⁴

Issues

- 5.9 While the PRA already provides for some items of special significance (heirlooms and taonga), in the Issues Paper, we observed that there may be other items that should not

⁵ The Working Group reported at 18:

Heirlooms and taonga are of a special nature as much of their value lies in their individuality; as a family treasure they cannot be replaced by another, although in other ways identical, object. Where an object's value lies partly in the fact that it has been passed down from earlier generations its special character is lost if it passes to someone outside the family or tribal group.

⁶ At 18.

⁷ *Humphrey v Humphrey* FC Christchurch FAM-2003-009-3044, 25 May 2005 at [112]. See also *H v F* FC Auckland FAM-2005-004-1312, 27 January 2006 at [48]; and *Stuart v Stuart* FC Christchurch FAM-2003-00-5175, 16 March 2005 at [19].

⁸ *Q v Q* (2005) 24 FRNZ 232 (FC).

⁹ *Stuart v Stuart* FC Christchurch FAM-2003-00-5175, 16 March 2005.

¹⁰ *H v F* FC Auckland FAM-2005-004-1312, 27 January 2006.

¹¹ *S v S* [2012] NZFC 2685 at [54]. We address the definition of taonga in Chapter 14.

¹² In that case, taonga may be relationship property under s 8(1)(e), and its value will be shared between the partners pursuant to s 20D.

¹³ For example, under ss 9A, 10(2) or 20E.

¹⁴ For example, under ss 18B and 18C.

be shared as relationship property because of the special significance the property holds.¹⁵ We referred, in particular, to:¹⁶

- (a) property that has a special meaning for a partner and is irreplaceable, such as a gift from a close friend or family member who has died or a trophy or ornament awarded for a particular achievement; and
- (b) property that is nominally owned by a partner but, due to its wider cultural significance, should not be treated as relationship property.

5.10 Classifying an item of special significance as relationship property simply because it is a family chattel may be unfair. It may also lead to arbitrary outcomes. For example, if one partner was gifted a valuable painting before the relationship began and kept that painting in a storage unit, it would be their separate property. If the painting was displayed in the family home for the partners' enjoyment, however, it would be relationship property. While a court could exercise its power under section 33(3)(c) to vest an item of special significance in the partner claiming a special attachment, the value of that item must still be accounted for in the global division of relationship property. If the item of special significance has a high monetary value, such as a valuable painting, this may not provide an appropriate remedy.

Results of consultation

- 5.11 Overall, 25 submitters commented on items of special significance in submissions on the Issues Paper and Preferred Approach Paper. They included 16 members of the public, four organisations and five academic and practitioner experts. Submitters generally favoured reform, specifically in relation to excluding items that have a personal significance for one partner from the definition of family chattels.
- 5.12 Members of the public generally supported treating heirlooms and other items of special significance as separate property.¹⁷ However, some submitters felt that such items should only be excluded if they are not related to the family joint venture (either because they were owned before the relationship was contemplated or were a third party gift or inheritance) unless the partners agree to treat the items as separate property. Two members of the public commented on items of wider cultural significance, submitting that these should be classified as separate property and treated in the same way as taonga.
- 5.13 The New Zealand Law Society (NZLS), Professor Nicola Peart, Professor Margaret Briggs and two practitioners supported excluding other items of special significance from the definition of family chattels. Peart said that the existing exclusion for heirlooms is too narrow and that art, antiques and pets acquired before the relationship began or

¹⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [11.64].

¹⁶ At [11.67].

¹⁷ 15 members of the public addressed the question: "Should the heirlooms a partner owns be exempt from equal sharing?" 13 submitters agreed that heirlooms should be excluded. Two submitters disagreed, with one submitter saying it would be unfair to exclude heirlooms, and another saying that an heirloom should only be excluded if it was acquired before the relationship began or if the recipient specifically requests that it be kept separate. Five submitters addressed the question: "Are there specific items of property that should be exempt from sharing under the Property (Relationships) Act 1976 because they have special significance?" All answered in the affirmative.

by gift or inheritance should also be excluded. Perpetual Guardian and one practitioner did not support a separate category for other items of special significance. Rather, they felt a court should have sufficient discretion as to what is an heirloom. The practitioner noted that the existing exclusions were working well and that a partner claiming a special attachment to a particular item could seek to have that item vested in them when implementing the division of relationship property.

- 5.14 The Ministry for Culture and Heritage and the New Zealand Federation of Business and Professional Women noted that often taonga and heirlooms will be in the possession of a person as guardian or kaitiaki of the object for the rest of the tribe or for future generations. As such, taonga and heirlooms should not be treated in the same way as property the partners own.

Conclusions

RECOMMENDATIONS

R21

The definition of family chattels should exclude items of special significance so that an item of special significance is classified in the same way as any other item of property that is not a family chattel.

R22

Items of special significance should be defined in the new Act in a way that captures items that:

- a. have special meaning to a partner; and
- b. are irreplaceable, in that a similar substitute item or its monetary value would be an insufficient replacement.

- 5.15 In Chapter 3, we recommend that family chattels should continue to be classified as relationship property under a family use approach. However, we recommend limiting the definition of family chattels to include only chattels "used wholly or principally for family purposes", which is more consistent with a family use approach. Heirlooms and taonga should continue to be excluded from the definition of family chattels. In Chapter 14, we recommend that taonga should be defined within a tikanga Māori construct and in consultation with Māori, including on whether taonga should apply pan-culturally. We also recommend that the new Act should ensure that taonga cannot be classified as relationship property in any circumstances and that a court cannot make orders requiring a partner to relinquish taonga as compensation to the other partner.
- 5.16 In addition to heirlooms and taonga, we recommend excluding items of special significance from the definition of family chattels in the Relationship Property Act (the new Act). In our view, items of special significance, like heirlooms, should not be classified as relationship property simply because they are used as family chattels.
- 5.17 The effect of this recommendation is that items of special significance will be treated in the same way as any other item of property that is not a family chattel. If an item of special significance was owned by one partner before the relationship was contemplated or was received as a gift or inheritance from a third party, it will be separate property. However, if an item of special significance was otherwise acquired or produced by either or both partners during the relationship or was acquired for the

partners' common use or common benefit, it will be relationship property. This reflects our view that, while the special nature of items of special significance outweighs their significance as a family chattel, it does not outweigh their significance as a product of or acquisition for the relationship. Partners should continue to share the fruits of the relationship and family acquisitions, even if that includes items of special significance.¹⁸

- 5.18 If an item of special significance is relationship property, the court can vest that item in the partner claiming a special attachment, although its value would still be accounted for in the global division of relationship property.
- 5.19 We recommend defining "items of special significance" given that it is not an established concept like heirlooms. The definition should focus on items that have special meaning to a partner and are irreplaceable in that a similar substitute item or its monetary value would be an insufficient replacement.
- 5.20 This differs from our recommendation in Chapter 14 that taonga should not be classified as relationship property under any circumstances. Taonga are distinguishable from items of special significance as taonga are held in accordance with tikanga Māori and the principle of kaitiakitanga. A person in possession of a taonga is not seen as its owner but rather a guardian of taonga for the rest of the tribe and for future generations.¹⁹ We recognise that similar principles may also operate in respect of other items of cultural significance that are only nominally owned by one partner. In such circumstances, established principles of trust law would apply, and the partner would not be the "owner" of the property for the purposes of the new Act.²⁰ Such property would therefore fall outside the new Act.
- 5.21 In Chapter 16, we recommend the publication of a comprehensive information guide. This guide should include information about how items of special significance are classified, including guidance on when an item may be a family chattel, an heirloom, a taonga or an item of special significance or excluded entirely from the new Act because it is not owned by the partners.

ACC AND PRIVATE INSURANCE PAYMENTS

Background

- 5.22 The PRA does not make special provision for the classification of personal injury payments made under either the Accident Compensation Act 2001 (ACC payments) or a private insurance policy.
- 5.23 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.²¹ The different types of entitlements can be categorised as follows:²²

¹⁸ We discuss our approach to classification and recommendations that partners share in the fruits of the relationship and family acquisitions in Chapter 3.

¹⁹ See discussion in Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18. See also *B v P* [2017] NZHC 338.

²⁰ Property (Relationships) Act 1976, s 2 definition of "owner" and s 4B. See, for example, *B v P* [2017] NZHC 338.

²¹ *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 the wife injury.

- (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.
 - (c) **Treatment and rehabilitation payments** to provide money and support to facilitate the injured person's rehabilitation.
 - (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).
- 5.24 ACC payments will be classified under the PRA according to when the statutory entitlement to the payment accrued,²³ 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.²⁴
- 5.25 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.²⁵ 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.²⁶

²² 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 Otago LR 169 at 176–181. They reflect ACC's operational approach rather than specific and identifiable statutory entitlements. For specific legal entitlements, see the Accident Compensation Act 2001.

²³ *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, the partner 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 Otago LR 169 at 184–186.

²⁴ 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.

²⁵ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004.

²⁶ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004; and *G v G* (1995) 13 FRNZ 427 (HC) at 434.

Issues

- 5.26 The current approach to personal injury payments raises several issues.²⁷
- 5.27 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.²⁸
- 5.28 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 of 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".²⁹
- 5.29 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 general rule that income received during the relationship should be classified and divided as relationship property.
- 5.30 Fourth, the current approach is complex. 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.³⁰

Approach in comparable jurisdictions

- 5.31 Compared to other rules-based property sharing regimes, New Zealand is unusual for allowing the division of personal injury payments. The law in most Canadian provinces excludes damages, settlements and insurance proceeds for personal injury from the

²⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [11.7]–[11.12].

²⁸ See discussion in Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15 Otago LR 169.

²⁹ *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.

³⁰ 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 the partner received from the Accident Compensation Corporation were held to be relationship property.

property eligible for division.³¹ Some provinces, however, allow division if the insurance moneys represent lost wages.³²

- 5.32 The discretionary property sharing regimes in Australia, England and Wales do not exclude damages or compensation for personal injury from division.³³ However, an aim of these regimes is to divide the partners' property to reflect the needs of the partners and their children. Any personal need the injured partner has to entitlements relating to their injury will likely be recognised through the division.³⁴
- 5.33 The recommendations of the American Law Institute are helpful. 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.³⁵ 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.³⁶

Results of consultation

- 5.34 In the Issues Paper, we asked whether personal injury payments for an injury or illness sustained during the relationship should continue to be classified as relationship property, including any future payments.³⁷ We received 20 submissions on this issue, and all but one submission was in favour of reform. Some submitters, including NZLS, the Accident Compensation Corporation and the Ministry of Business, Innovation and Employment 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. 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 general rule that income received after the relationship is separate property and is not divided.

³¹ 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); The Family Property Act SS 1997 c F-6.3, s 23(3)(a); The Family Property Act CCSM 2017 c F25, s 8(1); 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.

³² 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).

³³ See *W v W* (1985) 61 ALR 215 (HCA) at [3]; *Aleksovski v Aleksovski* (1996) 20 Fam LR 894 (FamCA) at [42] and [52]; *Wagstaff v Wagstaff* [1992] 1 WLR 320 (CA); and *M v M* [2011] EWCA Civ 1056, [2012] 1 FLR 117.

³⁴ *Wagstaff v Wagstaff* [1992] 1 WLR 320 (CA) per Butler-Sloss LJ at 325:

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].

³⁵ American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 4.08(2)(a)–(b).

³⁶ At § 4.08, comment (c).

³⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 216.

- 5.35 We received three submissions on the proposal in the Preferred Approach Paper that personal injury payments should be classified as separate property except to the extent that the payment compensates for loss of income during the relationship.³⁸ NZLS and the Auckland District Law Society (ADLS) agreed with the proposal. Professor Peart also supported the proposal, as it is consistent with the general rule that non-income related compensation is not produced by the partnership. However, Peart also argued that ACC payments used to improve the family home should be classified as separate property. This is because such payments are aimed at assisting the injured person and any subsequent increase in value in the home has not been produced by the partnership. Peart argued that by treating that increase in value as relationship property, the non-injured partner is getting a windfall at the expense of the injured partner, who will have to pay more to stay in the house adjusted to their physical needs.

Conclusions

RECOMMENDATION

R23

Payments 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.

- 5.36 We recommend that the classification of payments received under the Accident Compensation Act and under private insurance policies that insure against personal injury should depend on the nature of the entitlements.
- 5.37 In respect of payments received under the Accident Compensation Act, we recommend 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.³⁹ 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

³⁸ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P7.

³⁹ 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* (ebook ed, Thomson Reuters, March 2019 update) at § 4.08, comment(c).

undesirable to potentially undermine rehabilitation by making the payment subject to division.⁴⁰

- (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.⁴¹

5.38 We also recommend 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.⁴² 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 prevail over section 123 of the Accident Compensation Act. However, it would be preferable for section 123 of the Accident Compensation Act to be explicitly subject to the new Act.⁴³

5.39 We do not recommend special rules for personal injury payments that are used to modify relationship property, such as the family home or family vehicle. As Professor Peart and Simon Connell observe, it is difficult for such payments to retain their separate property character as it cannot be assumed that the use of a personal injury payment to modify relationship property will result in an increase in the asset's value.⁴⁴

⁴⁰ 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 to retain the benefit of modifications to an item of relationship property. For example, when implementing a division, a court could 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 Otago LR 169 at 192.

⁴¹ We note, however, the view in Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15 Otago LR 169 at 195 that survivor's weekly compensation should be classified under the approach in *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004. Under that approach, the compensation should be classified as a "one-off entitlement" rather than a series of fresh acquisitions of property. The key question would then be whether the surviving partner's entitlement to compensation upon the date of the partner's death arose when the surviving partner was in a qualifying relationship with a new partner.

⁴² 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.

⁴³ Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 15 Otago LR 169 at 191.

⁴⁴ At 191–192.

Accordingly, when a personal injury payment is applied to relationship property, that payment will lose its separate property status, just like other items of separate property that are applied to relationship property, such as gifts or inheritances. An injured partner may, however, retain the benefit of modifications to an item of relationship property by seeking an order that the modified property vest in the injured partner.⁴⁵ The PRA's existing rules already allow for this outcome as the court has flexibility in its ability to make orders to implement the division. We discuss the court's powers to implement a division and recommend these powers be retained in the new Act in Chapter 15.

- 5.40 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.

FAMILY GIFTING AND LENDING

Background

- 5.41 The law presumes that, when parents advance property to their children, they intend to do so as a gift.⁴⁶ This is known as the presumption of advancement. If a partner contends that the advance was a loan, the onus is on that partner to prove that is the case.
- 5.42 The classification of a transfer of property between family members (a family advance) can have significant implications under the PRA. For example, if money is advanced to the couple to enable them to purchase a family home and that advance is treated as a gift, it will form part of the couple's relationship property to be shared equally, and its value will be reflected in the value of the family home.⁴⁷ If that advance is treated as a loan, it will likely be considered a relationship debt under section 20 (as a debt incurred

⁴⁵ At 192.

⁴⁶ See, for example, *Narayan v Narayan* [2010] NZFLR 161 (HC). In that case, the High Court said at [48] that while the presumption of advancement applied to an advance from one partner's parents, that presumption was rebutted by the existence of a document, executed by the parents and described as an "irrevocable document", in which they recorded that they had loaned the partners the money. The presumption of advancement does not apply to gifts between a partner and a son-in-law or daughter-in-law: *Knight v Biss* [1954] NZLR 55 (SC); and *Terry Schwass Company Ltd v Marsh* [2017] NZHC 1382, [2017] NZCCLR 19 at [20]. In the recent case *Woolfe v Kaye* [2018] NZHC 2191, a party argued the presumption of advancement should not apply to parental advances to adult independent children, as decided by the majority of the Supreme Court of Canada in *Pecore v Pecore* 2007 SCC 17, [2007] 1 SCR 795. The High Court dismissed the argument, observing at [188] that most New Zealand court decisions proceed on the assumption that the presumption does extend to adult children.

⁴⁷ If a family advance to one partner is treated as a gift, it will be classified as that partner's separate property under s 10, unless it is applied to the family home or family chattels or is so intermingled with relationship property that it is unreasonable or impracticable to regard that property as separate property: Property (Relationships) Act 1976, ss 10(2) and (4). The classification of gifts and inheritances is discussed further in Chapter 3.

for the purpose of acquiring relationship property), and the value of the advance will be deducted from the relationship property pool under section 20D.

Issues

- 5.43 Family advances are likely to become more common in New Zealand. This is largely attributable to increasing house prices, which is putting home ownership out of reach for many without some form of family assistance.⁴⁸ It may also reflect New Zealand's increasingly culturally diverse population as family advances can be more prominent in some cultures.⁴⁹
- 5.44 As family advances become more common, so too does the scope for dispute over how that advance should be classified under the PRA. Disputes can arise where it is unclear whether a family advance was intended as a gift or a loan.
- 5.45 In the Issues Paper, we questioned whether the presumption of advancement reflected the contemporary and future trends of family advances in New Zealand.⁵⁰

Results of consultation

- 5.46 We received 25 submissions addressing the classification of family advances. NZLS, Perpetual Guardian, one practitioner and 11 members of the public said the presumption of advancement should not apply. Perpetual Guardian said that including or excluding a presumption does not necessarily lead to fairness. Rather, better articulation of the arrangement at the time the funds are advanced is required. Similarly, NZLS said that the matter should be dealt with on a case-by-case basis. Some of these submitters thought family advances should be presumed to be a loan or that classification should depend on the wishes of the parent. ADLS noted that section 20 (definition of relationship debt) "has become a battle ground where the bank of mum and dad has been involved in the funding of the family home".
- 5.47 Several submitters supported retaining the presumption of advancement. The New Zealand Federation of Business and Professional Women submitted that advances should only ever be treated as loans if they are formally documented as such. The need to document loans formally was also raised by several members of the public.

Conclusions

- 5.48 We do not recommend reform in relation to the way the presumption of advancement operates when classifying property. In our view, the presumption of advancement is a well-established principle that provides the court with an appropriate starting point when classifying family advances. In the cases we have reviewed where the classification of a family advance is contested, the courts appear to be exercising their

⁴⁸ See discussion in Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at 52.

⁴⁹ In *S v C* [2003] NZFLR 385 (FC), for example, the Family Court at [8] accepted the husband's argument that, in Chinese culture, there was a very clear expectation that advances of money to buy a house were loans rather than gifts. The Family Court's judgment regarding the advances and their classification as relationship debts was accepted on appeal to the High Court: *C v S* [2005] NZFLR 400 (HC) at [53].

⁵⁰ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [11.77]–[11.82].

discretion appropriately to depart from the presumption of advancement and treat the advance as a loan.⁵¹

- 5.49 We consider that a more appropriate response to the rise in family advances is to improve public awareness of the need to properly document legal and financial arrangements between family members. In Chapter 2, we recommend that the Government should consider ways to improve public awareness of and education about the new Act. The need to properly document legal and financial arrangements should also be addressed in the comprehensive information guide, which we recommend in Chapter 16.

STUDENT LOANS

Background

- 5.50 Student loans are classified under the PRA like any other debt. This means that a student loan is a personal debt unless it fits within the definition of a relationship debt under section 20.
- 5.51 Typically, student loans are classified as personal debts.⁵² There have, however, been cases where a student loan has been classified wholly or in part as a relationship debt because it funded a couple's common enterprise (as it enabled both partners to come from overseas to live, study and work in New Zealand)⁵³ or because it included living costs that were used to fund the family's living expenses.⁵⁴
- 5.52 If a partner has repaid some or all of the student loan with relationship property, for example, through PAYE deductions from income earned during the relationship, section 20E will apply. Under that section, if a partner's personal debt has been paid or satisfied out of relationship property, that partner is obliged to compensate the other partner. However, the amount of compensation awarded may reflect the fact that the other partner has benefited from the higher education and enhanced earnings resulting from the student loan.⁵⁵

⁵¹ See, for example, *Narayan v Narayan* [2010] NZFLR 161 (HC); and *S v C* [2003] NZFLR 385 (FC). The Family Court's judgment regarding the advances and their classification as relationship debts was accepted on appeal to the High Court: *C v S* [2005] NZFLR 400 (HC). See also *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338; *Zhang v Li* [2017] NZHC 129; and *D v T* [2017] NZHC 904.

⁵² *O'Connor v O'Connor* FC Christchurch FP1720/94, 16 December 1996; and *Kauwhata v Kauwhata* [2000] NZFLR 755 (HC). See also Nicola Peart (ed) *Brookers Family Law — Family Property* (online ed, Thomson Reuters) at [PR20.01(2)].

⁵³ *Jayachandran v Daswani* [2015] NZFC 5238.

⁵⁴ *C v B* FC Hamilton FAM-2005-019-991, 7 June 2006.

⁵⁵ In *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243, Ms Reed had completed a degree shortly before the relationship with Mr Shaws began. Ms Reed had incurred a student loan of almost \$50,000, which was repaid from income Ms Reed earned during the relationship. The Court awarded Mr Shaws compensation under s 20E. However, it recognised that Mr Shaws had received the benefit of Ms Reed's income during the relationship and therefore awarded Mr Shaws a "broad brush" sum of \$10,000 (at [52]–[56]).

Issues

- 5.53 Student loans are likely to become an increasingly common type of debt, particularly for younger partners. Given their prevalence, we asked in the Issues Paper whether the PRA required reform to deal with what are likely to be two common scenarios:⁵⁶
- (a) where a partner repays their student loan using relationship property income; and
 - (b) where both partners have student loans but, due to the division of functions in the relationship, one partner works and is able to repay their student loan while the other partner does not work and still has the loan after the relationship ends.
- 5.54 In the Issues Paper, we asked whether a simpler and fairer option could be to classify student loans as relationship debts, subject to limited exceptions.⁵⁷

Results of consultation

- 5.55 We received 14 submissions on the Issues Paper addressing student loans. NZLS and eight members of the public thought that student loans should be treated like any other type of debt and be classified according to the normal rules. One member of the public thought that student loans should always be relationship debt, while one practitioner and two members of the public thought that student loans should always be personal debt. Another practitioner observed that the question is connected to whether income-earning capacity is considered property and whether income-earning capacity that is enhanced by the relationship is considered relationship property. If so, a student loan should be considered a relationship debt.
- 5.56 In its submission on the Preferred Approach Paper, NZLS observed there was a risk of unfairness if one partner had an obligation to share future income under a Family Sharing Arrangement (FISA) as well as to pay compensation to the other partner for the repayment of a student loan during the relationship. NZLS suggested this issue could be addressed by making section 20E discretionary, by amending the definition of relationship debt in section 20 or through the exercise of discretion in awarding a FISA.

Conclusions

- 5.57 We do not recommend reform to specifically address the classification of student loans. The current approach enables a tailored decision to be made in each case, recognising that student loans will be incurred in different circumstances and for different reasons. It would be unfair to classify all student loans as relationship debts, particularly if one partner's loan is significant and has provided little benefit to the relationship. Consultation on this issue did not reveal any widespread concerns or issues with the current approach.
- 5.58 In response to the concern raised by NZLS where one partner is obliged to share future income under a FISA and provide compensation for the repayment of a student loan from relationship property, we agree that the power to award compensation, currently found in section 20E, should continue to be discretionary, enabling the court to award

⁵⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [11.73]–[11.74].

⁵⁷ At [11.75].

an amount that is fair in all the circumstances of the case. We note that our recommendation in Chapter 4 that the new Act adopt an amended version of the definition of relationship debt that includes debts incurred for the partners' common use or common benefit would continue to allow a court to take a flexible and case-specific approach to classifying student loans. Lastly, under the FISA regime, we recommend an adjustment provision that could potentially be used to recognise a student loan that has ultimately facilitated a higher combined family income. We discuss FISAs in Chapter 10.

CHAPTER 6

Qualifying relationships

IN THIS CHAPTER, WE CONSIDER:

how the PRA applies to marriages, civil unions and de facto relationships and whether reform is required in relation to:

- the eligibility criteria for de facto relationships; and
- the rules that apply to short-term relationships.

INTRODUCTION

6.1 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.¹

ELIGIBILITY CRITERIA FOR DE FACTO RELATIONSHIPS**Background**

6.2 The two requirements that must be satisfied in order for a de facto relationship to qualify for equal sharing under the PRA are that:

- (a) the relationship must meet the definition of de facto relationship in the PRA;² and
- (b) the partners must have lived together as de facto partners for three years or more.³

6.3 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 three year qualifying period are discussed below in the section on short-term relationships.

¹ Property (Relationships) Act 1976, s 1C.

² Section 2D.

³ Sections 1C(2)(b), 2E(1)(b) and 14A.

Defining a de facto relationship

- 6.4 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.⁴
- 6.5 In determining whether two people live together as a couple, all the circumstances of the relationship are to be considered, including the matters prescribed in section 2D(2). We refer to these below as the "section 2D(2) factors", and they are:
- (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; and
 - (i) the reputation and public aspects of the relationship.
- 6.6 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.⁵ 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.⁶
- 6.7 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 may be relevant to the court's exercise of discretion.⁷

The three year qualifying period

- 6.8 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".⁸ A qualifying period is generally

⁴ Section 2D(1).

⁵ Section 2D(3)(a).

⁶ Section 2D(3)(b).

⁷ The definition of de facto relationship is discussed in further detail in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 6.

⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9–10.

regarded as necessary for de facto relationships, because of their informal nature compared to marriages and civil unions.⁹ As Professor Bill Atkin explains:¹⁰

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.

6.9 The three year qualifying period for de facto relationships has two broad objectives:¹¹

- (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.¹² 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, such as entering into a relationship with the aim of acquiring a share of the other partner's property.¹³

⁹ 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 6.17 below, a qualifying period features in almost all comparable jurisdictions we have reviewed that extend or recommend the extension of a property sharing regime to de facto relationships.

¹⁰ Bill Atkin "Family property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Wellington, LexisNexis, 2013) 209 at 216.

¹¹ 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. 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, July 2007) at [3.33]–[3.45]; Law Reform Commission of Ireland *Report: Rights and Duties of Cohabitants* (LRC 82, December 2006) at [2.13]; Law Reform Commission of Nova Scotia *Final Report: Division of Family Property* (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].

¹² 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".

¹³ 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.

Issues

- 6.10 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?¹⁴
 - (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 broad¹⁵ or because the qualifying period is too short.¹⁶
 - (c) Do the eligibility criteria for de facto relationships strike the right balance between flexibility and certainty?¹⁷

Results of consultation

- 6.11 We received a total of 116 submissions on the Issues Paper and Preferred Approach Paper that commented on various aspects of the eligibility criteria for qualifying relationships, including 95 submissions from members of the public, 13 submissions from individual practitioner and academic experts and eight submissions from organisations. Eligibility criteria were discussed at 16 public meetings and 15 practitioner and academic meetings. The great majority of these submissions were concerned with how the PRA applies to de facto relationships.
- 6.12 Submissions reflected a diverse range of views. Some submitters, including the Human Rights Commission (HRC), the National Council of Women of New Zealand (NCWNZ) 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.
- 6.13 A common theme of submissions, however, was that the PRA should not apply to de facto relationships in the same way as it applies to 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. These submitters tended to prefer that the PRA be opt in for de facto relationships or that a longer qualifying period should apply. We discuss consultation on the options for reform at paragraphs 6.21–6.31 below.
- 6.14 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

¹⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [5.22]–[5.25].

¹⁵ At [6.29]–[6.47].

¹⁶ At [15.24]–[15.35].

¹⁷ At [6.48]–[6.51].

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 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.

Public attitudes and expectations of sharing

6.15 The Borrin Survey provides important evidence on public attitudes and expectations of sharing property when de facto relationships end. Key findings include:

- (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.**¹⁸ Respondents who lived with a partner tended to have higher awareness than those who did not have a partner (55 per cent),¹⁹ 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.²⁰ A higher proportion of respondents (68 per cent) knew that equal sharing applies to married and unmarried couples in the same way.²¹
- (b) **A range of factors were 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.²² On average, respondents thought that, of the eight factors described to them, six were important.²³
- (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 they had been together for a certain period of time (eight per cent).²⁴
- (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

¹⁸ 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].

¹⁹ At [115].

²⁰ 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.

²¹ At [113].

²² At [124].

²³ 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.

²⁴ At [125].

years.²⁵ The average length of time preferred was three years and three months.²⁶ When respondents were prompted with what the law actually says, six in 10 agreed with the current law.²⁷ Among those respondents who did not agree with the three year period, some thought the length of time after which the law should apply 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).²⁸

- (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.²⁹ 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.³⁰ 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.³¹

Approach in comparable jurisdictions

- 6.16 There is considerable variation in how de facto couples are accommodated in property sharing regimes in comparable jurisdictions. In England and Wales, the property sharing regime applies to married couples only.³² Scotland³³ and Ireland³⁴ 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 property entitlements as married partners in Australia³⁵ and in some Canadian provinces.³⁶ Other Canadian provinces do not accommodate de facto couples in their property sharing regimes³⁷ or only accommodate de facto couples on an opt-in basis.³⁸

²⁵ At 29 (Figure Three).

²⁶ At [135].

²⁷ At [146].

²⁸ At 32 (Figure Five).

²⁹ At 26 (Figure One).

³⁰ At [140]–[141].

³¹ At [141].

³² 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, July 2007).

³³ 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.

³⁴ In Ireland, cohabitants can apply for a property adjustment order or compensatory maintenance order if they are financially dependent on the other cohabitant and 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.

³⁵ Family Law Act 1975 (Cth), pt VIIIAB. For Western Australia, see pt 5A of the Family Law Act 1997 (WA). However, in Western Australia, de facto couples do not have the same rights as married couples to split superannuation payments.

³⁶ British Columbia, Manitoba, Saskatchewan, Nunavut and the Northwest Territories.

³⁷ Ontario, Quebec, Alberta and New Brunswick.

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,³⁹ and two recent Canadian reviews have recommended that de facto partners be granted the same property entitlements as married partners.⁴⁰

- 6.17 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.⁴¹ The statutory definitions in Australia and Ireland are similar to the PRA's 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.⁴²
- 6.18 Definitions in other jurisdictions tend to give priority to shared residence. In Scotland, the term "cohabitant" is used, which is defined to mean a couple "living together as if they were husband and wife".⁴³ The American Law Institute has proposed a definition of "domestic partners" that includes a presumption that two people are domestic partners if they have maintained a common household for a specified period of time.⁴⁴ In British Columbia, the definition of spouse includes a person who "has lived with another person in a marriage-like relationship".⁴⁵ In Manitoba, the term "common-law partner" is used, which means a person who "cohabited with him or her in a conjugal relationship".⁴⁶ Similarly, in Saskatchewan, the definition of "spouse" includes a person who "is cohabiting or has cohabited with the other person as spouses".⁴⁷ In 2017, the Law Reform Commission of Nova Scotia recommended defining common law partner as a

³⁸ Nova Scotia, Newfoundland and Labrador, Prince Edward Island and Yukon.

³⁹ See Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners* (Final Report 112, June 2018) at [148]–[168]. The Institute observed 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.

⁴⁰ 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 *Final Report: Division of Family Property* (September 2017) at 14. The recommendations of the Alberta Law Reform Institute have been accepted and will come into force in 2020: Family Statutes Amendment Act SA 2018 c 18. See also Ontario Law Reform Commission *Report on The Rights and Responsibilities of Cohabitants under the Family Law Act* (October 1993).

⁴¹ 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.

⁴² Family Law Act 1975 (Cth), s 4AA; and 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, July 2007) at [3.13].

⁴³ Family Law (Scotland) Act 2006, s 25. Section 25(2) further provides that, in determining whether a person is a cohabitant, the court shall have regard to the length of the period during which the partners have been living together, the nature of their relationship during that period and the nature and extent of any financial arrangements subsisting during that period.

⁴⁴ American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 6.03(3).

⁴⁵ Family Law Act SBC 2011 c 25, s 3.

⁴⁶ The Family Property Act CCSM 2017 c F25, s 1(1) definition of "common-law partner". See also Family Law Act SNWT (Nu) 1997 c 18, s 1(1), where "spouse" is defined to include a person who "has lived together in a conjugal relationship outside marriage with another person".

⁴⁷ The Family Property Act SS 1997 c F-6.3, s 2(1) definition of "spouse".

person "who is cohabiting or has cohabited with another person in a conjugal relationship".⁴⁸ Most recently, however, the Alberta Law Reform Institute recommended adopting a broader definition of "adult interdependent partners", capturing two people who 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.⁴⁹

- 6.19 The qualifying period for de facto relationships in other jurisdictions tends to be either two or three years, although Ireland adopts a qualifying period of five years or two years if the partners are the parents of dependent children.⁵⁰

Options for reform

- 6.20 In the Issues Paper, we identified several possible options for reform in the event that the questions relating to de facto relationships required legislative amendment, including:⁵¹
- (a) making the section 2D(2) factors an exhaustive list, which could increase certainty by restricting a court's inquiry to a known list of factors;
 - (b) giving more weight to one or more section 2D(2) factors, which could increase certainty and give more weight to factors considered more important characteristics of a relationship to which the PRA should apply;
 - (c) introducing a rebuttable presumption that two people are in a de facto relationship if they have shared a primary residence and maintained a joint household,⁵² which could increase certainty, give more weight to common residence and reduce the need for detailed inquiry; and
 - (d) increasing the qualifying period for some or all de facto relationships, which would accommodate concerns that three years is not achieving a just division of property when some relationships end.

⁴⁸ Law Reform Commission of Nova Scotia *Final Report: Division of Family Property* (September 2017) at 115.

⁴⁹ 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.

⁵⁰ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), s 172(5). The qualifying period is two years in Australia and the Canadian provinces of British Columbia, Saskatchewan, Nunavut and the Northwest Territories. In 2017, a two year qualifying period was also recommended by the Law Reform Commission of Nova Scotia in *Final Report: Division of Family Property* (September 2017) at [4.5.2]. Manitoba has a qualifying period of three years. A three 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* (October 1993) at 63; and Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners* (Final Report 112, June 2018) at [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, July 2007) at [3.45].

⁵¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [6.33]–[6.62] and [15.37]–[15.47].

⁵² This option was based on the recommendations of the American Law Institute in *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 6.03.

- 6.21 Submitters on the Issues Paper had mixed views on the preferred option for reform. 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.
- 6.22 Some submitters thought that the definition of de facto relationship should make certain section 2D(2) 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.
- 6.23 NZLS thought there was merit in giving priority to whether the partners shared a common residence.⁵³ 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. Other submitters, including Professor 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.
- 6.24 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 public⁵⁴ 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. Often the underlying concern was about what property was shared after three years. We address this concern in our classification recommendations set out in Chapter 3.
- 6.25 A small number of submitters raised concerns that touched on the objectives of the qualifying period (see paragraph 6.9). Some submitters thought that it can take longer than three years to build a genuine and committed relationship. NCWNZ noted that some 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

⁵³ The New Zealand Law Society 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.

⁵⁴ 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 nine 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.

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.

- 6.26 A clear theme from consultation on the Issues Paper 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, for the purposes of the PRA, 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 consultation on the Preferred Approach Paper

- 6.27 There was a mixed response to our proposals in the Preferred Approach Paper that the PRA should continue to apply in the same way to all marriages, civil unions and qualifying de facto relationships and to retain the existing eligibility criteria for de facto relationships.⁵⁵
- 6.28 We received submissions from 12 members of the public who expressed concern with the current law or our proposal to retain the current law. Some submitters were particularly concerned with how the PRA can apply to older couples and couples who do not share a household or finances where there has been no conscious decision to formalise a relationship through marriage or civil union. Several submitters favoured a longer qualifying period, but as with submitters on the Issues Paper, often the underlying concern was about what property was shared after three years (see paragraph 6.24 above).
- 6.29 NZLS agreed that the PRA should apply in the same way to all marriages, civil unions and qualifying de facto relationships but submitted that section 2D(2) be amended to make "the nature and extent of common residence" the first criterion in section 2D(2) and to replace section 2D(3)(a) and (b) to provide that the first consideration will be the nature and extent of common residence, and only if that criterion is not satisfied does the court need to consider the remaining criteria. NZLS did not agree with the observation in the Preferred Approach Paper that the case law does not reveal widespread problems with the way the definition of de facto relationship is interpreted and applied by the courts.⁵⁶ NZLS also said that the start date of a de facto relationship

⁵⁵ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P14–P15.

⁵⁶ In Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at n 260, we cited a study of reported cases from 2002 to 2009 that identified that 12 per cent of cases involving a de facto relationship involved a dispute over the application of the s 2D(2) factors: Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976:

is frequently a key issue (and often the only issue) in relationship property proceedings. It said the breadth of the current definition and the uncertainty it often creates mean that issues cannot be resolved efficiently, particularly given the courts' reluctance to have preliminary issues hearings about whether or not a qualifying de facto relationship exists.

- 6.30 The Auckland District Law Society (ADLS), on the other hand, said that it "cannot see an alternative to simply selecting an arbitrary time period within which the relationship becomes qualifying". It supported extending the qualifying period from three years to five years, noting that partners in a relationship of less than five years without children or meeting other qualifying criteria would still have rights under constructive trust law and rights reflected in the title to assets. Some members of the ADLS Committee were also of the view that real consideration should be given to providing a short form agreement at limited cost, perhaps with some form of educational support, to allow people to clearly opt in to the PRA. These members noted that this would provide clear certainty as to partners' rights and obligations but acknowledged that power imbalances and "various aspects of the human condition" will make some people vulnerable to the asset-owning party refusing to enter into such an agreement.
- 6.31 Several academic and practitioner experts supported our proposals, including academics Professor Peart and Nikki Chamberlain. Peart, however, supported making mutual commitment to a shared life an essential criterion, reflecting the approach of the courts in practice. Professor Atkin submitted that the PRA should specify that the claimant has the burden of proving the existence of a de facto relationship, which he considered would exclude some associations that are doubtful candidates for the PRA regime. One practitioner submitted that de facto couples should be required to opt in to the PRA or alternatively that the three year qualifying period be reconsidered, arguing that the current law applies too readily to a diverse range of relationships, many of which are far from being analogous to marriage.

Conclusions

RECOMMENDATIONS

R24 The new Act should apply in the same way to all marriages, civil unions and qualifying de facto relationships.

R25 The eligibility criteria for de facto relationships should retain the existing definition of de facto relationship and the existing three year qualifying period.

An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012). The New Zealand Law Society noted that this case study only covered the period from 2002–2009 and that there is often a lag of several years before issues caused by legislative change are addressed by the courts. We agree with the limitations of this study, which we also identified in Law Commission *Dividing relationship property – Time for change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [6.50].

R26

The new Act should include a presumption that two people are in a qualifying de facto relationship when they have maintained a common household for a period of at least three years. The presumption should be rebuttable by evidence that the partners did not live together as a couple, having regard to all the circumstances of the relationship and the matters currently prescribed in section 2D(2) of the PRA.

R27

When the partners have not maintained a common household for three years or more, the burden of proof of establishing that a qualifying de facto relationship exists should be on the applicant partner.

The Relationship Property Act should apply in the same way to marriages, civil unions and de facto relationships

- 6.32 De facto relationships that qualify for equal sharing (qualifying de facto relationships) should continue to be treated in the same way as marriages and civil unions under the Relationship Property Act (the new Act).
- 6.33 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 the partners 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.⁵⁷ 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.⁵⁸
 - (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 respondents agreed with the current law (that equal sharing should apply to *all* couples who live together for three years).⁵⁹ While seven in 10 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.⁶⁰

⁵⁷ 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.

⁵⁸ Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at ch 1.

⁵⁹ 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].

⁶⁰ At 26 (Figure One).

Only 11 per cent of respondents thought that whether a couple were married was the most important factor.⁶¹

- (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 the law of equity (see paragraph 6.16). 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.⁶² 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 under the new Act, with the ability to contract out, ensures more people, especially vulnerable people, are subject to the protections under the new Act.⁶³
- (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.

A new rebuttable presumption to help determine whether a qualifying de facto relationship exists

- 6.34 We recommend that the eligibility criteria for de facto relationships should retain the existing definition of de facto relationship currently in section 2D of the PRA but should include a new presumption that partners are in a qualifying de facto relationship if they have maintained a common household for a period of at least three years. This presumption should be rebuttable by evidence that the partners did not live together as a couple to be determined having regard to all the circumstances of the relationship, including the section 2D(2) factors. The presumption should also be rebuttable by evidence that the partners do not meet the other criteria for a de facto relationship in section 2D(1), namely, they did not meet the minimum age requirement (see discussion in Chapter 7) and were not otherwise married or in a civil union with each other.
- 6.35 In the Preferred Approach Paper, we did not propose changing the definition of de facto relationships for several reasons.⁶⁴ We cited the benefits of a flexible definition given the diverse nature of de facto relationships and the range of public attitudes and values about what is important when determining whether a de facto relationship exists.⁶⁵ We also noted that our review of the case law did not reveal widespread problems with the way the definition of de facto relationship is interpreted and applied by the courts. We considered the real issue was around the lack of guidance these individual cases can provide to the general public but preferred addressing that issue through greater public education.

⁶¹ At [125].

⁶² 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.

⁶³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [5.25].

⁶⁴ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at [4.31].

⁶⁵ At [4.31(a)].

- 6.36 We did not propose a presumption in the Preferred Approach Paper. We acknowledge, however, NZLS's submission that the start date of a de facto relationship is frequently a key issue (and often the only issue) in relationship property proceedings and that the breadth of the current definition and the uncertainty it often creates means that issues cannot be resolved efficiently. We also find force in the weight of submissions from members of the public who were dissatisfied with the degree of flexibility in the current definition. We consider that prioritising the factor of maintaining a common household through a rebuttable presumption would provide greater certainty for partners, facilitating the inexpensive, simple and speedy resolution of disputes. Most partners, we think, will be able to pinpoint with some degree of accuracy when they started sharing a common household. Prioritising maintaining a common household is also consistent with the approach taken in some comparable jurisdictions, including Scotland and Canada, in particular. Preserving the existing framework of the definition of de facto relationship will ensure an appropriate degree of flexibility and judicial discretion is retained to address circumstances where partners should be covered by the new Act even though the presumption does not apply to them or where the presumption is rebutted by evidence that the partners were not living together as a couple.
- 6.37 Consideration should be given to whether the new Act should include a definition of what it means to "maintain a common household" and whether the presumption should expressly require maintaining a common household for a continuous period of time.⁶⁶ We note the American Law Institute explained maintaining a common household as sharing a primary residence only with each other and family members or, when partners share a household with other unrelated persons, they act jointly rather than as individuals with respect to the management of the household.⁶⁷
- 6.38 We also recommend the new Act provide that, when the presumption does not apply because the partners have not maintained a common household for three years or more, the burden of proof of establishing a qualifying de facto relationship is on the partner making a claim under the new Act. This is consistent with the approach taken in some cases,⁶⁸ but we think it is helpful to express this in the new Act itself to clarify that the burden rests on the applicant and to minimise the risk of spurious claims.

No change to the three year qualifying period for de facto relationships

- 6.39 We do not recommend changing the qualifying period for de facto relationships.⁶⁹ The diverse nature of de facto relationships means that choosing a qualifying period is a

⁶⁶ As recommended by the American Law Institute in *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at § 6.03(3)–(4).

⁶⁷ At § 6.03(4).

⁶⁸ See for example, *H v G* FC Lower Hutt FAM-2005-032-527, 6 December 2006 at [3], where the Court said "[t]he onus must rest on the party asserting that a defacto relationship existed and this must be proved on the balance of probability". Compare, however, with the more general statement of the Court of Appeal in the recent case of *B v B* [2018] NZCA 546, [2018] NZFLR 854 at [27]:

Speaking generally, the Act does not rely on an onus of proof, except in the sense that an applicant will fail unless they can point to something in the evidence that supports their claim.

⁶⁹ We discuss the rules that apply to de facto relationships that do not meet this qualifying period and make recommendations for reform below.

difficult and arbitrary exercise.⁷⁰ While we acknowledge the views of many submitters who preferred a qualifying period of five years, on balance, 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.⁷¹
- (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 classification recommendations in Chapter 3 to limit equal sharing to property acquired during the relationship or for the partners' common use or common benefit (see paragraph 6.46). This will reduce the risk of unfair outcomes in relation to 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. Under our recommendation above, the presumption that partners are in a qualifying de facto relationship if they have maintained a common household for a continuous period of at least three years can be rebutted if the evidence establishes they were not living together as a couple based on the factors in section 2D(2). Second, an exception to equal sharing for extraordinary circumstances that make equal sharing repugnant to justice will continue to be available under the new Act (see discussion in Chapter 8).⁷²
- (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 2. 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) Finally, 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.

⁷⁰ 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 mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [15.27]–[15.32]. 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.

⁷¹ 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].

⁷² 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; *Q v Q* [2012] NZFC 7272; *L v R* FC Christchurch FAM-2008-009-1355, 17 November 2011; and *K v K* FC Porirua FAM-2009-091-717, 1 February 2011.

SHORT-TERM RELATIONSHIPS

Background

- 6.40 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.⁷³ These rules differ significantly depending on the type of relationship.
- 6.41 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.⁷⁴ 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.
- 6.42 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.
- 6.43 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 relationship⁷⁵ 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.

⁷³ 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.

⁷⁴ See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [16.3]–[16.8].

⁷⁵ See paragraph 6.68 for a discussion on the definition of child of the relationship.

6.44 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 the basis of their respective contribution to the relationship (section 14A(3)).

Issues

- 6.45 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;⁷⁶
 - (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;⁷⁷ and
 - (c) the additional eligibility criteria for short-term de facto relationships in section 14A(2) are unclear and set a high bar where there is a child of the relationship.⁷⁸
- 6.46 In light of our classification recommendations in Chapter 3, a more fundamental issue is whether it is necessary to retain the special rules for short-term relationships. Under our classification recommendations, partners will no longer be required to share property that was acquired before the relationship was contemplated (pre-relationship property) or was received by one partner as a gift or inheritance from a third party. Only increases in the value of pre-relationship, gifted and inherited property that occurred during the relationship and were attributable to the relationship, including any increase in the value of the family home, would be shared.⁷⁹ 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.
- 6.47 If the rules for short-term marriages and civil unions are no longer necessary and should be removed, the effect would be that the ordinary rules of division would apply to all marriages and civil unions from the date of the marriage or civil union. 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).

⁷⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [16.9]–[16.14].

⁷⁷ At [17.10]–[17.19].

⁷⁸ At [17.20]–[17.27].

⁷⁹ Family chattels will, however, continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 3.

Approach in comparable jurisdictions

- 6.48 We have not identified any comparable jurisdictions that have special rules for short-term relationships. Rather, in other comparable jurisdictions, 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).⁸⁰
- 6.49 As noted at paragraphs 6.17–6.19, most comparable jurisdictions that include de facto relationships in a property sharing regime impose a qualifying period, with the exception of Scotland.⁸¹ 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.⁸² 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 agreement to become interdependent partners.⁸³ In Ireland, the qualifying period reduces from five years to two years if the partners are parents of a dependent child.⁸⁴

Results of consultation

- 6.50 We received few submissions on the Issues Paper that commented specifically on the rules that should apply to short-term relationships.⁸⁵ Submitters who did comment on short-term relationships had mixed views.
- 6.51 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

⁸⁰ 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 1990 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).

⁸¹ 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.

⁸² 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 *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, July 2007) at [3.31].

⁸³ 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 two 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) definition of "spouse".

⁸⁴ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), s 172(5).

⁸⁵ 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.

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 couples.⁸⁶ 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.

- 6.52 Some 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.
- 6.53 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. Professor 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.
- 6.54 NZLS also submitted that the eligibility criteria for short-term de facto relationships should be restricted to where a child of the relationship is the biological or adoptive child of both partners. 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.
- 6.55 Few submitters commented on the rules of division that ought to apply to short-term relationships.⁸⁷ Some submitters were happy to retain the existing rules of division for

⁸⁶ 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.

⁸⁷ 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 changes, 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*

short-term marriages and civil unions (equal sharing with exceptions), although the Wellington Women Lawyers' Association noted the need, when the exceptions applied, 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.

- 6.56 NZLS did not, however, favour applying the same rules of division to short-term de facto relationships for the reasons discussed at paragraph 6.53. Professor 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.

Results of consultation on the Preferred Approach Paper

- 6.57 In the Preferred Approach Paper, we proposed repealing the provisions for short-term relationships and instead applying the ordinary rules of classification and division to all marriages and civil unions and de facto relationships that either meet the three year qualifying period or satisfy other additional eligibility criteria.⁸⁸ We proposed that the additional eligibility criteria for de facto relationships of less than three years should require that there was a child of the relationship or one partner made substantial contributions to the relationship and, in either case, a court considers it just to make an order for division.⁸⁹
- 6.58 ADLS and academics Professor Mark Henaghan and Nikki Chamberlain supported these proposals. ADLS noted that the current additional eligibility criteria for short-term de facto relationships, on which our proposals were based, were appropriate and have been refined over time by case law.
- 6.59 NZLS supported our proposal to repeal the special provisions for short-term relationships but reiterated its preference that the eligibility criteria for short-term de facto relationships should apply only to couples who have a child together, such as an adopted or biological child. NZLS noted that we preferred such a test when determining entitlement to a Family Income Sharing Arrangement (FISA). NZLS submitted that adopting two different tests for different entitlements under the PRA may lead to confusion and increased cost when considering contracting out and/or settlement agreements under Part 6 of the PRA. NZLS preferred a single definition of entitlement

– *Time for change? Te mātatoa 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].

⁸⁸ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P16.

⁸⁹ P17.

throughout the PRA and submitted that such entitlement be where the partners have a child together.

Conclusions

RECOMMENDATIONS

R28 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.

R29 A qualifying de facto relationship should include a de facto relationship that does not satisfy the three year qualifying period if it meets the additional eligibility criteria that:

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

6.60 We recommend repealing the special rules for short-term relationships in light of our classification recommendations outlined in Chapter 3 and summarised at paragraph 6.46. Our classification recommendations 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.

6.61 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.⁹⁰ This is due to the small number of marriages and civil unions that end within three years.⁹¹ 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.⁹² Given the increasing tendency for partners to live together before marriage, short-term marriages are less likely today than in 1976.⁹³
- (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

⁹⁰ 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.

⁹¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [15.22].

⁹² Property (Relationships) Act 1976, ss 2B and 2BAA.

⁹³ *Superu Families and Whānau Status Report 2014* (Families Commission, 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.

deciding whether equal sharing should apply to a couple,⁹⁴ 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.⁹⁵

- (c) The risk of unfair outcomes in applying the ordinary rules of division to short-term marriages and civil unions is mitigated by the continued availability of an exception to equal sharing in extraordinary circumstances (see paragraph 6.39(c)).
- (d) Repealing the special rules for short-term marriages and civil unions would be consistent with the accepted approach in comparable jurisdictions.

6.62 We also recommend repealing the special rules for short-term de facto relationships and extending the ordinary rules of division under the new Act to short-term de facto relationships that meet the additional eligibility criteria recommended below. In our view, this is an appropriate response given our classification recommendations, which, if adopted, will have the effect of reducing the pool of relationship property available for division in situations where the family home was one partner's pre-relationship property. If contributions-based sharing were retained 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.⁹⁶

6.63 Our recommendations to repeal the special rules for all short-term relationships and extend the ordinary rules of division to short-term de facto relationships that satisfy the additional eligibility criteria also have the following advantages:

- (a) The eligibility criteria will be simplified, making the new Act 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 recommendations 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 6.61(b)). For de facto relationships, the additional eligibility criteria recognise the necessarily arbitrary nature of the qualifying period and give equal weight to other measures of commitment.

⁹⁴ 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).

⁹⁵ At [140]–[141].

⁹⁶ 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) of the Property (Relationships) Act 1976 have been satisfied in 21 cases since 2001, an average of fewer than 1.5 cases per year.

- (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 6.66 below).

Additional eligibility criteria for de facto relationships

- 6.64 We recommend that de facto relationships that do not satisfy the qualifying period should be subject to the new Act if they satisfy the additional eligibility criteria that:
- (a) there is a child of the relationship and the court considers it just to make an order dividing relationship property; or
 - (b) one partner has made substantial contributions to the relationship and the court considers it just to make an order dividing relationship property.
- 6.65 These criteria provide different ways to measure commitment and 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.
- 6.66 This means that short-term de facto relationships will continue to be treated differently to marriages and civil unions of the same length. 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.⁹⁷ 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 new Act 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.
- 6.67 The recommended criteria 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.

Where there is a child of the relationship

- 6.68 A child of the relationship is a well-established concept in the PRA. It includes any child of both partners (such as a biological or adopted child of both partners) and any other child who was a member of the partners' family when the relationship ended.⁹⁸ This has been interpreted to include 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".⁹⁹

⁹⁷ 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]; applied in *Child Poverty Action Group (CPAG) v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43].

⁹⁸ Property (Relationships) Act 1976, s 2 definitions of "child of the civil union", "child of the de facto relationship" and "child of the marriage".

⁹⁹ *M v L* (2005) 24 FRNZ 835 (FC) at [33]–[34]. See also *A v A* [2012] NZFC 10192 at [26]–[34].

- 6.69 In our view, where there is a child of the relationship, partners can be presumed to be in a family joint venture to which the partners contribute equally although in different ways.¹⁰⁰ Results from consultation and the Borrin Survey affirm that the presence of children makes 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 6.15(c)).
- 6.70 We acknowledge the concern raised by NZLS that the presence of a child who was a member of the partners' family but is not the biological or adopted child of both partners (such as a stepchild) might not provide an appropriate measure of commitment. We also recognise that we recommend adopting a broader definition of child of the relationship than that used to establish entitlement to a FISA in Chapter 10. The presence of a child in these two situations, however, is used to measure different things. In the context of FISAs, the presence of a child is used to measure the partners' expectations to share the economic advantages and disadvantages that arise from satisfying the responsibilities associated with having and raising that child. While such expectations can be reasonably inferred when partners have a child together (or make a permanent commitment in respect of the future care of a child through the adoption process), they cannot be presumed to the same extent in relation to other children of the family and may not necessarily endure beyond the partners' separation. In the context of short-term de facto relationships, however, the presence of a child is used as a measure of commitment. In our view, the presence of a child who was a member of the partners' family is an appropriate measure of commitment given social trends towards more diverse family structures.¹⁰¹ Our view remains that NZLS's 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.

Where one partner makes a substantial contribution to the relationship

- 6.71 A short-term de facto relationship to which one partner has made substantial contributions should also qualify for equal sharing.¹⁰² This gives a court broad discretion

¹⁰⁰ 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 *CFLQ* 383; L Jamieson and others "Cohabitation and commitment: partnership plans of young men and women" (2002) 52 *The Sociological Review* 354; Charlie Lewis, Amalia Papacosta and Jo 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).

¹⁰¹ See discussion in Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at ch 4 and ch 5.

¹⁰² In Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017), we commented at [17.20] that the Property (Relationships) Act 1976 does not define or provide any guidance on what constitutes a "substantial contribution" to the de facto relationship. We are, however, satisfied

to recognise situations in which the substantial contributions made by one partner to the relationship demonstrate a significant commitment to the relationship. It also provides an avenue into the new Act for child-free couples and avoids discriminating on the basis of family status under human rights law.¹⁰³

the courts will be able to determine when a partner has made substantial contributions for the purpose of qualifying for equal sharing. The test should continue to be used.

¹⁰³ 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 dependants).

CHAPTER 7

Specific relationship types

IN THIS CHAPTER, WE CONSIDER:

how the PRA applies to specific relationship types and whether reform is required in relation to:¹

- relationships involving young people;
- relationships with and between members of the LGBTQI+ community;
- contemporaneous relationships;
- multi-partner relationships; and
- domestic relationships.

RELATIONSHIPS INVOLVING YOUNG PEOPLE**Background**

- 7.1 The PRA imposes a minimum age requirement on de facto partners. Both must be aged 18 or over.² This means that a de facto relationship involving young people will not be recognised as a de facto relationship for the purposes of the PRA until the younger partner turns 18. This also means that a de facto relationship that ends before the younger partner turns 21 will generally be excluded from the PRA unless they meet the additional eligibility criteria for short-term relationships in section 14A of the PRA.³
- 7.2 The PRA imposes no minimum age requirement on married or civil union partners. Under the Marriage Act 1955 and the Civil Union Act 2004, the minimum age requirement is 16, but if either party to the intended marriage or civil union is 16 or 17, they must first obtain the consent of a Family Court judge.⁴ The requirement for

¹ In Chapter 14, we also consider how the Property (Relationships) Act 1976 applies to Māori customary marriage.

² Property (Relationships) Act 1976, s 2D(1)(a).

³ This is because the length of the relationship, for the purposes of satisfying the three year qualifying period, is measured from when the youngest partner turns 18, not when the de facto relationship commenced (if earlier): ss 2D(1)(a), 2E(1)(b) and 14A.

⁴ Marriage Act 1955, s 18; and Civil Union Act 2004, s 19. A judge may consent to the intended marriage or civil union only if satisfied that, among other things, each partner aged 16 or 17 years "understands the consequences of the

consent of a Family Court judge is a recent change introduced by the Minors (Court Consent to Relationships) Legislation Act 2018.⁵ That Act also introduced the same consent requirements for de facto relationships as defined in the Interpretation Act 1999.⁶ This means that, in order for a de facto relationship to be legally recognised under legislation other than the PRA, the partners must both be 18 or be 16 or 17 and have the consent of a Family Court judge.⁷ The process for obtaining consent for a de facto relationship is set out in section 46A of the Care of Children Act 2004.

- 7.3 The PRA may still apply to a marriage or civil union that does not meet the minimum age or consent requirements set out in the Marriage Act and Civil Union Act. While such relationships are of no legal effect,⁸ the PRA expressly applies to void marriages and civil unions.⁹

Issues

- 7.4 A minimum age requirement for entry into a property sharing regime performs an important protective function. It ensures legal rights, duties and responsibilities are not imposed on young people before they are developmentally ready to understand and accept them.
- 7.5 A minimum age requirement is particularly important for de facto relationships under the PRA for several reasons. First, there has been no deliberate decision to formalise the relationship so the risk of drifting into a de facto relationship without appreciating its legal consequences is higher than for marriages and civil unions. Second, there is some evidence that young people are more likely to live together than be married or in a civil

application" and that the intended marriage or civil union is in that party's interests: Marriage Act, s 18(4); and Civil Union Act, s 19(4).

⁵ The Minors (Court Consent to Relationships) Legislation Act 2018 was the result of a members' bill, the Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017, introduced by Joanne Hayes and aimed at preventing possible forced marriages involving young people in New Zealand. The Bill proposed replacing the provision for young people to marry if they had the consent of their caregivers with a requirement that any person aged 16 or 17 who wished to marry obtain the consent of a Family Court judge.

⁶ The Select Committee extended the ambit of the Minors (Court Consent to Marriage of Minors) Amendment Bill to civil unions and de facto relationships as defined in the Interpretation Act 1999, observing that:

Civil unions and de facto relationships provide many of the same legal rights, duties, and responsibilities as marriage. Amending the three Acts together would maintain the intent of the bill across these similar relationships, ensure consistency, and avoid potential loopholes.

See Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017 (256-2) (select committee report) at 1–2.

The Legislation Bill 2017 (275-2) currently before Parliament intends to replace the Interpretation Act 1999 with a new statute entitled the "Legislation Act" but does not propose any substantive change to the definition of de facto relationship except in relation to the adoption of gender neutral language, which is discussed below at paragraph 7.23.

⁷ Section 29A of the Interpretation Act 1999 contains a definition of de facto relationship that applies unless an enactment provides otherwise: Interpretation Act, s 4. The definition of de facto relationship in s 29A is substantially different to the definition of de facto relationship in s 2D of the Property (Relationships) Act 1976.

⁸ Family Proceedings Act 1980, s 31(1).

⁹ Property (Relationships) Act 1976, ss 2A(1) and 2AB(1).

union.¹⁰ Third, results from the Borrin Survey indicate that awareness of the PRA is generally lower than average among young people.¹¹

- 7.6 The question is whether the minimum age requirements are appropriately set and, in particular, whether the minimum age requirement for de facto relationships is justifiable in light of the approach taken in other New Zealand legislation (see paragraph 7.2 above). This raises several issues.
- 7.7 First, while we have no evidence of the minimum age requirement operating unfairly in practice, it is possible that it could exclude some de facto relationships even if the partners have been together for more than three years, have had children together and have otherwise shared their lives in such a way that to exclude them from the rights and protections under the PRA would be unfair.
- 7.8 Second, the minimum age requirement for de facto relationships may be discriminatory on the basis of age under human rights law.¹² This is because young people who enter a de facto relationship at 16 or 17 are treated differently from those who enter a de facto relationship at 18. While the risk of age discrimination is also present in relation to marriages and civil unions, this has been considered justifiable discrimination on the basis that a 16 or 17-year-old can still obtain the consent of a Family Court judge to marry or enter a civil union in appropriate circumstances.¹³
- 7.9 Third, the minimum age requirement for de facto relationships may also be discriminatory on the basis of marital status under human rights law¹⁴ because it is different to the requirements for marriages and civil unions. This differential treatment does not appear to be justified. The current test for whether discrimination is justified under the New Zealand Bill of Rights Act 1990 includes consideration of whether the limit impairs the right or freedom "no more than is reasonably necessary for sufficient achievement of the objective".¹⁵ The current minimum age requirement for de facto relationships provides the court with no discretion to consent to de facto relationships involving people aged 16 or 17 in appropriate situations. Given this safeguard exists for marriages and civil unions, we do not think it is justifiable to adopt a higher and stricter age requirement for de facto relationships.
- 7.10 A separate issue is whether the PRA should apply to marriages and civil unions that are void for failing to satisfy the minimum age and consent requirements. Entering a marriage or civil union is a significant decision, and the minimum age and consent

¹⁰ See Law Commission *Relationships and families in contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa a nāianeī* (NZLC SP22, 2017) at 16.

¹¹ 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 23.

¹² 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 age, commencing with the age of 16 years.

¹³ See Civil Union Bill 2004 (149-1) (explanatory note) at 2; Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Civil Union Bill* (29 April 2004) at [7]–[8]; and Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Marriage (Court Consent to Marriage of Minors) Amendment Bill* (3 May 2017) at [11]–[12].

¹⁴ 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.

¹⁵ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] and [123].

requirements recognise the developing capacity of young people and afford them appropriate protections.¹⁶ It may be unfair to subject young people to rights and obligations under the PRA if those protective safeguards have not been met.

Approach in comparable jurisdictions

7.11 We have not identified any comparable jurisdiction that imposes a minimum age requirement on de facto partners. However, in the Canadian province of Alberta, new legislation is due to come into force in 2020 that will extend the property sharing regime to "adult interdependent partners".¹⁷ A minor may be an adult interdependent partner but may only enter an adult interdependent partner agreement if they are at least 16 years of age and have their guardian's written consent.¹⁸

Results of consultation

7.12 In the Issues Paper, we asked whether the minimum age requirement for de facto relationships should be lowered to be consistent with that for marriages and civil unions.¹⁹ We received nine submissions on this issue from six members of the public, one practitioner and two organisations.

7.13 Views from members of the public were mixed. Two supported lowering the minimum age, one supported lowering it when there were children involved and three supported retaining the existing minimum age. One practitioner supported the court having discretion to rule on whether at 16 or 17 the partners were in a qualifying relationship.

7.14 The Human Rights Commission (HRC) supported lowering the minimum age requirement to be consistent with that for marriages and civil unions. It submitted that a different age requirement for de facto relationships is unlikely to be justified given the contemporary statutory and social context.

7.15 The New Zealand Law Society (NZLS) also submitted in favour of lowering the minimum age requirement. It argued that, notwithstanding the view that a higher age limit might protect young people who drift into a de facto relationship, the current age requirement of 18 years could not be justified. However, it identified the practical difficulties in imposing a requirement for parental or court consent for de facto relationships and submitted that the PRA should recognise the start of a de facto relationship at the age of 16, regardless of whether consent was obtained. It suggested a rebuttable presumption that two people are in a de facto relationship may assist.

¹⁶ Civil Union Bill 2004 (149-1) (explanatory note) at 2.

¹⁷ Family Statutes Amendment Act SA 2018 c 18. This implements recommendations in Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners* (Final Report 112, June 2018).

¹⁸ Adult Interdependent Relationships Act SA 2002 c A-4.5, ss 6–7.

¹⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [7.7]–[7.13].

Conclusions

RECOMMENDATIONS

R30 The definition of de facto relationship in the new Act should require that both partners are aged 16 years or older but that a de facto relationship involving a person aged 16 or 17 years requires the consent of a Family Court judge in accordance with section 46A of the Care of Children Act 2004.

R31 The new Act should not apply to a marriage or civil union that is governed by New Zealand law and that is void for failing to satisfy the minimum age and consent requirements in the Marriage Act 1955 or the Civil Union Act 2004 until both partners reach the age of 18 years.

- 7.16 We recommend that the same minimum age and consent requirements should apply to all de facto relationships and marriages and civil unions governed by New Zealand law and that these should be consistent with the requirements elsewhere in New Zealand legislation, including in the Marriage Act, Civil Union Act and Interpretation Act.
- 7.17 The Relationship Property Act (the new Act) should only apply to de facto relationships involving young people aged 16 or 17 if they have obtained the consent of a Family Court judge. We consider the requirement for consent provides a sufficient safeguard to ensure legal rights, duties and responsibilities are not imposed on young people before they are developmentally ready to understand and accept them. This would reduce the risk of discrimination on the basis of age and avoids being discriminatory on the basis of marital status under human rights law.
- 7.18 We also recommend that a marriage or civil union that is governed by New Zealand law and that is void for failing to satisfy the minimum age and consent requirements should not attract property consequences under the new Act until the partners are both aged 18 years or older. As noted at paragraph 7.3 above, void marriages and civil unions are currently ordinarily subject to the PRA. This should not be the case under the new Act where the partners are minors and the safeguards set out in the Marriage Act or Civil Union Act have not been met.

LGBTQI+ RELATIONSHIPS

Background

- 7.19 The PRA applies to all marriages and civil unions, including same-sex marriages and civil unions, and to all de facto relationships between two persons who live together as a couple, "whether a man and a woman, or a man and a man, or a woman and a woman".²⁰

²⁰ Property (Relationships) Act 1976, s 2D(1).

- 7.20 The definition of de facto relationship lists specific matters that indicate whether two partners live together as a couple.²¹ These matters apply to all de facto relationships, including relationships between same-sex partners.

Issues

- 7.21 Some relationships among members of the lesbian, gay, bisexual, transgender, queer or questioning, intersex+ (LGBTQI+) community may differ from traditional relationship forms and norms.²²
- 7.22 In the Issues Paper, we questioned whether the definition of de facto relationship and, in particular, the list of matters indicating whether two people live together as a couple reflects heteronormative assumptions about relationships such as whether the partners present as a couple in public.²³ Some people may have trouble evidencing matters such as the reputation and public aspects of their relationship because they have not disclosed their sexuality to their friends and family.²⁴ Few cases have involved de facto relationships involving members of the LGBTQI+ community.
- 7.23 Another potential issue with the definition of de facto relationship is that it focuses on the sex of the partners, referring to "a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)".²⁵ It does not expressly recognise people who have a non-binary gender identity. In this regard, the definition is out of step with the Marriage Act 1955, which uses inclusive language to recognise a broader spectrum of gender identity and sexual orientation by defining a couple as two people "regardless of their sex, sexual orientation or gender identity".²⁶ The definition of de facto relationship in the PRA is also inconsistent with the language proposed for the new definition of de facto relationship in the Legislation Bill 2017. That Bill, if enacted, will replace the Interpretation Act 1999 and will include a new definition of de facto relationship that refers to "a relationship between 2 people (regardless of their sex, sexual orientation, or gender identity)".²⁷

²¹ Section 2D(2).

²² Families Commission *We're a Family: A study of how lesbians and gay men are creating and maintaining family in New Zealand* (Blue Skies Report No 29/09, August 2009) at 7.

²³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [7.17].

²⁴ One study of 2,269 lesbian, gay and bisexual individuals conducted in 1994 found that only 35 per cent of respondents had disclosed their sexual identity to everyone in their lives, and one per cent said they had not disclosed to anyone and did not plan to do so: Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53 *Journal of Homosexuality* 223 at 237.

²⁵ Property (Relationships) Act 1976, s 2D(1).

²⁶ Marriage Act 1955, s 2(1).

²⁷ Legislation Bill 2017 (275-2), cl 14.

Results of consultation

- 7.24 In the Issues Paper, we asked whether the PRA's definition of de facto relationship was working well for members of the LGBTQI+ community.²⁸ We received eight submissions on this issue from four members of the public, one practitioner and three organisations.
- 7.25 Two members of the public thought that the current definition of de facto relationship was not working well for members of the LGBTQI+ community, while one member of the public thought the definition was working well. Another member of the public thought that people should be required to enter a civil union in order to be subject to the PRA.
- 7.26 The HRC considered that the current definition of de facto relationship in the PRA was not heteronormative as it recognises that not all couples are heterosexual. It considered that the current framework for deciding whether a couple is in a de facto relationship is sufficiently flexible to cover relationships between members of the LGBTQI+ community that may not be publicly disclosed or may not involve continuous cohabitation.
- 7.27 HRC, Community Law Wellington and Hutt Valley (Community Law), NZLS and one practitioner all submitted that the PRA should adopt a gender neutral definition of de facto relationship. The HRC submitted that excluding people with a non-binary gender or gender identity was inconsistent with contemporary human rights standards. It supported adopting the gender neutral language of the Marriage Act and Legislation Bill. NZLS preferred the gender neutral language of "relationship between two persons".

Conclusions

RECOMMENDATION

R32

The definition of de facto relationship should adopt the gender neutral terminology of a relationship between two people, regardless of their sex, sexual orientation or gender identity.

- 7.28 We recommend that the definition of de facto relationship in the new Act refer to "a relationship between two people (regardless of their sex, sexual orientation, or gender identity)", consistent with the gender neutral terminology in the definition of marriage in the Marriage Act 1955 and in the proposed definition of de facto relationship in the Legislation Bill 2017.
- 7.29 In the absence of evidence to the contrary, we consider that the matters indicating whether two people live together as a couple in the current definition of de facto relationship in section 2D(2) of the PRA are sufficiently flexible to accommodate the different ways in which members of the LGBTQI+ community may maintain relationships.

²⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 131.

CONTEMPORANEOUS RELATIONSHIPS

Background

- 7.30 Section 52A and 52B of the PRA establish a regime for dividing relationship property when a person was in more than one qualifying relationship at the same time (contemporaneous relationships). Specifically, the regime applies where one person was a partner in:
- (a) a marriage or civil union as well as a de facto relationship; or
 - (b) two de facto relationships.
- 7.31 Sections 52A and 52B only apply if competing claims have been filed in court in respect of the same property²⁹ and there is insufficient property to satisfy the property orders.³⁰ In these situations, relationship property is to be divided as follows:
- (a) to the extent possible, the property orders must be satisfied from the property that is attributable to each relationship; and
 - (b) to the extent that it is not possible to attribute all or any of the property to either relationship, the property is to be divided in accordance with the contribution of each relationship to the acquisition of the property.³¹
- 7.32 We have not identified any cases in which these property rules have been successfully applied to contemporaneous relationships.
- 7.33 Sections 52A and 52B also apply to successive qualifying relationships and provide that relationship property is to be divided in accordance with the chronological order of the relationships. We have not identified any issues with the way in which these provisions apply to successive relationships. Our discussion below is therefore limited to contemporaneous relationships.

Issues

- 7.34 There are several issues with the provisions for contemporaneous relationships:
- (a) Establishing the existence of contemporaneous relationships is difficult in practice.
 - (b) Sections 52A and 52B do not capture all variants of contemporaneous relationships.
 - (c) It is unclear how the rules of division under sections 52A and 52B are intended to operate within the PRA framework.
 - (d) The rules of division may unfairly favour the common partner of two contemporaneous relationships.
- 7.35 We also note that the provisions for contemporaneous relationships only apply where one partner is in two separate relationships with different partners. They are not designed to capture situations where one partner is in a single relationship with two or more people (multi-partner relationships). While some multi-partner relationships might

²⁹ *S-H v D* (FC) Waitakere FAM-2008-090-304, 20 September 2011 at [53].

³⁰ Property (Relationships) Act 1976, ss 52A(1) and 52B(1).

³¹ We note that contributions to the acquisition of property is a different concept to contributions to the relationship, which is used elsewhere in the Property (Relationships) Act 1976 and is defined in s 18.

fit the characteristics of contemporaneous relationships and rely on the regime under sections 52A and 52B, others will not. Multi-partner relationships are discussed below.

Establishing contemporaneous relationships is difficult in practice

7.36 While sections 52A and 52B recognise and provide for the possibility of contemporaneous relationships, in practice, they are rarely recognised. This is because "assumptions of exclusivity still linger on in judicial interpretations of a 'qualifying relationship' under the Act".³²

7.37 Establishing a qualifying de facto relationship requires that the partners "live together as a couple",³³ but the courts have been reluctant to recognise a qualifying de facto relationship when the relationship lacks exclusivity.³⁴ The importance placed on exclusivity in relationships was explained by the High Court in *M v P*:³⁵

... a mutual acceptance of exclusivity, relative to other potential partners in general, inheres in the notion of living "together" as a "couple" ... The statutory indicia of a shared life are broadly consistent with a substantial degree of exclusivity in qualifying relationships.

7.38 The High Court went on to explain:³⁶

... a contemporaneous de facto relationship with a different partner tends to show that the relationship before the court lacks the character of a life lived as a couple. The legislation governs division of the property of a relationship between two people and there must be natural limits to one's capacity to spend the only life that one has in contemporaneous bilateral relationships with more than one person.

7.39 In the Issues Paper, we also noted that it might be difficult to establish a contemporaneous de facto relationship because its features may differ from an "orthodox" de facto relationship.³⁷ For example, a contemporaneous relationship may be hidden, making it difficult to prove the reputation and public aspects of the relationship, and the partners may not share a common household for significant lengths of time or be financially dependent or interdependent. In *M v P*, the High Court observed that contemporaneous relationships may be most likely when the relationships follow an "orthodox" format, that is, when "A cohabits intermittently with each of B and C, maintaining two households on an indefinite basis".³⁸

7.40 The judicial approach to contemporaneous relationships is, however, still developing. In *N v H* (decided following publication of our Issues Paper), the High Court observed that:³⁹

³² *N v H* [2017] NZHC 2788 at [50].

³³ Property (Relationships) Act 1976, s 2D(2).

³⁴ *N v H* [2017] NZHC 2788 at [54].

³⁵ *M v P* [2012] NZHC 503, [2012] NZFLR 385 at [26].

³⁶ At [29].

³⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [7.22].

³⁸ *M v P* [2012] NZHC 503, [2012] NZFLR 385 at [29].

³⁹ *N v H* [2017] NZHC 2788 at [57]. In that case, the High Court had to consider whether the applicant had a reasonably arguable case that the applicant was in a de facto relationship with the respondent in order to sustain a notice of claim over a property owned by the respondent. The respondent argued they were not in a de facto relationship,

... the jurisprudence in this area is still embryonic. Courts are only just beginning to wrestle with the novel complexities presented by various forms of contemporaneous relationships. In particular, difficult questions remain as to how and to what extent the judicial dictum in *M v P* can be read consistently with the Act's unabashed acknowledgement that contemporaneous relationships are possible.

- 7.41 The Court also recognised the risk of a partner in two de facto relationships avoiding property consequences under the PRA by arguing that neither relationship satisfies the requirements of "living together as a couple":⁴⁰

... I am not sure the Act would tolerate Mr [H] escaping his obligations by effectively playing off his two relationships one against another. Going down that route opens up the possibility of exploitation of a vulnerable party, and of a dominant party benefiting from their own deceit.

Not all contemporaneous relationships are captured

- 7.42 Sections 52A and 52B fail to provide for all the variants of contemporaneous relationships. Specifically:

- (a) The provisions do not anticipate multiple marriages or civil unions. However, the PRA expressly applies to void marriages and civil unions⁴¹ so it is possible that, for the purposes of the PRA, one person could be married or in a civil union with more than one spouse or civil union partner at the same time.
- (b) It is unclear whether the provisions apply to valid foreign polygamous marriages. The definition of marriage in section 2A of the PRA is non-exhaustive and includes void marriages. However, it is unclear whether a valid polygamous marriage would be "void" for the purposes of section 2A.⁴² This is in contrast with the Family Proceedings Act 1980, which expressly includes valid foreign polygamous relationships within the definition of marriage for the purposes of that Act.⁴³ That means a partner in a valid foreign polygamous marriage may be entitled to maintenance but would have no property rights under the PRA.
- (c) The provisions do not apply to situations where there are more than two contemporaneous relationships, such as a marriage and two de facto relationships.

pointing to the fact that the respondent had two consecutive marriages with other women during the 17 year period in question. The Court concluded at [61] that "there is enough flexibility in the Act, and sufficient pointers to the potential future trajectory of judicial interpretation" to be satisfied that the applicant had an arguable case. See also *Greig v Hutchison* [2014] NZFC 2895, where the Family Court noted at [262] that common residence in contemporaneous relationships is unrealistic.

⁴⁰ *N v H* [2017] NZHC 2788 at [59].

⁴¹ Property (Relationships) Act 1976, ss 2A and 2B. A marriage or civil union is void if it satisfies one of the grounds set out in s 31 of the Family Proceedings Act 1980. These grounds include if, at the time of the solemnisation of the marriage or civil union in New Zealand, either party was already married or in a civil union (s 31(1)(a)(i)).

⁴² The definition of void marriage in s 31 of the Family Proceedings Act 1980 applies only to marriages governed by New Zealand law. According to Martha Bailey and others "Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada" (2008–2009) 25 Natl J Const L 83 at 92, under common law:

... a polygamous marriage valid by the law of the place of celebration and by each party's personal law will be recognized for many purposes even if the marriage is actually polygamous.

⁴³ Family Proceedings Act 1980, s 2 definition of "marriage".

- 7.43 It is unclear how property would be divided under the PRA when there are multiple marriages or civil unions or more than two contemporaneous relationships. Such relationships are, however, likely to be rare.⁴⁴

The rules of division are unclear

- 7.44 The policy of sections 52A and 52B is clear from the legislative history and the Law Commission's earlier report on succession law on which sections 52A and 52B were based.⁴⁵ That is, property that is the subject of competing claims under the PRA is to be distributed between the two relationships "in proportion to the extent to which each contributed towards its acquisition, maintenance and improvement".⁴⁶
- 7.45 However, the draft provisions on which sections 52A and 52B are based were developed in the context of succession law. They were not designed to be inserted into the PRA or to apply to situations involving three (surviving) people. As a result, several problems arise when applying sections 52A and 52B within the PRA framework:
- (a) First, it is unclear whether sections 52A and 52B are to apply to allocate the contested property between the relationships *before* or *after* the court has decided how it should be divided between the partners to each relationship.⁴⁷ This is significant, because if sections 52A and 52B are to apply after the partners' shares in the relationship property have been determined, it means there is little chance of a partner successfully relying on section 13 or section 18A to seek a greater share of relationship property.⁴⁸
 - (b) Second, the extent to which sections 52A and 52B are intended to replace the ordinary rules of classification in the PRA is unclear. The first limb of the rules of division for contemporaneous relationships requires that, to the extent possible, the property orders must be satisfied from the property that is attributable to each

⁴⁴ We note, however, the Australian case *Green v Green* (1989) 13 Fam LR 336 (NSWCA) involved a marriage contemporaneous with two de facto relationships.

⁴⁵ Sections 52A and 52B of the Property (Relationships) Act 1976 were introduced in 2001 and were based on a provision proposed in the Law Commission's report on succession law to address the priority of claims on a deceased's estate: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 27. The provision proposed in Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) (cl 59(2)(b)) was as follows:

If the estate of a deceased has insufficient assets available after satisfaction of liabilities to fully satisfy property division orders and support awards, the assets of the estate are to be applied so that ... in the case of contemporaneous partnerships, a property division order is to be satisfied from that part of the estate of the deceased person as the court is able to attribute to the partnership concerned and, to the extent that such attribution is not practical, the court is to make an order that is proportionate to the contribution of each partnership to the acquisition of the assets.

⁴⁶ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 141.

⁴⁷ Subsection (1) of both ss 52A and 52B of the Property (Relationships) Act 1976 says that the special rules apply if there are "competing claims" for property orders, which suggests the special rules are to be applied when making property orders in respect of each relationship. However, subs (2) then directs how a court is to satisfy property orders when there is insufficient property, which suggests that the special rules are applied after a court has made the property orders in relation to each relationship and those orders classify property as being the relationship property of two relationships. See discussion in Adrienne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 6–7 and 25–29.

⁴⁸ This is because it will not be known, before a court applies ss 52A–52B, whether a partner's conduct in maintaining a separate qualifying relationship has "significantly affected the extent or value of the relationship property" for the purposes of s 18A(3).

relationship. It is unclear whether this requires the courts to adopt a different classification exercise to the ordinary rules of classification in the PRA. Reid argues this first limb is redundant, because if property is relationship property under the ordinary rules, it will be attributable to that relationship.⁴⁹ If this limb does require a court to undertake a different classification exercise, it is unclear how a court will determine which property is "attributable" to which relationship.⁵⁰ This might be interpreted more narrowly than the existing definition of relationship property.

- (c) Third, the second limb of the rules of division for contemporaneous relationships refers only to contributions to the *acquisition* of the property. There is no reference to the improvement or sustenance of property, even though provision is made elsewhere in the PRA's ordinary rules of classification for the maintenance or sustenance of separate property. For example, property might have been acquired before the second qualifying relationship began but it might have been maintained or improved as a result of contributions made by the second relationship.
- (d) Fourth, there is no ability for a court to make a finding of fact that property is the relationship property of two separate relationships unless two separate claims have been filed. In situations where one of the contemporaneous relationships is ongoing, this would require the partner in the ongoing relationship to incur the cost of filing a separate claim in respect of any disputed property in order to preserve their position. This would appear inconsistent with the principle of simple, speedy and inexpensive resolution of disputes as is consistent with justice.

The rules of division may unfairly favour the common partner

7.46 Sections 52A and 52B are designed to divide contested property between relationships, not between partners. As noted above, they were based on a provision formulated in the context of competing claims to a deceased estate when the court is distributing one person's property between two claimants rather than dividing property from two relationships involving three people. When the same policy is applied in the context of separation, the effect is that the common partner is likely to receive a half share of all the contested property while the other partners share the remainder between them.⁵¹

7.47 This may lead to unjust results, particularly if the relationship property of one relationship has been eroded because a partner concealed a relationship from one or both of their partners. Section 13 may be relied on in these situations to reduce the common partner's share of relationship property in one or both relationships. In Chapter 8, we recommend clarifying that a court can consider whether misconduct is an exceptional circumstance that would render equal sharing repugnant to justice if the conduct was gross and significantly affected the extent or value of the relationship

⁴⁹ Adrienne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 7 and 46–50.

⁵⁰ The term "attributable" is not defined in the Property (Relationships) Act 1976 (PRA), although it is used in other sections of the PRA in different ways, for example, ss 8(1)(g), 8(1)(i) and 9A(2).

⁵¹ See discussion in Adrienne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 60.

property. Whether the common partner's conduct in concealing a relationship from one or both partners meets this threshold will ultimately be a question for the court.

- 7.48 A further issue is that sections 52A and 52B do not appear to cater for situations where the contemporaneous relationships are open and consensual. For example, a person may share a home and family life with two partners who are not in a relationship with each other. All three people may contribute equally to their shared future. They may not consider the common partner should be entitled to half their combined property while they are each left with one quarter.

Approach in comparable jurisdictions

- 7.49 The property sharing regime in Australia anticipates the possibility of one person being in both a marriage and a de facto relationship or more than one de facto relationship at the same time.⁵² It does not, however, provide any specific rules of division that are to apply in the case of contemporaneous relationships. This is not surprising given Australia operates a discretionary regime under which a court has discretion to adjust the partners' property interests on separation.
- 7.50 We have not identified any other comparable jurisdiction that specifically provides for contemporaneous relationships, although many jurisdictions expressly include valid foreign polygamous marriages in their relationship property regimes (including Australia, England and Wales and the Canadian provinces of Ontario, Prince Edward Island, Nunavut and the Northwest Territories and Yukon).⁵³ A similar recommendation was recently made by the Law Commission of Nova Scotia, which noted that including valid foreign polygamous marriages in the property sharing regime was in the interests of women and children to these marriages, in particular.⁵⁴

Results of consultation

- 7.51 In the Issues Paper, we asked how contemporaneous relationships should be recognised by the PRA, whether sections 52A and 52B have the potential to lead to an unjust result and, if so, how should they be reformed.⁵⁵ We received five submissions from two organisations, one practitioner and two members of the public.
- 7.52 Community Law submitted on the issue of contemporaneous relationships after consulting with interested members of the polyamorous community. It reported that the polyamorous community wanted a clear way to have their multiple relationships recognised by the law when they desired those relationships to be recognised. In the case of de facto relationships, the polyamorous community did not want the presence of multiple relationships to count against the legal validity of other relationships. They

⁵² Family Law Act 1975 (Cth), s 4AA(5)(b).

⁵³ Family Law Act 1975 (Cth), s 6; Matrimonial Causes Act 1973 (UK), s 47; Family Law Act RSO 1990 c F.3, s 1(2); Family Law Act RSPEI 1988 c F-2.1, s 1(2); Family Law Act SNWT (Nu) 1997 c 18, s 1(2); and Family Property and Support Act RSY 2002 c.83, s 1. See also Patrick Parkinson "Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities" (1994) 16 Sydney LR 473 at 497; and Richard Chisholm "Casenote: A potentially polygamous foreign marriage can be recognised as a valid marriage in Australia: Ghazel & Ghazel" (2016) 30 AJFL 129.

⁵⁴ Law Reform Commission of Nova Scotia *Final Report: Division of Family Property* (September 2017) at 289–292.

⁵⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [7.19]–[7.26] and [12.53]–[12.68].

said each relationship should be considered on its own merits rather than by comparison to another relationship. Members of the polyamorous community differed as to the emphasis that should be placed on living together and on whether there should be a hierarchy of relationships where one relationship lasts significantly longer than the other. The lack of guidance as to what happens when property is used by two or more contemporaneous relationships was a big concern for the polyamorous community. It was submitted that the PRA could clearly provide for the different types of polyamorous relationships that might exist, including where one partner is in two separate relationships but both relationships use or contribute to the same property. It was agreed that equitable division should remain a key principle.

- 7.53 NZLS did not favour any of the proposed changes to the way contemporaneous relationships are recognised under the PRA. It submitted that the introduction of a rebuttable presumption that two people are in a de facto relationship may address the difficulties in practice in establishing the existence of contemporaneous relationships. We discuss this in Chapter 6. NZLS did, however, say that it seems inappropriate that one partner (Partner A) can bring about the reduction of another partner's (Partner B) property by secretly commencing a second relationship (with Partner C) and that it is even more inappropriate where Partner C contributes to the subterfuge. However, NZLS did not consider that this should be treated as "misconduct" within the first relationship but rather it would be preferable that the first relationship should have primacy so that Partner B keeps their half-share undiminished. On that basis, the new relationship would share the combined relationship property of Partner A and Partner C. Similar submissions were made by one practitioner and one member of the public.
- 7.54 NZLS also questioned whether sections 52A and 52B apply appropriately to polygamous relationships (for example, religious polygamous marriages) where one relationship ends but another (or others) continue. NZLS noted that this may require further consideration.

Conclusions

RECOMMENDATIONS

- R33** The new Act should provide for contemporaneous relationships in a stand-alone provision that:
- applies whenever property is the relationship property of two or more qualifying relationships (contested relationship property); and
 - requires a court to apportion contested relationship property in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.
- R34** The definition of marriage in the new Act should expressly include valid foreign polygamous marriages, consistent with the definition of marriage in the Family Proceedings Act 1980.

- 7.55 We recommend that the existing rules relating to contemporaneous relationships in sections 52A and 52B be reformed. The new Act should provide for contemporaneous relationships in a stand-alone provision that retains the underpinning policy but resolves the existing technical limitations of sections 52A and 52B and fits more clearly within the framework of the new Act.
- 7.56 The new provision for contemporaneous relationships should apply to property that is classified as the relationship property of two or more qualifying relationships, applying the ordinary rules of classification.⁵⁶ A court should be able to find that property is relationship property of two or more relationships even if only one relationship has ended. It should not be necessary for two formal competing claims to be filed with the court. We note that section 37 enables a court to give notice to any person having an interest in the property that would be affected by the order and provides that person shall be entitled to appear and be heard in the matter as a party to the application.
- 7.57 When the recommended provision applies, the contested relationship property should be apportioned between the qualifying relationships in accordance with the contribution of each relationship to the acquisition, maintenance or improvement of that property.⁵⁷ The ordinary rules of division would then apply in respect of each relationship's pool of relationship property. This leaves open the possibility of one or more partners making a claim under the general exception to equal sharing for extraordinary circumstances currently found in section 13. This exception might apply if a partner's conduct in concealing a relationship from one or both partners meets the revised threshold of misconduct recommended in Chapter 8.
- 7.58 We have considered but do not recommend giving the first relationship in time priority over subsequent relationships as proposed by NZLS. In our view, this would reduce the court's discretion to achieve a result that is fair in all the circumstances.
- 7.59 We do not recommend legislative reform to address the practical difficulties in establishing the existence of contemporaneous qualifying relationships. We consider it would be inappropriate to do so given that the judicial approach on this issue is still developing and that there has been a clear indication from the High Court that the previously restrictive judicial approach needs revisiting.⁵⁸
- 7.60 We do, however, recommend that the definition of marriage in the new Act expressly include valid foreign polygamous marriages in the same way as the definition of marriage in the Family Proceedings Act 1980. This would clarify the application of the new Act in a way that is consistent with the Family Proceedings Act 1980 and the approach in comparable jurisdictions.
- 7.61 These recommendations do not address the concern that the PRA's rules may not be consistent with expectations in consensual contemporaneous relationships. We discuss these concerns in our discussion on multi-partner relationships below.

⁵⁶ As amended by our classification recommendations in Chapter 3.

⁵⁷ This is a different concept to contributions to the relationship, which are defined in s 18 of the Property (Relationships) Act 1976.

⁵⁸ *N v H* [2017] NZHC 2788 at [57].

MULTI-PARTNER RELATIONSHIPS

Background

- 7.62 The PRA is premised on the notion of "coupledom".⁵⁹ It applies only to marriages, civil unions and de facto relationships that are intimate relationships between two people. The PRA does not apply to intimate relationships between three or more people (multi-partner relationships).
- 7.63 The PRA does, however, provide for the possibility of contemporaneous relationships, which may include some types of multi-partner relationships where one person has two partners and those partners are not in a relationship with each other. The provisions for contemporaneous relationships are discussed above.
- 7.64 People in multi-partner relationships that do not fall within the PRA's provisions for contemporaneous relationships must rely on general remedies in property law or equity. They may have difficulty in finding a viable basis for making a property claim when one partner leaves the relationship or when the relationship ends. People in multi-partner relationships do, however, have options to secure property rights during the relationship by changing the way their property is owned, agreeing by contract on how their property is to be shared or providing for each other in their wills.

Issues

- 7.65 Multi-partner relationships may share many of the hallmarks of a qualifying relationship, such as common residence, raising children together, financial dependence or interdependence, ownership, use and acquisition of property, mutual commitment to a shared life and the performance of household duties. Excluding multi-partner relationships that are functionally similar to qualifying relationships from the PRA may therefore be difficult to justify.
- 7.66 This is an issue that is likely to grow in significance in future. While multi-partner relationships may be uncommon today, they may become more prevalent as social attitudes change and become more inclusive of different relationship structures.
- 7.67 There are, however, a number of practical considerations that would need to be addressed if a property regime were to be extended to multi-partner relationships. Policy would need to be developed on which relationships should be captured, whether the regime should be opt in or opt out and what the property entitlements should be. Careful consideration would also need to be given to the implications of recognising multi-partner relationships for other areas of the law.

Approach in comparable jurisdictions

- 7.68 Multi-partner relationships are not expressly provided for in any of the jurisdictions New Zealand often compares itself with (Australia, England and Wales, Scotland, Ireland and Canada). However, some jurisdictions make provision for valid foreign polygamous marriage, which we address above in our discussion on contemporaneous relationships.

⁵⁹ See discussion in Margaret Briggs "Outside the Square Relationships" (paper presented to New Zealand Law Society PRA Intensive, October 2016) 135.

7.69 The Alberta Law Reform Institute, in its recent report on extending the property sharing regime to de facto relationships, identified the concern that multi-partner relationships are excluded but noted this was outside the scope of its project.⁶⁰ The Institute observed that:⁶¹

Reform may be needed to address the needs of individuals in these relationships, especially those who are vulnerable or unable to negotiate the terms of the relationship. Property division is only one of many potential legal issues. It would be best to review the issues in a comprehensive way. The Canadian Research Institute for Law and the Family recently published findings from a survey of people in polyamorous relationships. The survey provides insight into the demographics of people in such relationships, and identifies some legal issues they face. Future research may offer further insight.

7.70 The Law Reform Commission of Nova Scotia also considered the situation of multiple common law partners in a recent report.⁶² It thought that the principle that a partner leaving a qualifying relationship should have a presumptive right to an equal division of family assets should not be limited to two-person relationships.⁶³ It considered that the principles of equal division should in most cases be applicable to the claim of someone leaving a multiple common law relationship "with potentially greater complexity but no greater uncertainty".⁶⁴ It is unclear how the Commission's recommendations would operate in practice if implemented.

Results of consultation

7.71 In the Issues Paper, we asked whether the PRA should specifically recognise multi-partner relationships and, if so, how they should be defined and what property division rules should apply.⁶⁵

7.72 We received six submissions that addressed multi-partner relationships from three members of the public, one practitioner and two organisations. The three members of the public supported extending property rights to multi-partner relationships, with one person supporting extension on an opt-in basis only. Two members of the public described diverse relationship and family structures that differ from the traditional couple structure and nuclear family. They felt that, as diverse structures become more common, legal recognition and rights need to be available. They noted that the current law strongly favours the 'primary' couple who may be married or in a civil union and largely excludes any secondary partners who may still contribute significantly to the family. One person noted that the current law provides for multiple relationships but that these tend to be interpreted as illicit 'cheating' relationships when the reality can be more consensual and nuanced than that.

⁶⁰ Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners* (Final Report 112, June 2018) at 5.

⁶¹ At 6 (footnotes omitted).

⁶² Law Reform Commission of Nova Scotia *Final Report: Division of Family Property* (September 2017).

⁶³ At 115.

⁶⁴ At 115.

⁶⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 135.

- 7.73 Community Law submitted on the issue of multi-partner relationships after consulting with interested members of the polyamorous community. It explained that there are many different types of polyamorous relationships. Some of these relationship structures involve all partners being in intimate relationships with each other, while others involve one partner being in relationships with two or more partners who are not involved with each other but who consent to the other relationship. Some relationships have an explicit hierarchy of partners who might be referred to as primary, secondary and possibly tertiary partners. Other relationships have no hierarchy between different partners. Community Law identified a range of different issues with applying a couple-focused regime to multi-partner relationships. Its submission focused on how the provisions for contemporaneous relationships operate for members of the polyamorous community. These provisions are discussed below. A broader theme from Community Law's submission was that the polyamorous community wanted a clear way to have their relationships recognised by the law when they desired those relationships to be recognised.
- 7.74 NZLS did not support extending the PRA to multi-partner relationships. One practitioner also did not support including multi-partner relationships, considering that this would overcomplicate the PRA.

Conclusions

RECOMMENDATION

R35

The Government should consider undertaking research to identify the nature and extent of multi-partner relationships in New Zealand and how multi-partner relationships should be recognised and provided for in the law.

- 7.75 We do not recommend extending the property sharing regime to multi-partner relationships at this time. The PRA is premised on an intimate relationship between two people, and we consider that this should also be the premise of the new Act. Extending the regime to multi-partner relationships would be a fundamental shift in policy and should be considered within a broader context involving more extensive consultation about how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people.
- 7.76 Extending the property sharing regime to multi-partner relationships would also be a complex exercise. Careful consideration would need to be given to determining when and how multi-partner relationships should attract property consequences and what those property consequences should be.
- 7.77 We anticipate this is an area that will call for greater attention in the future as multi-partner relationship structures are likely to become more prevalent. Presently, little is known about different types of multi-partner relationships, how they are formed and function and their property sharing expectations. We recommend the Government consider undertaking research in this area to support any future law reform relating to multi-partner relationships.

DOMESTIC RELATIONSHIPS

Background

- 7.78 The PRA does not apply to domestic relationships, which are non-intimate relationships between two people who provide care and support for each other. These can include relationships between family members (such as siblings or parents and adult children), companions or informal carers and those they care for.
- 7.79 Domestic partners, like partners in multi-partner relationships, must rely on general remedies in property law or equity. They may, however, secure their property rights during the relationship by changing the way their property is owned, agreeing by contract on how their property is to be shared or providing for each other in their wills.

Issues

- 7.80 The exclusion of domestic relationships from the PRA may be difficult to justify on a functional analysis.⁶⁶ This is because domestic relationships, like multi-partner relationships discussed above, may share many of the hallmarks of a qualifying relationship. Domestic partners may share a common residence, raise children together, be financially dependent or interdependent, own, acquire or use property together and have a mutual commitment to a shared life together.
- 7.81 We know little about the prevalence of domestic relationships in New Zealand, but they are likely to become more common due to the increasing number of people sharing their household with members of their extended family⁶⁷ and the increasing demand for informal caring due to factors such as New Zealand's ageing population.⁶⁸
- 7.82 There are, however, a number of practical considerations that must be addressed if a property regime were to be extended to domestic relationships. As with multi-partner relationships, policy would need to be developed on what relationships should be captured, whether the regime should be opt in or opt out and what the property entitlements should be. Careful consideration would also need to be given to the implications of recognising domestic relationships for other areas of the law.⁶⁹

⁶⁶ Margaret Briggs "Outside the Square Relationships" (paper presented to New Zealand Law Society PRA Intensive, October 2016) 135 at 143. See also 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 54–55.

⁶⁷ See Law Commission *Relationships and families in contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at 36.

⁶⁸ National Advisory Committee on Health and Disability *How Should we Care for the Carers, Now and into the Future? Manaaki tangata* (Ministry of Health, 2010) at 7–8.

⁶⁹ Briggs observes that careful consideration would need to be paid to the implications of domestic relationships on areas such as succession, insurance and superannuation entitlements, dependent children and so forth: Margaret Briggs "Outside the Square Relationships" (paper presented New Zealand Law Society PRA Intensive, October 2016) 135 at 147.

Approach in comparable jurisdictions

- 7.83 In Australia, a majority of states and territories have extended the property sharing regime for marriages and de facto relationships to domestic relationships.⁷⁰ While the regimes vary (for example, some are opt in, some are opt out), they all require that the relationship is one where the parties provide care and support for each other.⁷¹ However, despite widening the law to include domestic relationships, the number of cases concerning domestic partners has been modest.⁷²
- 7.84 In the Canadian province of Alberta, new legislation is due to come into force in 2020 that will extend the property sharing regime to "adult interdependent partners", which includes non-intimate relationships between two people.⁷³ Domestic relationships are not otherwise expressly provided for in jurisdictions New Zealand often compares itself with (England and Wales, Scotland, Ireland and other Canadian provinces).

Results of consultation

- 7.85 In the Issues Paper, we asked whether the PRA should apply to domestic relationships and, if so, on what basis.⁷⁴ We received 18 submissions including submissions from 14 members of the public, two practitioners and two organisations.
- 7.86 Submissions from members of the public were mixed. Five people supported extending the PRA to domestic relationships. These submitters thought that relationships where people live together and are financially or emotionally dependent should be captured. However, nine people did not support change.
- 7.87 NZLS did not support extending the PRA to domestic relationships on the basis that there was not a compelling case for reform. Neither did the two practitioners who submitted on this issue. Members of the National Council of Women of New Zealand were evenly divided on the issue of domestic relationships. Some supported inclusion of domestic relationships as potentially having similar levels of care and support to qualifying relationships. However, other members argued strongly that these are different relationships and that it is not appropriate for the PRA to apply. Some said that people in shared households should enter into their own arrangements about property that defined what was 'shared' and what was 'separate', highlighting that "a one size fits all solution is not possible".

⁷⁰ See Domestic Relationships Act 1994 (ACT); Property (Relationships) Act 1984 (NSW); Relationships Act 2003 (Tas); Domestic Partners Property Act 1996 (SA); and Relationships Act 2008 (Vic).

⁷¹ Margaret Briggs "Outside the Square Relationships" (paper presented New Zealand Law Society PRA Intensive, October 2016) 135 at 147.

⁷² At 147.

⁷³ Family Statutes Amendment Act 2018 SA c 18. This implements recommendations of the Alberta Law Reform Institute. The Institute observed that it was difficult to identify a principled reason to exclude partners in non-conjugal adult interdependent relationships and that the potential for people to be unintentionally captured (for example, roommates) was "mostly a theoretical concern": Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners* (Final Report 112, June 2018) at [237]–[242].

⁷⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 139.

Conclusions

RECOMMENDATION

R36

The Government should consider undertaking research to identify the nature and extent of domestic relationships in New Zealand and how domestic relationships should be recognised and provided for in the law.

- 7.88 We do not recommend extending the property sharing regime to domestic relationships for largely the same reasons given above in relation to multi-partner relationships (paragraphs 7.75–7.77). In our view, extending the property sharing regime to non-intimate relationships would be a fundamental shift in policy and should be considered within a broader context involving more extensive consultation about how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people.
- 7.89 Extending the new Act to domestic relationships would also be a complex exercise. Careful consideration would need to be given to determining when and how domestic relationships should attract property consequences and what those property consequences should be. While some Australian states have extended property rights to domestic partners, we note that their property sharing regime is not constrained by a general rule of equal sharing. Rather, property is divided on a discretionary basis, which enables property division to be tailored to the particular circumstances of the relationship.
- 7.90 As with multi-partner relationships, we suspect this is an area that will call for greater attention in the future as domestic relationships are likely to become more prevalent. We therefore recommend that the Government consider undertaking further research in this area.
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CHAPTER 8

Dividing relationship property

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; and
- the relevance of misconduct.

THE GENERAL RULE OF EQUAL SHARING**Background**

- 8.1 Section 11 of the PRA provides that, on the division of relationship property, 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.¹
- 8.2 Sections 11A and 11B provide for situations where there is no family home. Section 11A provides that, if the family home was sold with the intention of applying all or part of the sale proceeds to the purchase of a new home but a new home was not acquired, each partner is entitled to share equally in the sale proceeds.² If section 11A does not apply and either there is no family home or the family home is not owned by either or both partners, section 11B provides that a court must award each partner an equal share in "such part of the relationship property as it thinks just" in order to compensate for the absence of an interest in the family home. These provisions played an important role

¹ 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.

² Applications under s 11A must be made no more than two years after the sale proceeds were received or became payable, whichever is later: Property (Relationships) Act 1976, s 11A(1)(c).

before the Act was amended in 2001, when the general rule of equal sharing applied only to the family home and family chattels. Without sections 11A and 11B, all other relationship property (including sale proceeds from a former family home) might have been divided on the basis of each partner's contribution to the relationship.³ When equal sharing was extended to all relationship property in 2001, these provisions became largely redundant.⁴

- 8.3 Section 12 provides for situations where the family home is a homestead. A homestead is defined as a family residence situated on an unsubdivided part of land that is not used wholly or principally for the purposes of the household, such as a family home situated on a farm.⁵ Section 12 entitles the partners to share equally in "a sum of money equal to the equity of either spouse or partner or both of them in the homestead". In Chapter 3, we recommend that the PRA should continue to make special provision for family homes that are homesteads but that homesteads should be classified and divided in the same way as any family home.

Exceptions to equal sharing

- 8.4 The PRA provides limited exceptions to the general rule of equal sharing. The primary exception is section 13, which enables a court to depart from equal sharing if there are extraordinary circumstances that make equal sharing repugnant to justice. Section 13 is discussed below.
- 8.5 A court can also adjust each partner's share of relationship property or order the payment of money or transfer of property from one partner to another in certain situations, specifically:⁶
- (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);
 - (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,⁷ one partner has done anything that would have been a contribution to the relationship had the relationship not ended (section 18B);

³ Section 15 of the Matrimonial Property Act 1976 provided for matrimonial property, other than the family home and family chattels, to be divided on a contributions basis if one partner's contribution to the relationship was clearly greater than that of the other partner.

⁴ However, s 11A of the Property (Relationships) Act 1976 may still be relied on where the family home was one partner's separate property, as any sale proceeds from the sale of that family home would, but for s 11A, be separate property: *Thompson v Thompson* [2000] NZFLR 161 (HC) at [17]–[18].

⁵ Property (Relationships) Act 1976, s 2 definition of "homestead".

⁶ A court can also depart from equal sharing in relationships of less than three years' duration under ss 14–14A (discussed in Chapter 6), and in order to redress economic disparities under ss 15–15A (discussed in Chapter 10).

⁷ In proceedings commenced after the death of one of the partners, s 18B is modified by s 86: s 18B(3).

- (e) when, after separation but before relationship property is divided,⁸ the relationship property has been materially diminished in value by the deliberate action or inaction of one partner (section 18C); or
- (f) when relationship property has been used to pay or satisfy (directly or indirectly) one partner's personal debt (section 20E).

8.6 We discuss these adjustment provisions in Chapter 9.

Issues

- 8.7 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.⁹
- 8.8 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 relationship¹⁰ 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 8.13 below).

Public attitudes and expectations of sharing

- 8.9 The Borrin Survey provides data on 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").¹¹ The Borrin Survey also identified a high level of support for equal sharing, with 74 per cent of all respondents stating they either agreed (43 per cent) or strongly agreed (32 per cent) with equal sharing.¹²
- 8.10 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. 37 per cent strongly agreed with equal sharing (compared to 32 per cent of all

⁸ In proceedings commenced after the death of one of the partners, s 18C is modified by s 86: s 18C(3).

⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [12.6].

¹⁰ Currently provided for under ss 13–14A.

¹¹ 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.

¹² Six per cent strongly disagreed, 10 per cent disagreed, seven per cent neither agreed nor disagreed and two per cent did not know: at 31 (Figure Four). Note that the figures in individual categories may not add up to the net figure due to rounding.

respondents), and 10 per cent strongly disagreed with equal sharing (compared to six per cent of all respondents).¹³

- 8.11 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.¹⁴ In other parts of this report, we address what this means for considering what property is shared (Chapter 3) and how to respond to economic disparities following separation (Chapter 10). The responses also raise a more general point that the law may need to recognise that, in some situations, equal sharing should be departed from.

Approach in comparable jurisdictions

- 8.12 Comparable jurisdictions that operate rules-based property sharing regimes all adopt a general statutory rule of equal sharing but reserve some discretion to the court for departing from equal sharing in limited circumstances.¹⁵ We address these circumstances at paragraphs 8.34–8.35 below.
- 8.13 Australia, England and Wales, Scotland and Ireland operate discretionary regimes under which a court has discretion to adjust the partners' property interests on separation if it considers it just to do so.¹⁶ In these jurisdictions, equal sharing of the partners' property may be a guiding principle in determining an award,¹⁷ but other principles such as meeting future needs and compensating for economic disadvantage resulting from the relationship are also relevant.¹⁸ These principles usually develop through case law. However, in Scotland a court's discretion is guided by a set of statutory principles.¹⁹
- 8.14 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.²⁰ The

¹³ At [149].

¹⁴ At [257].

¹⁵ See, for example, the law in British Columbia where "family property" is generally shared equally, but a court has the power to order unequal division where equal division would be "significantly unfair": Family Law Act SBC 2011 c 25, s 95.

¹⁶ See Family Law Act 1975 (Cth); Matrimonial Causes Act 1973 (UK); Family Law (Scotland) Act 1985; and Family Law (Divorce) Act 1996 (Ireland).

¹⁷ See, for example, *White v White* [2001] 1 AC 596 (HL); and *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 for a discussion of the principle of equal sharing applied in the courts in England and Wales. In Scotland, the principle that matrimonial property is to be shared fairly between the parties is a statutory principle under s 9(1)(a) of the Family Law (Scotland) Act 1985, and under s 10(1), matrimonial property is "taken to be shared fairly ... when it is shared equally or in such other proportions as are justified by special circumstances".

¹⁸ See *Waggott v Waggott* [2018] EWCA Civ 727, [2019] 2 WLR 297 for a discussion of these principles as they apply in England and Wales. See also s 9 of the Family Law (Scotland) Act 1985.

¹⁹ Family Law (Scotland) Act 1985, s 9.

²⁰ 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:

disadvantage of such an approach is that the law is less accessible and 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.²¹

Results of consultation

- 8.15 Most submitters who commented on equal sharing in the Issues Paper were concerned that the equal sharing of pre-relationship property after three years is unfair.²² This was a strong theme from consultation and is explored in Chapter 3. In that chapter, we recommend that partners should no longer be required to share property that was acquired before the relationship was contemplated other than increases in value that occur during the relationship and were attributable to the relationship, including any increases in the value of the family home.²³
- 8.16 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 issue was raised in 24 submissions on the Issues Paper, 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

... 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 reallocation 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.

²¹ In the United Kingdom, 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 sharing: cl 4(2). The Bill received its third reading in the House of Lords on 19 December 2018 and is now awaiting its second reading in the House of Commons. In Australia, 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 recommended that the Family Law Act 1975 (Cth) should be reformed to introduce a presumption that the parties made equal contributions during the relationship. The Commission explained that, when a court exercises its discretion to make property settlement orders under s 79 having regard, among other things, to the partners' contributions, the starting point of presumed equality would reduce conflict and focus the parties' attention on the adjustment necessary to take account of each party's future economic circumstances: Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [7.1] and Recommendation 12.

²² 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 one 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.

²³ Family chattels should, however, continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 3.

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.

- 8.17 These submitters favoured division on the basis of the partners' contributions to the relationship. The 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 6) 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.
- 8.18 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 10.
- 8.19 We received 10 submissions that commented specifically on the proposal in the Preferred Approach Paper that the general rule of equal sharing should be retained.²⁴ This was supported by the New Zealand Law Society (NZLS), academics Professor Nicola Peart and Nikki Chamberlain and one practitioner. The Auckland District Law Society (ADLS) submitted that equal sharing is a good "general rule" for the division of relationship property as it allows for recognition of both financial and non-financial contributions to a relationship. It supported equal sharing provided the definition of relationship property excludes pre-relationship property, gifts and inheritances, regardless of how such property is used or applied by the family. We address ADLS's submissions regarding classification in Chapter 3. Four members of the public were concerned that equal sharing can be unfair where there are no children of the relationship, where the partners are older or where they make different contributions to the relationship or have different career trajectories. One practitioner submitted that equal sharing should be opt in. Whether the PRA should be opt in is discussed in Chapter 6.

²⁴ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P11.

Conclusions

RECOMMENDATIONS

R37 Each partner should continue to be entitled to share equally in all relationship property under the new Act, subject to limited exceptions.

R38 Sections 11A and 11B of the PRA should be repealed.

- 8.20 We recommend retaining equal sharing, subject only to the limited exceptions discussed below and in Chapter 9. We recommend simplifying the equal sharing rule currently found in section 11 by removing the distinction between the family home, family chattels and other relationship property. This distinction is unnecessary given that the same rules of division have applied to all items of relationship property since 2001.
- 8.21 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 generally continue to make more non-financial contributions than men.²⁵
 - (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).

²⁵ See Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (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.²⁶ This would hinder the simple, speedy and inexpensive resolution of relationship property matters.
- 8.22 We also recommend repealing sections 11A and 11B. As explained at paragraph 8.2, these provisions became largely redundant when, in 2001, all relationship property became subject to the general rule of equal sharing. Retaining these provisions and, in particular, section 11A would also be inconsistent with our recommendations relating to classification in Chapter 3. Under those recommendations, the family home will no longer be classified as relationship property on the basis of family use but instead will be treated in the same way as any other item of property for classification purposes.²⁷
- 8.23 Our recommendations should be seen as a package of reforms. The key issues identified with equal sharing are addressed by our recommendations in Chapter 3 and Chapter 10. In light of those recommendations, we consider that the benefits of a simple, well-understood and certain rule of division outweigh the benefits of adopting a more individualised and discretionary approach to division.

THE EXCEPTION TO EQUAL SHARING FOR EXTRAORDINARY CIRCUMSTANCES

Background

- 8.24 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. Contributions to the relationship are defined in section 18 and include monetary and non-monetary contributions. Section 18(2) 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.
- 8.25 The operation of section 13 was settled by a series of Court of Appeal cases decided shortly after the Matrimonial Property Act 1976 was enacted.²⁸ In 2016, the High Court described the approach to be taken under section 13 as "uncontroversial and beyond doubt".²⁹

²⁶ 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.

²⁷ Except that any increases in the value of the family home during the relationship will be treated as a distinct item of relationship property. Repealing s 11A of the Property (Relationships) Act 1976 will ensure that one partner is not required to share the full proceeds of the sale of their separate property family home, contrary to our recommendations in Chapter 3.

²⁸ 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 authoritative despite the 2001 amendments to what is now the Property (Relationships) Act 1976: *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC).

²⁹ *B v B* [2016] NZHC 1201, [2017] NZFLR 56 at [26].

- 8.26 Section 13 sets a high threshold for departing from equal sharing. In *Martin v Martin*, the Court of Appeal said:³⁰
- 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.
- 8.27 Section 13 is not, however, an impossible threshold.³¹ In determining whether the section 13 threshold is met, all the circumstances of the case must be considered.³² This requires a comparison of the relevant relationship against the whole range of different qualifying relationships rather than against some kind of relationship "norm".³³
- 8.28 The fact that one partner brought the family home to the relationship,³⁴ earned significantly more than the other partner,³⁵ is significantly younger or older than the other partner³⁶ or is nearing retirement on separation³⁷ 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.³⁸
- 8.29 There are two broad categories of cases where section 13 applies:³⁹
- (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

³⁰ *Martin v Martin* [1979] 1 NZLR 97 (CA) at 102.

³¹ *Jones v Ballantine* (1984) 1 FRNZ 140 (HC) at 141.

³² *S v W* [2013] NZHC 1809 at [68], affirming *Joseph v Johansen* (1993) 10 FRNZ 302 (CA).

³³ *Joseph v Johansen* (1993) 10 FRNZ 302 (CA) at 307.

³⁴ 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.

³⁵ See *S v W* [2013] NZHC 1809 at [78].

³⁶ *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [134].

³⁷ At [134].

³⁸ For example, see *B v S* [2016] NZFC 7132. In that case, there was a finding of extraordinary circumstances where S 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, S was 22 years older than B and, realistically, S's opportunities to re-establish herself following on from the breakdown of the marriage were limited as S was aged 74 years and in receipt of a benefit. In the more recent case of *K v R* [2018] NZHC 5032, [2018] NZFLR 841, the High Court upheld the Family Court's decision to order an unequal division of relationship property in favour of Ms R, even though Mr K had contributed to outgoings, financially supported Ms R for part of their relationship and worked on improvements to the family home. The Court noted at [38] that one reason for this finding was that R had contributed the family home to the relationship using money from an earlier relationship property settlement that "represented the fruits of Ms R's life endeavours". The High Court held at [30]–[31] that the contribution of the property was not given undue weight in the context of the time the partners were together and the other contributions made.

³⁹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [12.28]–[12.30].

very short period of time⁴⁰ or where an inheritance was applied to the family home or family chattels shortly before the partners separated.⁴¹

- (b) Where there is a gross disparity in contributions to the relationship.⁴² 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.⁴³

Issues

- 8.30 In the Issues Paper, we expressed the view that a court must be able to depart from equal sharing in appropriate cases and that there should be a high threshold for departing from equal sharing in order to preserve the principles of the PRA.⁴⁴
- 8.31 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.⁴⁵
- 8.32 We noted two options for reform:⁴⁶
- (a) **Option 1:** Prescribing in greater detail the matters a court should take into account when deciding whether section 13 should apply.
- (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.

Approach in comparable jurisdictions

- 8.33 As noted at paragraph 8.12, 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. There is, however, no consistency in the test for departing from equal sharing.

⁴⁰ 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).

⁴¹ See *A v C* (1997) 16 FRNZ 29 (HC).

⁴² RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online 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 97 (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); and *SJB v IRM* [2011] NZCA 435, [2011] NZFLR 1087.

⁴³ *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: *Joseph v Johansen* (1993) 10 FRNZ 302 (CA) at 306 per Richardson J and at 309 per McKay J.

⁴⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [12.16]–[12.17].

⁴⁵ At [12.18]–[12.19].

⁴⁶ At [12.20].

- 8.34 In Canada, the provinces adopt different tests for departing from equal sharing, including where equal sharing would be "unconscionable",⁴⁷ "inequitable",⁴⁸ "significantly unfair",⁴⁹ "grossly unfair or unconscionable",⁵⁰ "unfair or unconscionable"⁵¹ or "unfair and inequitable".⁵² 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.⁵³
- 8.35 Scotland operates a discretionary regime,⁵⁴ although a court must exercise its discretion by applying a principle of fair sharing of matrimonial property, which requires equal sharing or "sharing in such other proportions as are justified by special circumstances".⁵⁵ 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.⁵⁶ The discretionary approach in Scotland⁵⁷ and the lower threshold of "special circumstances" means that, overall, the threshold for departing from equal sharing is much lower than in New Zealand or the Canadian jurisdictions.⁵⁸

Results of consultation

- 8.36 Overall, 12 submitters commented specifically on section 13 in submissions on the Issues Paper and Preferred Approach Paper. Submitters generally agreed that there remains a need for a provision that permits a court to depart from equal sharing in appropriate

⁴⁷ In Ontario, see Family Law Act RSO 1990 c F.3, s 5(6); and Prince Edward Island, see Family Law Act RSPEI 1988 c F-2.1, s 6(5).

⁴⁸ In New Brunswick, see Marital Property Act RSNB 2012 c 107, s 7.

⁴⁹ In British Columbia, see Family Law Act SBC 2011 c 25, s 95.

⁵⁰ In Manitoba, see The 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.

⁵¹ In Nova Scotia, see Matrimonial Property Act RSNS 1989 c 275, s 13.

⁵² In Saskatchewan, see The 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.

⁵³ 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; The Family Property Act SS 1997 c F-6.3, s 21(3); Matrimonial Property Act RSNS 1989 c 275, s 13; Family Law Act RSNL 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 36(6); Marital Property Act RSNB 2012 c 107, s 7; and Family Property and Support Act RSY 2002 c.83, s 13.

⁵⁴ Discretionary regimes also operate in Australia, England and Wales and Ireland, as discussed at paragraph 8.13 above. However, Scotland is the only discretionary regime that applies a statutory sharing principle.

⁵⁵ Family Law (Scotland) Act 1985, ss 9(1) and 10(1).

⁵⁶ Section 10(6).

⁵⁷ Four other principles in s 9 can affect orders for financial provision 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.

⁵⁸ 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.

- cases. NZLS commented that section 13 prevents partners falling prey to strict equal sharing within a narrow probationary period.
- 8.37 Professor Peart, two practitioners and five members of the public submitted that the section 13 threshold was set too high. One practitioner submitted that the courts put a gloss on the plain words of section 13 and require something demonstrably or truly exceptional rather than something that is simply "extraordinary". That practitioner submitted that a significant disparity in contributions should always be treated as extraordinary; it should not have to amount to a "gross" disparity. Another practitioner, however, thought that "exceptional circumstances" was a lower and more appropriate threshold for section 13 than the current threshold.
- 8.38 In its submission on the Issues Paper, 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. In its submission on the Preferred Approach Paper, however, NZLS suggested an amendment to "slightly lower the threshold from extraordinary circumstances to exceptional circumstances".
- 8.39 ADLS, in contrast, supported retaining section 13 in its current form provided pre-relationship property, gifts and inheritances are classified as separate property regardless of how such property is used or applied by the family. We address ADLS's submissions regarding classification in Chapter 3. ADLS supported the publication of a guide explaining how the section 13 test operates and when it might apply.
- 8.40 Practitioners and Family Court judges we spoke with 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.

Conclusions

RECOMMENDATIONS

R39

The new Act should continue to provide an exception to equal sharing for extraordinary circumstances that make equal sharing repugnant to justice. Where the exception applies, relationship property should continue to be divided in accordance with each partner's contributions to the relationship.

R40

The new Act should retain the existing definition of contributions to the relationship in section 18 of the PRA but should clarify that the care of any former child of the relationship is included.

- 8.41 We recommend the Relationship Property Act (the new Act) retains the existing exception to equal sharing for extraordinary circumstances that make equal sharing repugnant to justice in section 13 of the PRA. We consider that the proper role of this exception, in light of our other recommendations in this report that are intended to align the law more closely to public values and expectations, remains to address truly

extraordinary cases that cannot be provided for in specific statutory rules and that would make equal sharing, in the broader context of the framework of the new Act, repugnant to justice.

- 8.42 When the exception for extraordinary circumstances applies, relationship property should continue to be divided on the basis of each partner's contribution to the relationship. We think this remains appropriate as it permits a court to consider all the relevant circumstances of the relationship and arrive at an individualised result without compromising the principles of the new Act, for example, a court is not limited to focusing only on monetary contributions to the relationship.⁵⁹
- 8.43 We are satisfied that extraordinary circumstances making equal sharing repugnant to justice remains an appropriate threshold for departing from equal sharing and is flexible enough to respond to the many different variations in relationships today and into the future. While we recognise submitters' concerns that the threshold in section 13 is too high, our review of the cases has not identified a concern with how it is applied in practice.⁶⁰ Further, any amendment to the section 13 threshold, whether to lower the threshold or modernise the language, would have 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.⁶¹ A lower threshold would also increase the risk of litigation as more people would seek to rely on the exception. This would increase costs and delay resolution which is inconsistent with the principle of inexpensive, simple and speedy resolution of relationship property matters. Given our view on the proper role of an exception to equal sharing discussed above, we do not think a lower threshold is justified in the New Zealand context.
- 8.44 We have also considered but do not recommend including in the new Act a list of factors relevant to the application of the exception for extraordinary circumstances. This is for several reasons:
- (a) First, we do not consider that the operation of the exception is amenable to a simple list of relevant considerations. In determining whether the threshold of extraordinary circumstances making equal sharing repugnant to justice 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.

⁵⁹ 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.

⁶⁰ See, for example, the High Court's decision in *K v R* [2018] NZFLR 841, [2018] NZHC 5032, discussed at n 38 above. See also *Brown v Starke* [2016] NZFC 7132; *Bowden v Bowden* [2016] NZHC 1201, [2017] NZFLR 56; and *Vann v Fay* [2016] NZFC 1676.

⁶¹ 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 8.25 above).

- (b) Second, relationships are of infinite variety, and extraordinary circumstances "can involve an infinite variety of situations".⁶² Section 13 as currently worded imposes no limits on the range of circumstances the courts can take into account.⁶³ Coming up with a comprehensive list of relevant considerations would be difficult and likely so wide-ranging as to be of little assistance.
- (c) Third, the current 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".⁶⁴ The High Court in a subsequent decision said this "constituted a permission to adapt the law to changing social norms".⁶⁵ 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.

8.45 We do, however, recognise the need for more information to be available to the public on how the exception for extraordinary circumstances operates in practice. In Chapter 16, we recommend the publication of a comprehensive information guide. That guide should include information about when a court might apply the exception and depart from equal sharing and what it means to divide relationship property on the basis of each partner's contributions to the relationship.

Clarifying what is a contribution to the relationship

8.46 We are satisfied that the wide definition of contributions to the relationship in section 18 remains sound. However, we recommend clarifying that the care of any child of the relationship, which is a contribution under section 18(1)(a), includes the care of any former child of the relationship. This clarification is necessary because a child of the relationship is defined to mean any child of both partners and any other child who was a member of the partners' family at the time of separation.⁶⁶ Therefore, the care during the relationship of a former child of the relationship, such as a stepchild who had left home before the partners separated, would not be counted as a contribution to the relationship under section 18.⁶⁷ This is clearly inappropriate given that all other types of contributions made throughout the relationship are relevant under section 18.⁶⁸

⁶² *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 at [28].

⁶³ *Joseph v Johansen* (1993) 10 FRNZ 302 (CA) at 304.

⁶⁴ At 307.

⁶⁵ *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [129].

⁶⁶ Property (Relationships) Act 1976, s 2 definitions of "child of the civil union", "child of the de facto relationship" and "child of the marriage".

⁶⁷ See, for example, *M v K* [2012] NZFC 7672, where the Court said at [51]:

There are no children of the relationship. Ms M had three children from a former relationship. Two of them were in her care when the marriage began. The eldest moved out after the marriage. The youngest son resided with the parties until separation. He is therefore considered a child of the marriage for the purposes of s 18(1)(a).

⁶⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) (Issues Paper) at [28.48]–[28.49]. The New Zealand Law Society supported reform to address this

THE RELEVANCE OF MISCONDUCT

Background

8.47 Section 18A addresses the relevance of misconduct in relationship property matters. It provides:

18A Effect of misconduct of spouses or partners

- (1) Except as permitted by subsections (2) and (3), a court may not take any misconduct of a spouse or partner into account in proceedings under this Act, whether to diminish or detract from the positive contribution of that spouse or partner or otherwise.
- (2) Subject to subsection (3), the court may take into account any misconduct of a spouse or partner—
 - (a) in determining the contribution of a spouse to the marriage, or of a civil union partner to the civil union, or of a de facto partner to the de facto relationship; or
 - (b) in determining what order it should make under any of sections 26, 26A, 27, 28, 28B, 28C, and 33.
- (3) For conduct to be taken into account under subsection (2), the conduct must have been gross and palpable and must have significantly affected the extent or value of the relationship property.

8.48 The effect of section 18A is that the partners' conduct during the relationship is generally irrelevant to the division of property unless it was gross and palpable and significantly affected the extent or value of the relationship property. For convenience, we refer to this as "gross and palpable misconduct". This reflects the implicit "no fault" principle underpinning the PRA. The extent to which section 18A prevents a court from taking misconduct into account for other purposes is uncertain, for the reasons discussed at paragraphs 8.57–8.64 below.

Legislative history of section 18A

8.49 Section 18A has been the subject of several amendments over the years. When originally enacted in 1976, section 18(3) (as it then was) provided:

In determining the contribution of a spouse to the marriage partnership any misconduct of that spouse shall not be taken into account to diminish or detract from the positive contribution of that spouse unless the misconduct has been gross and palpable and has significantly affected the extent or value of the matrimonial property. The Court may, however, have regard to such misconduct in determining what order it should make under any of the provisions of sections 26, 27, 28, and 33 of this Act.

8.50 Section 18(3) had a narrow application, applying only to prevent a court from diminishing or detracting from a partner's positive contributions but expressly permitting misconduct to be taken into account under other specified sections. Assessing contributions to the relationship had greater significance then, as matrimonial property other than the family home and family chattels was divided on a contributions basis if one partner's contribution to the relationship was clearly greater than that of the other partner.⁶⁹ By preventing a court from taking into account misconduct "to diminish or

issue in its submission on the Issues Paper. See also discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [18.81].

⁶⁹ Matrimonial Property Act 1976, s 15 (repealed).

detract from the positive contribution of that spouse", section 18(3) ensured a court did not punish a spouse for their misconduct by depriving them of a share in the matrimonial property unless the conduct met the prescribed threshold of gross and palpable misconduct.⁷⁰

- 8.51 In 1986, section 18(3) was amended in order to make it clear that the threshold of gross and palpable misconduct also applied when a court determines "what order it should make to carry out the division of matrimonial property".⁷¹ The revised section 18(3), now reflected in the current wording of section 18A, was expressed to apply much more broadly, providing that a court may not take misconduct into account in any proceedings under the PRA when assessing contributions "or otherwise".

Issues

- 8.52 The terms of section 18A and how it has been interpreted by the courts give rise to issues in relation to:
- (a) how misconduct can affect the partners' shares in relationship property given the unclear relationship between sections 13 and 18A; and
 - (b) whether misconduct can be taken into account for other purposes under the PRA.
- 8.53 In the Issues Paper, we also questioned whether, as a matter of policy, misconduct and family violence, in particular, should have a greater bearing on how relationship property is divided between the partners.

The relationship between section 13 and section 18A is unclear

- 8.54 The relationship between section 13 (the general exception to equal sharing) and section 18A is unclear. This is because 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.
- 8.55 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 13.⁷²

⁷⁰ In the White Paper published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice explained: "Nor should the share of one spouse be enlarged simply to punish the misconduct of the other spouse." AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10.

⁷¹ Law Reform (Miscellaneous Provisions) Bill 1986 (46-1) (explanatory note) at ix. This addressed the uncertainty in s 18(3) as enacted, which had resulted in differing interpretations in the cases. See *Hackett v Hackett* [1977] 2 NZLR 429 (SC); and *Van Zanten v Van Zanten* (1979) 1 MPC 217 (SC).

⁷² The authors of Nicola Peart (ed) *Brookers Family Law – Family Property* (online 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.

- 8.56 It is also unclear whether the *effect* of misconduct falling short of the gross and palpable threshold is relevant under section 13. In *Joseph v Johansen*, 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 that resulted from that misconduct.⁷³ In the later case of *J v J*, the Court of Appeal took a more restrictive approach, observing that "misconduct is irrelevant except to the extent provided for by s 18A(2) and (3)".⁷⁴

The extent to which section 18A excludes misconduct for other purposes is unclear

- 8.57 Section 18A provides a court may not take any misconduct into account "whether to diminish or detract from the positive contribution of that spouse or partner or otherwise". This has been interpreted as imposing a comprehensive prohibition on taking misconduct into account for any purpose except as expressly provided under sections 18A(2) and (3).⁷⁵
- 8.58 Arguably, the breadth of the wording in section 18A(1) and the way it has been interpreted does not reflect the narrower original policy intent described at paragraph 8.51 above. It also gives rise to several issues of interpretation, as many other provisions of the PRA apply in situations where there is misconduct. Members of the Supreme Court have recently expressed doubt as to the universality of section 18A's application in the case of *Scott v Williams*, discussed below.⁷⁶

The relevance of misconduct to other provisions of the PRA

- 8.59 Several provisions in the PRA allow a court to make orders when one partner's conduct has affected the other partner's interests under the PRA. These provisions address situations where property should be restored to a partner or to the relationship property pool in order to achieve a just division of property. In some cases, these provisions will apply when one partner's conduct can be described as misconduct. For example:

By contrast, the authors of RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online 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 *S v W* [2013] NZHC 1809 at [79].

⁷³ *Joseph v Johansen* (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. In *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006, Gendall J cited *Joseph v Johansen* (1993) 10 FRNZ 302 (CA) and 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.

See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online 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].

⁷⁴ *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 an 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 of the Property (Relationships) Act 1976 (at [10]). The Court held that, because the misconduct did not fit within s 18A(3), it was irrelevant because of s 18A(1).

⁷⁵ At [11].

⁷⁶ At paragraphs 8.62–8.64.

- (a) Section 17A applies when one partner has, by deliberate action or inaction materially diminished the value of the other partner's separate property, for example, by refusing to return the other partner's separate property jewellery.⁷⁷
 - (b) Section 18C applies when, after separation, one partner has by deliberate action or inaction materially diminished the value of relationship property, for example, materially diminishing the value of a company by advancing capital payments to one partner and related parties.⁷⁸
 - (c) Section 20E applies when one partner has satisfied a personal debt with relationship property, for example, when the family home and family vehicle are sold to pay one partner's gambling debt.⁷⁹
 - (d) Sections 43 and 44 apply where a disposition is intended or made in order to defeat a partner's claim or rights under the PRA, for example, by transferring money to the United States in a scheme to defeat a partner's rights.⁸⁰
 - (e) Sections 44C and 44F apply when one partner has disposed of relationship property to a trust or qualifying company that has the effect of defeating the other partner's claim or rights under the PRA, for example, when a partner settles their home on trust to guard against claims under the PRA.⁸¹
- 8.60 Section 40 also enables a court to make such orders as to costs as it sees fit. A court could, for example, make an award of costs to reflect a partner's unreasonable conduct of litigation.
- 8.61 In practice, the courts do not appear to be constrained by section 18A when exercising discretion under these provisions. Nonetheless, the relationship between section 18A and these provisions should be clarified.

Observations of the Supreme Court in *Scott v Williams*

- 8.62 In *Scott v Williams*, the Supreme Court commented on the relevance of one partner's misconduct to a court's exercise of discretion in vesting items of relationship property in the other partner under section 33 of the PRA.⁸² Glazebrook J commented:⁸³

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.

- 8.63 Similarly, William Young J said:⁸⁴

⁷⁷ *D v D* (1988) 3 FRNZ 624 (HC).

⁷⁸ *M v A* HC Wellington CIV-2006-485-1868, 5 April 2007.

⁷⁹ *M v M* (1980) 3 MPC 117 (HC). The Court did not make orders under s 20E, however, because the husband had no funds with which to pay the order.

⁸⁰ *H v D* FC Auckland FAM-2003-084-33, 14 November 2011.

⁸¹ *O v S* (2006) 26 FRNZ 459 (FC).

⁸² *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [61] per Glazebrook J and at [402] per William Young J. O'Regan J was also in agreement with the comments made by Glazebrook and William Young JJ (at [364]).

⁸³ *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [61].

⁸⁴ At [402].

Despite the breadth of the language of s 18A, I have some reservations as to the universality of its application. As I have said, on the basis of the Judge's findings, Mr Williams' conduct in relation to the litigation included dishonesty, concealment and manipulation. I find it hard to accept that such conduct could not be reflected in an order for costs. The hostility between the parties (which, given the tenor of the judgment, Judge McHardy saw as having been exacerbated by the conduct of Mr Williams) was relevant to whether the Remuera properties should be dealt with in such a way as might result in Ms Scott and Mr Williams being neighbours. And, coming more closely to the point, the extent to which Ms Scott had refocused her personal and business life around the Remuera properties was material to the vesting decision. It would be odd if Mr Williams could insist on her connection with the properties being taken out of consideration on the basis that it had been caused by his unreasonable conduct of the litigation. On the other hand, I accept that this factor – that is, her connection with the properties – should not have been accorded enhanced significance by reason of Mr Williams' unreasonable conduct.

- 8.64 While these comments are obiter, they highlight the practical difficulties inherent in attempting to comprehensively exclude any consideration of one partner's misconduct when exercising discretion under the PRA. A court would ordinarily have regard to the full factual circumstances of the case, including the conduct of the partners and the impact that conduct may have had. We understand that it is not uncommon for evidence in relationship property matters to include a discussion of conduct (which may sometimes constitute misconduct). Preventing a court from taking misconduct into account effectively requires a court to ignore facts it would otherwise have considered relevant. It is also unclear when *conduct* can be described as *misconduct* given the term *misconduct* is not defined in the PRA.

Should misconduct have a greater role in the division of relationship property?

- 8.65 It is rare for misconduct and family violence, in particular, to have any impact on the division of property under the PRA. This is for two reasons.
- 8.66 First, it is often difficult to satisfy the high threshold of gross and palpable misconduct. The requirement that misconduct be "palpable" has been interpreted to mean that the misconduct must be "readily perceived or evident",⁸⁵ which might exclude misconduct that is subtle or hidden. The requirement that the misconduct must have significantly affected the extent or value of relationship property is also limiting as it focuses the inquiry on misconduct of a financial nature, such as dissipation of property through gambling or fraud. These requirements are significant barriers to taking into account family violence, in particular. As the District Court observed in *W v G*, "[t]hat the misconduct must be externally perceived will make it difficult for situations of [family] violence to meet this test".⁸⁶ Even if family violence does satisfy this requirement, the need to also establish a causative link between the misconduct and the extent or value

⁸⁵ *Wright v Graham* DC Wellington FP558/92, 16 August 1995 at 12; and *Watson v Watson (No 2)* (1999) 19 FRNZ 24 (DC) at 25.

⁸⁶ *Wright v Graham* DC Wellington FP558/92, 16 August 1995 at 12. In that case, the Court was satisfied that there was gross and palpable misconduct on the part of Mr Graham by virtue of the violence. However, the evidence fell short of establishing a causative link between that misconduct and the value of the property.

of relationship property "has caused Judges difficulty in recognising in any real way the economic consequences of [family] violence".⁸⁷

- 8.67 Second, there must be extraordinary circumstances to justify a departure from equal sharing under section 13. Family violence may not meet this test. 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".⁸⁸ In *H v D*, violence occurred throughout the relationship, exposing the children to physical, emotional and psychological abuse.⁸⁹ However, the High Court agreed with the Family Court that the circumstances of this relationship were "ordinary rather than extraordinary – they are typical of many current de facto or marriage relationships".⁹⁰
- 8.68 We are only aware of one case where family violence was found to be gross and palpable misconduct, 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 under section 13.⁹¹
- 8.69 As we observed in the Issues Paper, 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.⁹² There are 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".⁹³
 - (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

⁸⁷ *Watson v Watson (No 2)* (1999) 19 FRNZ 24 (DC) at 25, citing *Wright v Graham* DC Wellington FP558/92, 16 August 1995.

⁸⁸ *S v S* DC Whangarei FP888/218/82, 22 April 1991 at 10. The Court found the husband's assaults on the wife were serious, but having regard to the number of assaults (four), 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", the Court was "satisfied that such evidence does not create a situation where there are extraordinary circumstances" (at 10).

⁸⁹ *H v D* HC Wellington CIV-2008-485-950, 3 September 2008.

⁹⁰ At [31].

⁹¹ *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.

⁹² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [12.28] referring to Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 and 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). During the lead-up to the 2001 amendments to the Property (Relationships) Act 1976 (PRA), several submitters said to the Justice and Electoral Select Committee that family violence needed to be taken into account under the PRA regime: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 14–15. Note we use the term "family violence" rather than "domestic violence" to reflect the current terminology in the Family Violence Act 2018.

⁹³ Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

initiatives to curtail violent behaviour.⁹⁴ 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".⁹⁵

- (c) It is inconsistent for the PRA to take into account the consequences of some criminal behaviour, such as fraud but not violence.⁹⁶ 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.⁹⁷ By not penalising violence in property division, the law "ignores the economic effect of the violence on the property of the parties".⁹⁸

8.70 On the other hand, there are several arguments against giving family violence greater weight in property division. In particular:

- (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.⁹⁹
- (b) A specific exception carries with it a serious risk of abuse by the predominant aggressor.¹⁰⁰
- (c) There are practical issues with how such an exception would operate. The Australian experience detailed below demonstrates the evidential difficulties in attempting to recognise and respond to family violence within the narrow context of property division.

⁹⁴ At 153. Current action and innovations being undertaken by the Government include the Integrated Safety Response/Whangaia Ngā Pa Harakeke, e Tū Whānau and Pasefika Proud and the Family Violence Act 2018 and Family Violence (Amendments) Act 2018, which seek 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 2018, the Government launched a joint venture to address family violence. 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).

⁹⁵ 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 (FC) at 171–172.

⁹⁶ 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.

⁹⁷ 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.

⁹⁸ Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

⁹⁹ 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.

¹⁰⁰ See the submission from the Family Violence Death Review Committee discussed below at paragraph 8.79.

- (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.¹⁰¹

Approach in comparable jurisdictions

- 8.71 Property division regimes in comparable jurisdictions are all underpinned by a no-fault philosophy. Misconduct is therefore of limited relevance to property matters unless it has a direct financial impact on the partners or their property. In some jurisdictions, the limited relevance of misconduct when making orders in relation to the partners' property interests is expressed in legislation.¹⁰² However, it is common particularly in rules-based jurisdictions for the legislation to be silent on misconduct, leaving it to the courts to decide whether circumstances justify a departure from equal sharing.
- 8.72 No comparable jurisdiction imposes a comprehensive statutory prohibition on taking misconduct into account for all other purposes, such as deciding how to implement a property division or whether to make an occupation order.

Recent developments to take greater account of family violence in Australia

- 8.73 Case law in Australia 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 contribution to the marriage".¹⁰³ In practice, however, family violence is rarely relied on, which has raised concerns about access to justice for victims of family violence.¹⁰⁴ Several problems have been identified with the Australian approach, including the difficulty in proving family violence and its impact on the victim's

¹⁰¹ 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 AJFL 117. However, that goes beyond the scope of the Property (Relationships) Act 1976 and our review.

¹⁰² In Canada, misconduct is typically irrelevant unless it amounts to dissipation or has some other direct financial impact: see, for example, The Family Property Act CCSM 2017 c F25, s 14(3); The Family Property Act SS 1997 c F-6.3, s 25; and Family Law Act RSNL 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 Fam 72 (CA); *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618; and *Z v Z* [2016] EWHC 3234 (Fam), [2018] 1 FLR 153.

¹⁰³ *In the Marriage of Kennon* (1997) 22 Fam LR 1 (FamCA) at 3.

¹⁰⁴ 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; and Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [6.86].

contributions to the relationship and the difficulty in quantifying the impact of family violence.¹⁰⁵

- 8.74 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 regime.¹⁰⁶ Others suggest that family violence should be considered a negative contribution to the relationship property¹⁰⁷ 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.¹⁰⁸
- 8.75 In March 2019, the Australian Law Reform Commission (ALRC) released a report on its review of the family law system.¹⁰⁹ It recommended amendments to acknowledge the relevance of family violence to the economic circumstances of the party who has suffered violence.¹¹⁰ This would be achieved by the express inclusion of a tort of family violence giving rise to the ability to claim compensation for both physical and psychiatric injury and any consequent economic loss.¹¹¹ The ALRC preferred addressing family violence through tortious compensation rather than weighing violence when assessing the parties' contributions. It explained the level of damages should reflect the harm suffered rather than being based on a percentage of the couple's wealth.¹¹² The ALRC emphasised this is not a reinstatement of the fault principle formerly underpinning divorce but rather it allows the court to consider the economic consequences of family violence by reference to the particular circumstances of the victim.¹¹³ The ALRC said the tort should be included within the parties' property settlement to avoid additional proceedings and minimise the time and costs associated with bringing a claim.¹¹⁴ The Australian Government is currently considering the ALRC's report.

Results of consultation

- 8.76 We received 32 submissions on the Issues Paper and 23 submissions on the Preferred Approach Paper that commented on the role of misconduct under the PRA. Most submitters focused on family violence and the impact it should have on property

¹⁰⁵ 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 Qijun Jia "Can domestic violence affect property settlement?" *The Bulletin* 39(4) (South Australia, May 2017) at 40.

¹⁰⁶ 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.

¹⁰⁷ Qijun Jia "Can domestic violence affect property settlement?" *The Bulletin* 39(4) (South Australia, May 2017) at 41.

¹⁰⁸ Patrick Parkinson "Reforming the Law of Family Property" (1999) 13 AJFL 117.

¹⁰⁹ Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019).

¹¹⁰ At [7.102].

¹¹¹ Recommendation 19.

¹¹² At [7.106].

¹¹³ At [7.107].

¹¹⁴ At [7.114].

division, although a few members of the public submitted that other forms of misconduct, including, in particular, adultery, should be considered when dividing property under the PRA.

- 8.77 Members of the public were divided on the relevance of family violence to property division. We received 13 submissions on the Issues Paper and nine submissions on the Preferred Approach Paper from members of the public who 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 on the Issues Paper 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.
- 8.78 The Ministry for Women, The Backbone Collective and most members of the National Council of Women of New Zealand were 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.
- 8.79 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 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".
- 8.80 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. A similar submission was made by a practitioner who commented 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".

- 8.81 In the Preferred Approach Paper, we proposed clarifying that a court can take into account gross and palpable misconduct when deciding whether section 13 applies.¹¹⁵ However, we did not propose a separate exception to equal sharing for family violence. Instead, we considered that property division under the PRA should be considered in the context of the Government's wider response to family violence.¹¹⁶ These proposals were supported by NZLS, ADLS and five academic and practitioner experts and were broadly consistent with the earlier submission of FVDRC. ADLS submitted that misconduct should be limited to conduct that has a direct financial impact on the partners or their property. It was wholly opposed to family violence becoming a specific exception to equal sharing. ADLS thought this would broaden the discretion of the court too widely and place an inappropriate focus on finding fault in relationship breakdowns, potentially encouraging such allegations and prolonging litigation.
- 8.82 The Judges of the Family Court observed that section 18A is rarely applied. The Judges thought the PRA should continue to exclude fault-based claims based on moral issues and the high threshold in section 18A should remain. However, they favoured a change in the terminology because the language of "gross and palpable" is problematic due to the literal meaning of "palpable", being "readily perceived or evident", as well as being an unfamiliar legislative term. They suggested substituting the wording with "serious misconduct". The Judges noted the contrast between the powers to compensate under section 18C for dissipation of property post-separation and section 18A. They said clarification of the powers to compensate for misconduct would be a welcome reform. The Judges supported the proposal in the Preferred Approach Paper to clarify the relationship between the two provisions.¹¹⁷

Conclusions

RECOMMENDATIONS

R41

The new Act should provide that a court may not take into account any misconduct of a partner for the purposes of:

- a. diminishing or detracting from that partner's positive contributions to the relationship; or
- b. diminishing or detracting from that partner's entitlement, rights or interests when determining whether to make any order under sections 26, 26A, 27, 28, 28B, 28C and 33 of the PRA (those provisions to be retained in the new Act);

unless that misconduct amounts to gross misconduct that has significantly affected the extent or value of the relationship property.

¹¹⁵ Law Commission Review of the Property (Relationships) Act 1976: Preferred Approach – *Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P12.

¹¹⁶ P13.

¹¹⁷ At [3.66].

R42 For the avoidance of doubt, the new Act should provide that, when deciding whether there are extraordinary circumstances that make equal sharing repugnant to justice, a court may take into account a partner's gross misconduct when that misconduct has significantly affected the extent or value of relationship property.

R43 The Government should consider the relevance of family violence to the division of property at the end of a relationship under the new Act in the context of its wider response to family violence.

Restating the relevance of misconduct under the new Act

- 8.83 We recommend restating the relevance of misconduct for the purposes of the new Act in a way that is clear and consistent with the original policy intent of the PRA described at paragraph 8.50 above. Specifically, a court should not be able to deprive a partner of entitlements, rights and interests because of their misconduct unless that misconduct meets a high threshold.
- 8.84 The qualified prohibition on taking misconduct into account should continue to focus on assessments of a partner's contributions to the relationship and determinations under current sections 26, 26A, 27, 28, 28B, 28C and 33 of the PRA. These provisions should continue in the new Act subject to the amendments we recommend in this report. These are all instances where a court has largely unrestricted discretion to make orders affecting a partner's property entitlements, rights or interests.
- 8.85 The threshold for taking misconduct into account should continue to focus on gross misconduct that has affected the relationship property pool, even when making orders that only affect temporary access to or enjoyment of relationship property. For example, where a partner has depleted significant amounts of relationship property in a particularly blameworthy way (such as deliberate destruction of property or grossly lavish expenditure or dissipation), a court may not be inclined to grant that partner an occupation order under section 27 to meet their resulting accommodation needs. However, we consider that the current requirement in section 18A(3) that misconduct be "palpable" is inappropriate and risks excluding some types of serious misconduct that may be highly relevant but is subtle and hidden.¹¹⁸ We therefore recommend revising the threshold so that the word "palpable" is omitted.
- 8.86 Our recommendations are focused on ensuring a partner is not punished for their misconduct unless it meets the revised threshold of gross misconduct. A court should not be required to make moral judgements as to the blameworthiness of the parties or to dissect the wrongdoing except in cases of gross misconduct. This does not, however, require a court to ignore relevant misconduct when considering the full factual circumstances of the case, nor does it prevent a court from taking into account the *effect* of one partner's misconduct on the other partner, even if the misconduct falls

¹¹⁸ See paragraph 8.66 above.

short of the revised threshold. This affirms the approach of the Court of Appeal in *Joseph v Johansen* (see paragraph 8.56),¹¹⁹ addresses the comments of the Supreme Court in *Scott v Williams* (see paragraphs 8.62–8.63) and appears broadly consistent with the courts' existing pragmatic approach to inquire into the effects of the partners' conduct, notwithstanding the seemingly comprehensive exclusion of misconduct under the current law (see paragraph 8.64).

- 8.87 When taking into account the effects of misconduct, we are confident the courts will continue to distinguish factual matters that are relevant from matters that are irrelevant and take an approach that avoids becoming the arbiter of immaterial recriminations about the partners' conduct.¹²⁰

No general prohibition on taking misconduct into account for other purposes under the new Act

- 8.88 We do not recommend that the new Act expressly preclude a court from taking misconduct into account for other purposes. This ensures a court is able to make orders under other provisions of the new Act where a partner's conduct is directly relevant to the court's exercise of discretion, even if that conduct can be described as misconduct. This includes orders under current sections 17A, 18C, 20E, 40, 43, 44, 44C and 44F of the PRA. By not precluding a court from taking misconduct into account under these provisions, the apparent contradiction under the current law is avoided.
- 8.89 Misconduct will not have a role beyond these provisions. This is because most other provisions are expressed as strict rules that do not provide any scope for a court to take misconduct into account, such as the classification provisions and the general rule of equal sharing.¹²¹ Even where a court does have discretion under other provisions, the parameters of that discretion determined by the wording of the provision and its interpretation by the courts provides no scope for a court to take misconduct into account.¹²²

¹¹⁹ See also the recent case of *Miramontes v Brennan* [2017] NZFC 4298, (2017) 31 FRNZ 745, where the Court held that, because the applicant had contributed settled housing and settled employment to the relationship, "in the context of abusive and assaultive behaviour to her", her contributions had a higher value than in less adverse circumstances (at [43]). The Court also held that, as a result of a partner's "complex and abusive behaviour" throughout the relationship, the other partner had forgone a higher standard of living than would otherwise have been available and considered this a positive contribution in terms of s 18(1)(g) of the Property (Relationships) Act 1976 (at [45]–[47]).

¹²⁰ We note Glazebrook J's comments in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [63]:
I do stress that parties should take care to introduce conduct evidence only to the extent necessary and relevant. This is not an opportunity to air irrelevant grievances. Extensive affidavit evidence was filed by both parties in this case, much of which appears to be irrelevant and should therefore not have been proffered. Judges should refuse to admit irrelevant evidence.

¹²¹ Sections 8–10 and 11.

¹²² For example, the discretion in s 9(4) to treat property acquired after separation as relationship property has been interpreted as applying only when its acquisition is closely referable to pre-separation activities: *Thompson v Thompson* [2015] NZSC 26, [2015] 1 NZLR 593 at [38]. Another example is s 16, which gives the court discretion to award compensation "according to what it considers just to compensate for the inclusion of the home of only one spouse or partner in the relationship property".

Clarifying the relevance of misconduct to the exception to equal sharing for extraordinary circumstances

- 8.90 We also recommend clarifying that gross misconduct that has affected the relationship property pool can be taken into account when deciding whether there are extraordinary circumstances that make equal sharing repugnant to justice. We do not think Parliament could have intended a restrictive interpretation that requires a court to ignore gross 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.
- 8.91 Gross misconduct, the effect of any misconduct on the other partner (discussed at paragraph 8.86) and all other relevant circumstances would still need to meet the high threshold of extraordinary circumstances that make equal sharing repugnant to justice to justify a departure from equal sharing.

No greater role for misconduct in the division of relationship property

- 8.92 We do not recommend any greater role for misconduct in the division of relationship property beyond the recommendations discussed above. To date, Parliament has resisted calls to give misconduct greater weight in the division of relationship property,¹²³ and we are not persuaded that it is appropriate or desirable that misconduct should play a greater role in property division under the new Act.

No specific exception for family violence

- 8.93 We recognise the concern that sections 13 and 18A and our recommendations for reform discussed above are an inadequate response to family violence. However, we find force in the submission that any reform of the property sharing regime to respond to family violence should follow a full and proper examination of the causes of family violence in New Zealand and "across-the-board solutions" rather than "one-offs in largely unrelated legislation".
- 8.94 We therefore recommend that any reform that has the effect of penalising perpetrators of family violence by reducing their property entitlements on separation 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.
- 8.95 Any future consideration of this issue should take into account the arguments for and against reform set out at paragraphs 8.69–8.70 above.

¹²³

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.

CHAPTER 9

Adjustments to equal sharing

IN THIS CHAPTER, WE CONSIDER:

how partners' property interests, including their entitlement to an equal share in relationship property, should be adjusted in circumstances where:

- both partners owned a home when the relationship began but only one home is shared as relationship property;
- one partner's separate property has been sustained or diminished;
- one or both partners have made contributions after the relationship ends;
- one partner has dissipated property; and
- one partner's personal debts have been satisfied out of relationship property or the other partner's separate property.

INTRODUCTION

9.1 The PRA rests on the general rule of equal sharing with an exception for extraordinary circumstances (discussed in Chapter 8). However, several provisions in the PRA enable a court to adjust the partners' property interests in specific circumstances where the application of the general rule of equal sharing may create injustice.

ADJUSTMENTS WHERE THERE ARE TWO HOMES**Background**

9.2 Section 16 applies in situations where each partner owned a home when the relationship began that was capable of becoming the family home, but on separation, the home (or proceeds of the sale of the home) of only one partner is shared as relationship property.¹ Section 16 also applies where one partner sold their home in contemplation of

¹ Property (Relationships) Act 1976, s 16(1).

the relationship and the other partner's home is shared as relationship property.² When section 16 applies, a court may adjust the shares of the partners in any of the relationship property "according to what it considers just to compensate for the inclusion of the home of only one spouse or partner in the relationship property".³

- 9.3 Section 16 is aimed at remedying a potential unfairness under the family use approach to classification under which a decision to live in one partner's home entitles the other partner to an equal share in that home while the other partner retains their own home as their separate property.⁴
- 9.4 Section 16 is limited, however, in the extent to which it can respond to potential unfairness under the family use approach.⁵ It does not apply where one partner owned a home and the other partner owned separate property other than a home when the relationship began⁶ or owned no property at all, nor does section 16 apply when a home is held on trust or when a home is acquired by one partner during the relationship as a third party gift or inheritance.

Issues

- 9.5 In Chapter 3, we make recommendations that will change the way the family home is classified. Under our recommendations, if each partner owned a home before the relationship was contemplated and they lived in the home of one partner (Partner A), only the increase in the value of Partner A's home would be relationship property. The other partner (Partner B) would still retain their home as separate property, subject to any claim Partner A may have if any increase in the value of that home was attributable to the relationship.
- 9.6 Our recommendations in Chapter 3 respond to the risk of unjust outcomes under the family use approach.⁷ In light of these recommendations and given the limitations of

² Section 16(2).

³ Section 16(3).

⁴ See discussion in *Shepherd v Shepherd* [1998] NZFLR 426 (HC); and *Letica v Letica* (1979) 2 MPC 112 (SC) at 113.

⁵ See Chapter 3 for a discussion of the risk of unjust outcomes under the family use approach to classification. For a discussion of the limitations of s 16, see RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [12.90].

⁶ When considering amendments to the Matrimonial Property Act 1976 (now the Property (Relationships) Act 1976) in 1999, the Government Administration Select Committee considered whether s 16 should be extended to situations where one partner has a home and the other has substantial separate property at the time the relationship began. It did not support such an extension, saying this would undermine the principle that there was a presumption of equal sharing of the family home and chattels regardless of the source or method of acquisition: *Matrimonial Property Amendment Bill 1998 (109-2)* (select committee report) at xvii.

⁷ In its submission on the Issues Paper, the New Zealand Law Society (NZLS) preferred amending s 16 to address the risk of unjust outcomes under the family use approach instead of amending the rules of classification. A similar submission was made by Professor Bill Atkin on the Preferred Approach Paper. In particular, NZLS recommended extending s 16 to situations where Partner B has separate property of any kind. In the Preferred Approach Paper (Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018)) at [2.85], we said we did not favour such a reform 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. In its submission on the Preferred Approach Paper, NZLS accepted our classification proposals discussed in Chapter 3 above.

section 16 identified at paragraph 9.4 above, it is necessary to consider whether section 16 should be retained and, if so, in what form.

- 9.7 If section 16 is retained, an issue that needs to be resolved is whether it should apply in situations where Partner A sold their home and used the proceeds of the sale of the home to acquire new property that is classified as relationship property, such as a new family home. Currently, the law is unsettled on this point.⁸

Conclusions

RECOMMENDATION

R44

An adjustment to equal sharing should be available where:

- a. both partners owned homes when the relationship began; and
- b. the increase in the value of the home owned by one partner (Partner A) is divided as relationship property while the home owned by the other partner (Partner B) remains their separate property;

unless Partner A sold their home and used the sale proceeds to acquire new items of relationship property.

- 9.8 We recommend that the Relationship Property Act (the new Act) should continue to provide for adjustments in situations where both partners owned a home when the relationship began. Otherwise, the partners would share the increase in the value of one partner's home as relationship property while the other partner's home would remain their separate property. After a long relationship over a period of considerable market inflation, this could leave one partner considerably disadvantaged and the other partner considerably advantaged on separation. The court should still have discretion to determine the extent of compensation in such situations or whether compensation is appropriate at all.
- 9.9 We do not recommend extending the scope of the adjustment power to situations where one partner owns other types of separate property or where their home is held on trust. Section 16 was originally designed to respond to the specific risk of unfairness arising from the classification of the family home as relationship property. To extend the scope of the adjustment power beyond that would undermine our approach to classification set out in Chapter 3.
- 9.10 We do not consider that the adjustment power should apply when one partner sells their home and uses the proceeds to acquire new property that is then classified as relationship property, such as a new family home for the partners during or in contemplation of the relationship. As we discuss in Chapter 3, such acquisitions should

⁸ In *Illingworth v Illingworth (No 2)* (1979) 3 MPC 86 (SC), Barker J held that the reference to the home or proceeds of sale referred to the house owned at the date of the marriage. On appeal, the Court of Appeal questioned this but did not reach a final view on the matter: *Illingworth v Illingworth* [1981] 1 NZLR 1 (CA) at 11–12. Other cases, however, have preferred a more flexible interpretation and applied s 16 where the sale proceeds from Partner A's house can be traced into a subsequent purchase. See *Gooch v Gooch* (1990) 6 FRNZ 499 (HC); and *D v B* FC Alexandra FAM-2005-002-77, 26 October 2011 discussed in Nicola Peart (ed) *Brookers Family Law — Family Property* (online ed, Thomson Reuters) at [PR16.03].

be relationship property regardless of how they were funded. New acquisitions of property are distinguishable from property one partner brings into the relationship because new acquisitions are made with the relationship in mind, especially the purchase of a family home that is acquired for the partners' common use or common benefit. At a practical level, new acquisitions are also distinguishable from acquisitions made before the relationship was contemplated because there is the opportunity for partners to agree to contract out of the property sharing regime. Given the current uncertainty in the case law referred to in paragraph 9.7, the new Act should make it clear that the adjustment power should not apply when the proceeds of the sale of Partner A's home are used to acquire new items of relationship property.

ADJUSTMENTS WHERE SEPARATE PROPERTY IS SUSTAINED

Background

- 9.11 Section 17 applies where one partner's separate property has been sustained by the application of relationship property or the actions of the other partner.⁹ When section 17 applies, a court can adjust the partners' shares in relationship property or order that one partner pay the other partner a sum of money as compensation.¹⁰
- 9.12 Section 17 is very similar to section 9A. Both sections apply when relationship property or the actions of one partner have been applied to the other partner's separate property. However, section 9A concerns the classification of property. It applies when separate property has *increased in value*. Section 17 is not about how property is classified but rather how property should be shared. It applies when separate property has been *sustained*, meaning the property has been preserved, kept in existence, maintained or kept in its existing condition.¹¹

Issues

- 9.13 No submitter raised issues with section 17 during consultation. We note, however, that section 17 does not expressly deal with situations where separate property is sustained by the application of the other partner's separate property.¹² Limited case law and commentary suggest that the application of separate property in these circumstances will constitute "the actions" of the non-owning partner for the purposes of section 17.¹³ However, it is preferable that this is made explicit.

⁹ Section 17(1).

¹⁰ Section 17(2).

¹¹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [14.13], citing *French v French* [1998] 1 NZLR 62 (CA) at 65 and 69.

¹² We discuss a similar issue in relation to s 9A in Chapter 3 above.

¹³ In *Martin v Martin* [2014] NZFC 3492, the Family Court held that an advance of separate property by one partner to enable the other partner to purchase their former wife's share in a farm was a loan and that it constituted an "action" that enabled the other partner to sustain their separate property under s 17. On appeal, the High Court held that the advance was not a loan but instead a contribution of funds to the relationship that enabled the other partner to acquire the farm, and the farm was therefore relationship property under s 8(1)(e): *Martin v Martin* [2015] NZHC 1823 at [39]–[40]. Nevertheless, the Family Court judgment demonstrates that an application of separate property to the other partner's separate property can constitute an "action" under s 17. See also RL Fisher (ed) *Fisher on Matrimonial*

- 9.14 Commentary on section 17 observes that section 17 awards tend to be conservative.¹⁴ For example, in *N v N*, the Court of Appeal awarded Mrs N \$35,000 under section 17 for the work Mrs N had carried out on the husband's farm over 28 years of marriage.¹⁵ In other cases, however, the courts have taken a more generous approach under section 17. For example, in *V v V*, the wife's contributions to the husband's farm over a 20 year marriage entitled the wife to an award of 20 per cent of the capital gain of the farm, amounting to \$262,000.¹⁶

Conclusions

RECOMMENDATION

R45

An adjustment to equal sharing should be available where a partner's separate property has been sustained by the application of relationship property, the actions of the other partner or the application of the other partner's separate property.

- 9.15 The new Act should continue to provide an adjustment power in situations when one partner's actions or the application of relationship property has sustained the other partner's separate property rather than increased its value.
- 9.16 We also recommend that the adjustment power applies when one partner has applied their separate property to sustain the other partner's separate property. This is consistent with our recommendation in Chapter 3 that any increase in the value of separate property (or any income or gains derived from separate property) that is attributable to the application of the other partner's separate property should be classified as relationship property.
- 9.17 We do not recommend reform to provide greater guidance on how a court should exercise its discretion when making an award for the sustenance of separate property. While some awards under section 17 have been low, the level of compensation that is appropriate in any given case will always be heavily fact dependent. In our view, a court should retain maximum flexibility to make an award under the new Act that is just in all the circumstances.

and Relationship Property (online ed, LexisNexis) at [11.46]; *Oakley v Oakley* (1980) 3 MPC 127 (HC); and *Hight v Hight* (1996) 15 FRNZ 129 (HC), addressing whether the application of separate property constitutes an "action" under s 9A(2). The authors of *Fisher on Matrimonial and Relationship Property* observe at [14.15] that the elements in s 17(1) "appear to be identical in purpose and meaning to the equivalent paragraphs in s 9A".

¹⁴ Nicola Peart (ed) *Brookers Family Law — Family Property* (online ed, Thomson Reuters) at [PR17.06].

¹⁵ *N v N* [2005] 3 NZLR 46 (CA) at [135]. The work performed by Mrs N was recorded at [131] as follows:

The husband accepted that "she was pretty involved in farm work". She would be left in charge of the farm for up to four or five days at a time when he went away on fishing trips. She dagged sheep, worked the dogs and mustered sheep. She dealt with lambs when they had the staggers. She helped with fencing, general work and irrigation around the farm. She was involved in spraying, mowing and irrigating the orchard and, in the later years of the marriage, she cleaned and administered for shearers.

¹⁶ *V v V* [*Relationship Property*] [2007] NZFLR 350 (FC). The judgment records, in relation to the work performed by Mrs V, at [12]:

I accept the applicant carried out renovation work in the home in landscaping the gardens and the domestic surrounds. On the farm she played a significant part in work associated with cropping and raising stock, helping to maintain the machinery, clearing weeds and assisting with shelterbelt planting and fencing. She undertook a significant role in the maintenance of the financial records and obligations of the farming partnership; indeed in this regard she had the primary responsibility.

ADJUSTMENTS TO RECOGNISE CONTRIBUTIONS MADE AFTER THE RELATIONSHIP ENDS

Background

- 9.18 Section 18B applies when, after the partners have separated but before a court hears an application under the PRA, a partner has done anything that would be considered a contribution to the relationship (we refer to these as post-separation contributions). The PRA defines contributions to the relationship in section 18.
- 9.19 Section 18B was introduced when the PRA was amended in 2001. Prior to 2001, the PRA made no provision for post-separation contributions. Instead, the courts had to rely on their power to adjust the date of valuation in order to take post-separation contributions into account.¹⁷ For example, where one partner had made post-separation contributions and the value of an item of relationship property, such as the family home, had increased since separation, a court could order that the family home be valued at the date of separation rather than the date of hearing. The court could then vest the home in the partner who had made the post-separation contributions, enabling them to benefit from any increase in value from the date of separation.¹⁸
- 9.20 In 1988, a Working Group established to review the Matrimonial Property Act 1976 recommended that a court be expressly empowered to consider post-separation contributions.¹⁹ The recommendations were implemented in the 2001 reforms resulting in the enactment of section 18B. Under the section, a court is able to consider the post-separation contributions made by both partners and offset those contributions when deciding what compensation to order.²⁰
- 9.21 When section 18B applies, a court may compensate a partner who has made post-separation contributions by ordering the other partner to pay a sum of money or transfer any property regardless of whether it is relationship property or separate property.
- 9.22 The court's discretion under section 18B is broad. It can award compensation when "it considers it just". In practice, the courts take what they describe as a "broad brush" approach to assessing the partners' post-separation contributions and determining what compensation to award rather than one of "precise accounting".²¹

¹⁷ Pursuant to s 2(2) of the Matrimonial Property Act 1976 (repealed), now s 2G of the Property (Relationships) Act 1976.

¹⁸ See, for example, *Meikle v Meikle* [1979] 1 NZLR 137 (CA); and *Rush v Rush* (1986) 4 NZFLR 236 (CA).

¹⁹ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 28.

²⁰ Since the introduction of s 18B of the Property (Relationships) Act 1976, the courts have been clear that post-separation gains and losses attributable to the partners' contributions should normally be dealt with under ss 18B and 18C rather than adjusting the date of valuation under s 2G: *F v W* (2003) 23 FRNZ 703 (CA) at [24]; *Walker v Walker* [2007] NZFLR 772 (CA) at [43]; and *Burgess v Beaven* [2012] NZSC 71, [2013] 1 NZLR 129 at [25].

²¹ *Ronayne v Coombes* [2016] NZCA 393, [2016] NZFLR 672 at [32]. In *A v A [Economic Disparity]* [2008] NZFLR 297 (HC), a partner produced extensive records of all they had spent on the household from the date of separation. The High Court at [24] strongly discouraged the preparation of such evidence, saying it invited the prolonging of litigation.

Issues

- 9.23 The two potential issues with section 18B are:
- (a) whether the courts' broad brush approach to compensation is appropriate; and
 - (b) whether section 18B should provide greater compensation for the post-separation care of children of the relationship.

The broad brush approach to compensation

- 9.24 Some submitters and commentators argue that section 18B gives a court too much discretion on whether and how it awards compensation. One practitioner and one member of the public submitting on the Issues Paper said that section 18B should provide more certainty as to what compensation is available and in what circumstances.
- 9.25 Professor Bill Atkin cautions that the words "broad brush" may ring warning bells, and that "[t]hey could simply be a synonym for laziness and permit gross variations in judicial approach of the very kind the 1976 Act was designed to avoid."²² Atkin notes this is different from doing an evidence-based calculation followed by an overall judgement to see whether the outcome is fair and just.²³ Atkin argues that adjustments for post-separation contributions "should usually be mandatory" but that a court should still have discretion to make an award "if it considers just", giving judges sufficient flexibility to deny compensation when the outcome compromises the purpose and principles of the PRA.²⁴

Compensation for the post-separation care of children of the relationship

- 9.26 The second issue relates to how section 18B operates in respect of the post-separation care of children of the relationship.²⁵ The Court of Appeal has ruled that section 18B should not be used as an alternative to child support or maintenance.²⁶ Jurisdiction under section 18B should be used sparingly, such as when one partner has abdicated all childcare responsibilities or has avoided paying child support.²⁷
- 9.27 Professor Atkin has commented that this is a very narrow approach.²⁸ Atkin argues that Parliament should give a clear mandate to the courts to compensate for childcare, irrespective of maintenance and child support, and for occupation rent.²⁹

²² Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 89.

²³ At 89.

²⁴ At 94.

²⁵ The care of children of the relationship is a recognised contribution to the relationship under s 18(1)(a)(i) of the Property (Relationships) Act 1976.

²⁶ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [160]–[161]. This decision overrides an earlier line of cases where compensation had been awarded for post-separation care of children: see, for example, *S v S* [Compensation] [2005] NZFLR 218 (FC); *C v S* (2004) 24 FRNZ 273 (HC); *A v A* [Economic Disparity] [2008] NZFLR 297 (HC); and *Tarr v Tarr* [2014] NZHC 1450.

²⁷ *G v B* FC New Plymouth FAM-2002-043-245, 1 December 2004, cited with approval in *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [156].

²⁸ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 93.

²⁹ At 93–94. Atkin notes at 94, however, that such awards should be made only after a full assessment of all the post-separation circumstances. Occupation rent refers to the compensation the court awards for when one partner uses

- 9.28 Stephen van Bohemen argues that the court's approach under section 18B tends to disadvantage the primary carer of the couple's children after separation – typically the mother:³⁰

In my experience, this section operates to disadvantage mothers caring for the children in the family home post separation. It is easy to calculate and claim an adjustment based on occupation rent. It is less easy to value and monetise the non-financial contribution of the partner who remains in the home caring for the children, often providing stability for them at a time of difficulty and turmoil in their lives.

- 9.29 However, van Bohemen hesitates to suggest that the care of children should be monetised, noting that this might lead to more litigation about the children's care arrangements.³¹ Instead, van Bohemen suggests avoiding the injustices caused by the operation of section 18B by providing for a period of income sharing after separation.³² This is similar to our recommendations for Family Income Sharing Arrangements (FISAs), which we discuss in Chapter 10.

Conclusions

RECOMMENDATION

R46

An adjustment to equal sharing should continue to be available for contributions made by a partner after the relationship has ended.

- 9.30 We consider that the new Act should retain the existing adjustment power for post-separation contributions in section 18B.
- 9.31 We do not think reform is necessary to provide greater guidance on how a court should exercise its discretion when awarding compensation for post-separation contributions. In our view, a broad brush approach is appropriate. Partners should not be encouraged to dispute every dollar spent and every contribution made after separation. Minor imbalances in post-separation contributions are likely to be common as the partners transition out of a relationship. A more precise accounting approach would likely increase the risk of disputes, increase costs and delay resolution of disputes, which is inconsistent with the principle of inexpensive, simple and speedy resolution of relationship property matters.
- 9.32 We do not recommend reform to provide greater scope for a court to award compensation for the post-separation care of children. In our view, this would undermine the proper role of child support, which is to ensure that parents take financial responsibility for their children.³³ In Chapter 12, we conclude that problems with how

and occupies the other partner's share of relationship property after separation. We discuss occupation rent further in Chapter 15.

³⁰ Stephen 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 88.

³¹ At 89.

³² At 89.

³³ Child Support Act 1991, s 4. Additional reasons for not favouring reform of s 18B of the Property (Relationships) Act 1976 include that it is preferable that partners are able to determine their responsibilities to meet childcare costs

parents take financial responsibility for their children ought to be addressed through a review of the child support regime rather than reform of the property sharing regime, and we recommend a review of 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.

- 9.33 We note, however, that our recommendations in Chapter 10 regarding FISAs would result in a redistribution of property, which may help the partner who has disproportionately borne childcare responsibilities after separation.³⁴

DISSIPATION OF PROPERTY

Background

- 9.34 As a general rule, unless the PRA provides otherwise, nothing affects the power of either partner to acquire, deal with or dispose of any property as if the PRA had not been passed.³⁵ While the partners remain together, each may deal with their property without any obligation to recognise the rights the other partner may have under the PRA if the relationship were to end.

- 9.35 There are, however, several provisions in the PRA that might provide a remedy where one partner has dissipated relationship property:

- (a) Section 13 might be relied on where the dissipation of relationship property during the relationship is so extreme as to constitute "extraordinary circumstances" that make equal sharing repugnant to justice.³⁶ If the dissipation is due to misconduct, the high threshold in section 18A(3) must be satisfied. Sections 13 and 18A are discussed in Chapter 8.
- (b) Section 17A empowers the court to adjust the partners' shares in relationship property when the separate property of one partner has been materially diminished by the deliberate action or inaction of the other partner.
- (c) Section 18C provides a remedy for the dissipation of relationship property after a relationship ends. It applies when, after the partners have separated but before a court hears an application under the PRA, the relationship property has been materially diminished in value by the deliberate action or inaction of one partner. When section 18C applies, a court may order that partner to pay the other partner a sum of money or transfer any property, regardless of whether it is relationship property or separate property, as compensation.

under one regime rather than looking under the Child Support Act and the Property (Relationships) Act and that s 18B would be an inappropriate mechanism to determine such responsibilities because it only applies to contributions made after separation but before the date of the court hearing and is not specific to the care of children.

³⁴ There is a question as to how FISA payments should be treated for the purposes of s 18B of the Property (Relationships) Act 1976 (PRA). In our view, the payments should be considered neutral to the contributions of both the paying and receiving partner as they are satisfaction of one partner's entitlement under the PRA.

³⁵ Section 19.

³⁶ See, for example, *B v B* (1977) 1 MPC 23 (SC) where the husband spent his income on drink and gambling and failed to support his family.

- (d) Section 20E provides that a court may compensate one partner if the other partner's personal debts have been paid or satisfied out of relationship property. However, section 20E is of limited assistance as it applies only in cases where relationship property has satisfied a debt. It does not apply to contemporaneous exchanges of goods and services for payment, such as retail purchases or gambling.
- (e) Section 44 provides that, when a partner has disposed of property to a third party in order to defeat the other partner's claim or rights under the PRA, a court may order that the property be transferred back or that the person who received the property pay compensation.³⁷ In the Issues Paper, we noted the limitations with this provision.³⁸ First, it can be difficult to prove that the disposition was intended to defeat a partner's claim or rights under the PRA. Second, section 44 only provides a remedy against the third party recipient of the disposed property. Section 44 is therefore unsuitable in situations where one partner repeatedly dissipated small quantities of property on a number of occasions by disposing of property to a number of third parties. Additionally, if the property was received in good faith and for consideration (as will be the case when property is exchanged with most third party suppliers), the recipient is likely to have a good defence to the recovery of the property.³⁹

9.36 The PRA also makes provision for circumstances where there has been the dissipation of separate property. Section 17A applies where one partner's separate property has been "materially diminished" by the "deliberate action or inaction" of the other partner. In those circumstances, a court has discretion to reduce the other partner's share of relationship property "to such extent as it thinks just".⁴⁰

Issues

- 9.37 In the Issues Paper, we noted that the PRA may not deal adequately with the dissipation of relationship property *during* a relationship, such as gambling or excessive personal expenditure given the limitations of the existing remedies discussed at paragraph 9.35 above.⁴¹
- 9.38 A further issue is whether the threshold for relief under section 18C is too high. The applicant partner must show the value of relationship property has been "materially diminished", meaning more than a slight or insignificant decrease in value.⁴² The

³⁷ See, for example, *N v R* [2014] NZFC 5380, where one of the partners in a de facto relationship (Partner A) had died and, in the years prior to death, Partner A had suffered from Alzheimer's disease. During that period, the other partner (Partner B) had transferred significant amounts of money from Partner A's account to Partner B's own account. Partner B would not explain to the Family Court what had happened to this money, and the Family Court applied s 44, ordering Partner B to repay the unaccounted sums to Partner A's estate.

³⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [12.47].

³⁹ Sections 44(2) and 44(4).

⁴⁰ Section 17A(1).

⁴¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [12.42]–[12.52].

⁴² Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR18C.06].

applicant must also show the partner deliberately intended to diminish the value of relationship property.⁴³ Professor Atkin argues that section 18C should be recast so that a much wider range of negative post-separation conduct is taken into account.⁴⁴ Atkin suggests that "[t]he party whose negligent and misguided action or inaction runs down the value of relationship property should arguably have to account".⁴⁵

- 9.39 While section 17A is rarely used,⁴⁶ we have not identified any issues with its operation, and no issues were raised with section 17A during consultation. We address, however, the limited powers of a court under section 17A below when we discuss the court's compensation power under the various adjustment provisions.

Results of consultation

- 9.40 We received 22 submissions on the Issues Paper and seven submissions on the Preferred Approach Paper that addressed the dissipation of relationship property. They included submissions from 23 members of the public, four academic and practitioner experts and two organisations.
- 9.41 Submissions generally focused on the dissipation of relationship property during the relationship. The majority of members of the public thought that dissipation of relationship property during the relationship was a problem and that the PRA should have better ways to help the affected partner. Some submitters told personal stories about their partner dissipating relationship property during the relationship through excessive or reckless spending or gambling or by incurring relationship debt without the other partner's knowledge. Some members of the public, however, did not support reform. These submitters tended to think that dissipation of property during a relationship was an issue between the partners and that the law should not try to intervene.
- 9.42 The New Zealand Law Society (NZLS) submitted that there should be no adjustment where the affected partner was aware the other was dissipating property during the relationship but took no steps to protect the property. NZLS also observed that, "[w]here a partner has covertly dissipated property, section 18A(3) may provide a remedy". Otherwise NZLS was generally satisfied that the PRA adequately equips the court to make fair adjustments in most circumstances. A similar submission was also made by one practitioner. The National Council of Women of New Zealand said that a number of its members considered that adjustments should be available where one partner has misused shared property during the relationship, including through gambling and credit card debt.

⁴³ There has been some disagreement among the cases as to whether the word "deliberate" in s 18C applies only to the partner's action or inaction or whether it means the partner must have had the deliberate intention of diminishing the value of relationship property. The Supreme Court resolved the question in *M v M* [2014] NZSC 32, [2014] NZFLR 599 at [4] in a leave to appeal decision. It affirmed the Court of Appeal's decision in *M v M* [2013] NZCA 660, [2014] NZFLR 418 where the Court of Appeal held at [37] that s 18C required the partner to have acted or failed to act intending to diminish the value of relationship property.

⁴⁴ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 94–95.

⁴⁵ At 95.

⁴⁶ Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR17A.03].

- 9.43 Few submitters commented specifically on the dissipation of relationship property after separation. Submitters that did so supported an adjustment provision. Professor Nicola Peart and three practitioners submitted that the current provisions were inadequate and, in particular, the requirement that the dissipation be deliberate set the threshold too high. NZLS also submitted that a court should have the power to make an adjustment where one partner dissipates property in contemplation of separation. NZLS considered the circumstances in which the court should make an adjustment and the extent of the adjustment should be left to the courts' discretion.

Conclusions

RECOMMENDATION

R47

An adjustment to equal sharing should continue to be available where one partner has, through deliberate action or inaction, materially diminished:

- a. the other partner's separate property; or
- b. relationship property after the relationship has ended.

- 9.44 We consider that the new Act should retain the existing adjustment powers for dissipation of separate property and post-separation dissipation of relationship property.
- 9.45 We do not recommend introducing a specific adjustment power to address dissipation of relationship property during the relationship. We are not satisfied that it is appropriate or desirable that a partner's conduct during the relationship should play a greater role in property division under the new Act. This would incentivise partners to focus on fault and lay blame. It would also introduce an undesirable level of discretion into what is a rules-based regime, making the law less certain and predictable, thereby undermining the principle of inexpensive, simple and speedy resolution of relationship property matters.
- 9.46 In Chapter 8, we recommend retaining an exception to equal sharing for extraordinary circumstances. This may provide a remedy in serious cases of dissipation. If dissipation amounts to misconduct, our recommendations in Chapter 8 will ensure that such conduct can be taken into account if it meets the threshold of gross misconduct that has significantly affected the extent or value of the relationship property.⁴⁷ Sections 44 and 20E (discussed below) should also be retained in the new Act and may also provide relief, albeit in limited circumstances, as discussed above.
- 9.47 In relation to dissipation after a relationship ends, we are satisfied that the current threshold in section 18C remains appropriate. Few submitters raised concerns with section 18C, and our review of cases has not identified a problem with its application in

⁴⁷

We also recommend in Chapter 4 that, in situations of net indebtedness, a court should have power to adjust the partners' shares in the debt if there are extraordinary circumstances that would mean equal sharing of the debt would be repugnant to justice. This might provide relief in situations where one partner's dissipation of relationship property during the relationship has resulted in a situation of net indebtedness.

practice.⁴⁸ We are concerned that a lower threshold would lead to more disputes and would unhelpfully increase the costs and delays in resolving relationship property matters. We do not think it is helpful or desirable to invite scrutiny of a partner's handling of relationship property after separation except in extreme cases. We also note the other methods of protecting a partner's interest in relationship property under sections 42, 43 and 45 of the PRA, which should be retained in the new Act, discussed in Chapter 15. Finally, we do not consider it is necessary to provide specifically for the dissipation of relationship property in contemplation of separation.

- 9.48 While we are not convinced that the problem of dissipation during a relationship warrants reform at this stage, if in the future reform is justified, amending the court's power to set aside dispositions of property, currently in section 44 of the PRA, could be considered. That section could be altered to give the court additional powers to award compensation from the partner who has disposed of property. The circumstances in which the section applies would remain the same; the affected partner would need to show the other partner disposed of property knowing it would affect the other partner's claim or rights to relationship property. However, the court would have the ability to remedy unfairness when the property disposed cannot be recovered from a third party.

PAYMENT OF PERSONAL DEBTS

Background

- 9.49 Section 20E applies when a partner's personal debt has been paid or satisfied out of relationship property. When section 20E applies, a court can adjust the partners' shares in relationship property, order that one partner pay the other a sum of money as compensation or order that any separate property of the partner who had their personal debts satisfied out of relationship property be treated as relationship property under the PRA.

Issues

- 9.50 We have not identified any issues with how section 20E operates in practice. An issue does, however, arise in respect of the limited jurisdiction of section 20E. It only applies where personal debt has been paid from *relationship property*. It does not apply, and the PRA provides no other remedy, where a partner's personal debt has been paid from the other partner's *separate property*.⁴⁹
- 9.51 The Family Court has noted this anomaly, observing that, if a compensatory payment can be made for payments out of relationship property, one would have thought that it was even more appropriate for an adjustment to be made when the payment was made by the other partner out of their own separate property.⁵⁰ In 1988, the Working

⁴⁸ For example, in some cases, the court awarded compensation where a partner had made drawings from a company after separation: *M v A* HC Wellington CIV-2006-485-1868, 5 April 2007; and *S v S* [2012] NZFC 4050. In another case, a partner chose not to operate a fishing business after separation, and the Court held that, by so doing, the partner had deliberately chosen to diminish the value of the business and consequently s 18C applied: *C v C* [2017] NZHC 42, dismissing the appeal from *C v C* [2015] NZFC 6270.

⁴⁹ *McKay v McKay* [1995] NZFLR 266 (DC); and *M v T* FC Porirua FAM-2006-091-572, 20 February 2007.

⁵⁰ *McKay v McKay* [1995] NZFLR 266 (DC) at 271.

Group on Matrimonial Property and Family Protection recommended that the PRA be reformed to compensate a partner for paying the other's personal debts from their separate property.⁵¹ However, no reform eventuated. Section 17 may provide a remedy in some cases but only where the payment of a personal debt has sustained the other partner's separate property.⁵² This will not always be the case.

Conclusions

RECOMMENDATION

R48

An adjustment to equal sharing should be available where a partner's personal debt has been paid or satisfied (directly or indirectly) out of relationship property or the other partner's separate property.

9.52 We recommend that the new Act should continue to provide an adjustment power in situations where one partner's personal debt is satisfied from relationship property. We also recommend that the adjustment power applies when a personal debt is satisfied from the other partner's separate property. A partner should be entitled to compensation when they have used their separate property to pay or satisfy the other partner's personal debt. Given we recommend in Chapter 2 that the new Act should be the principal source of law for the division of property when relationships end on separation, it is undesirable to require a partner to seek a remedy outside the PRA in such situations.

THE COURT'S COMPENSATORY POWERS UNDER THE ADJUSTMENT PROVISIONS

Background

9.53 The court's compensatory powers under the adjustment provisions in the PRA vary. Sections 16 and 17A empower a court to adjust the partners' shares in relationship property but do not give a court powers to order the payment of money or the transfer of property. In contrast, section 17 empowers a court to adjust the partners' shares in relationship property *or* order one partner to pay the other partner a sum of money. Sections 18B and 18C are different again, as they empower a court to order the payment of a sum of money or the transfer of any property, whether that property is relationship property or separate property. Finally, section 20E empowers a court to adjust the partners' shares in relationship property, order the payment of a sum of money or order that separate property be treated as relationship property for the purpose of division.

⁵¹ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 32.

⁵² See *V v V* [2007] NZFLR 350 (FC); *O v O* FC Hamilton FAM-2001-019-1355, 4 May 2006; *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC); *B v A* (2005) 25 FRNZ 778 (FC); and *W v W* FC Wellington FAM-2008-032-461, 6 July 2009. The courts have reasoned that, in these circumstances, Partner A's separate property has been sustained because of the consequences if the payments were not made: *Buckman v Buckman* (1979) 3 MPC 20 (SC) at 22.

Issues

9.54 We see no good reason for the inconsistency in compensatory powers under the adjustment provisions. In principle, a court should have all necessary powers to make an award that achieves a just result in all the circumstances of the case. In some situations, it might be appropriate to adjust the partners' shares in relationship property. In other cases, for example, where there is insufficient relationship property from which to award adequate compensation, it might be more appropriate to order the payment of a sum of money or the transfer of property.

Conclusions

RECOMMENDATION

R49

The powers of adjustment described in R44–R48 should grant broad and consistent powers to a court to compensate one partner through an adjustment to the partners' shares in relationship property, the payment of a sum of money or the transfer of property, whether that property is relationship property or separate property.

9.55 We recommend that a court have broad and consistent compensatory powers under the adjustment provisions in the new Act. In particular, a court should be able to adjust the partners' shares in relationship property to achieve a just outcome. It is equally important that a court be able to order the payment of money or the transfer of property, especially where there is insufficient relationship property to adequately compensate a partner. This will enhance the courts' ability to order adequate compensation in situations where one or more of the adjustment provisions apply.

CHAPTER 10

Sharing economic advantages and disadvantages

IN THIS CHAPTER, WE CONSIDER:

how partners should share the economic advantages and disadvantages arising from the relationship or its end (economic advantages and disadvantages).

BACKGROUND

- 10.1 Section 15 of the PRA provides that a court may award compensation to a partner from the other partner's share of relationship property if three requirements are met:¹
- 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 standard of living is likely to be after the relationship ends.²
 - 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,³ and it is presumed that the division of functions was agreed to by the partners.⁴

¹ These requirements were discussed in detail in the Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [18.31]–[18.80]. 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.

² "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 being 'clearly greater' and 'disproportionately greater'" in *N v N* [2003] NZFLR 150 (FC) at [120].

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

⁴ *X v X* [*Economic Disparity*] [2009] NZCA 399, [2010] 1 NZLR 601 at [105].

- (c) Third, compensation must be just in the circumstances.⁵
- 10.2 If these requirements are met, a court must then assess the amount of compensation to be awarded.⁶ 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.⁷ Another approach focuses on the enhancement of the respondent partner's earning ability.⁸ A third approach is less formulaic and looks more broadly at all the relevant circumstances, taking a "broad brush approach".⁹
- 10.3 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 15.¹⁰ 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 \$520,000.¹¹ Professor Bill 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".¹²

The basis for sharing economic advantages and disadvantages

- 10.4 Section 15 is based on the theory that a qualifying relationship is a family joint venture to which each partner contributes equally but in different ways.¹³ Partners contribute to the

⁵ The Court of Appeal in *X v X* [*Economic Disparity*] [2009] NZCA 339, [2010] 1 NZLR 601 explained at [115]:

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.

⁶ See Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [18.81]–[18.103] for a detailed analysis of the amount of s 15 awards.

⁷ *X v X* [*Economic Disparity*] [2009] NZCA 339, [2010] 1 NZLR 601 at [171].

⁸ *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].

⁹ See, for example, *J v J* [2014] NZHC 1495.

¹⁰ *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. Ms Scott 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) 107.

¹¹ *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.

¹² Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 121.

¹³ We discuss the family joint venture in greater detail in Chapter 2.

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.

- 10.5 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 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. 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.
- 10.6 Traditional role-divided relationships in which one partner (typically a man) works full-time and the other partner (typically a woman) devotes themselves to the care of the home and family are less common today.¹⁴ However, the common pattern remains for women and men as parents to make different life investments, with fathers' primary investments being in their career or self-employed business, while women's life investments are more diversified and include a major orientation towards the care of children.¹⁵ As Lady Hale recently said in a keynote speech:¹⁶
- [W]e cannot ignore the fact that marriage is a partnership in which the spouses (whatever their sex) often play different roles – and often varying over time - for their mutual benefit and that of their children and elderly parents ... Research has clearly shown that a person who gives up work, even for a few years, in order to concentrate on child care or other family responsibilities will never make up what they have lost.
- 10.7 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, further impacting on their earning capacity.¹⁷
- 10.8 In these situations, an equal division of relationship property under the PRA fails to divide all of the fruits of the family joint venture. It does not share the economic

¹⁴ In Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017), we observed that the most common workforce participation arrangement for couples with children today is for both partners to work full-time (45 per cent of couples with dependent children in 2016). In contrast, in 1982, the dominant pattern was one partner working full-time while the other partner was not in the workforce (52 per cent of couples with dependent children, down to 33 per cent in 2016) at 39.

¹⁵ Patrick Parkinson "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 FLR 1. We explored the different impact of parenthood on workforce participation for men and women in New Zealand in Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at ch 6.

¹⁶ Lady Hale, President of the United Kingdom Supreme Court "Keynote Speech" (speech to Resolution's 30th National Conference, Bristol, 20 April 2018) at 14.

¹⁷ The different impact of the functions performed during the relationship on economic recovery after separation is explored in Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at ch 8. See also Christopher Turnbull "Family Law Property Settlements: Principled Law Reform for Separated Families" (PhD Thesis, Queensland University of Technology, 2017) at 44.

advantages one partner leaves the relationship with, nor does it address the economic disadvantages the other partner suffers.

- 10.9 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.¹⁸ 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.¹⁹

The relationship between section 15 and maintenance

- 10.10 Part 6 of the Family Proceedings Act 1980 grants the court powers to order a partner to make maintenance payments to the other partner. The purpose of maintenance is 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.²⁰ The applicant partner must, however, assume responsibility for meeting their own financial needs within a reasonable time.²¹ Maintenance is therefore typically temporary in nature.²²
- 10.11 Given their similar subject matter, maintenance and section 15 are often used interchangeably in practice.²³ This is because they both primarily focus on the future

¹⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16. As Margaret Wilson said in Parliament, s 15 of the Property (Relationships) Act 1976 is "to ensure that each partner has a fair division of resources, and that each is placed on a fair footing to deal with life after separation": (29 March 2001) 591 NZPD 8626.

¹⁹ Section 1N(d). Other principles introduced to the Property (Relationships) Act 1976 in 2001 include 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)).

²⁰ 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, s 63(2)(d)–(e).

²¹ Section 64A.

²² 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 three to four 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.

²³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [19.60]. Atkin observes that, since the first decision on s 15 of the Property (Relationships) Act 1976 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

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.²⁴

ISSUES

- 10.12 How to share economic advantages and disadvantages has long presented a challenge for policy makers, legislators and the courts, both in New Zealand and elsewhere.²⁵ Past efforts to address the problem in New Zealand have included unsuccessful arguments before the courts to classify and divide enhanced earning capacity as relationship property,²⁶ improvements to the maintenance regime to achieve better sharing of future income²⁷ and legislative provision for compensation from the relationship property pool in the form of section 15.
- 10.13 Despite these attempts, sharing the economic advantages and disadvantages remains unavailable for most New Zealanders.²⁸ As Professor Atkin observes, "the problem of genuine equality of outcome on relationship breakdown remains a real issue".²⁹
- 10.14 Failing to share economic advantages and disadvantages 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.³⁰ They may also be unable to meet their future needs, which can become a societal problem if state resources are

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.

²⁴ This was the case in *M v P* [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 the wife 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]).

²⁵ See paragraphs 10.29–10.32 for a discussion of comparable jurisdictions. In New Zealand, this problem was identified back in 1988 by the Royal Commission on Social Policy. See Royal Commission on Social Policy/Te Kōmihana A Te Karauna Mō Ngā Āhukatanga-Ā-Iwi *The April Report* (Government Printer, vol 4, April 1988) at 217–227; and Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4.

²⁶ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280.

²⁷ 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 xiv. 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 Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 20.

²⁸ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 102.

²⁹ At 102.

³⁰ *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [13] per Lord Nicholls.

used to provide for them. 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 12.

Section 15 has failed to provide an effective response

- 10.15 Section 15 has failed to provide an effective mechanism to share economic advantages and disadvantages. There are a range of legal and practical problems with section 15:
- (a) The time and cost involved in making a section 15 claim puts it beyond the reach of many New Zealanders.³¹
 - (b) The inconsistent approach to section 15 awards makes it an uncertain and unpredictable remedy. The lack of consensus as to the correct approach between all the Supreme Court 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. A section 15 claim will only be determined 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.
- 10.16 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",³² while Arnold J observed the "widespread view amongst family law commentators" is that section 15 "has not lived up to expectations".³³ O'Regan J agreed there were problems and noted that:³⁴

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 substitute for sharing economic advantages and disadvantages

- 10.17 In 2001, the maintenance regime in the Family Proceedings Act was amended, ostensibly to make it easier to obtain maintenance but the resulting overlap between section 15 and maintenance has been described as "baffling", raising "[p]erhaps the question of greatest uncertainty and confusion" since the 2001 amendments were introduced.³⁵

³¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [18.104]–[18.108].

³² *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [351].

³³ At [279].

³⁴ At [377].

³⁵ 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 of the Property (Relationships) Act 1976 on the maintenance regime may not have been properly appreciated at the time given the possibility of integrating the separate

10.18 While maintenance might provide access to future income, its objective is not to share economic advantages and disadvantages. It remains focused primarily on meeting needs.

10.19 There is also a broader question as to the role of maintenance in 2019, especially in light of section 15. Associate Professor John Caldwell explains:³⁶

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

10.20 These issues have led to calls for greater rationalisation of the two remedies, with some preferring maintenance over section 15³⁷ and others preferring to reform section 15 so that the role of maintenance can be subsumed within it.³⁸

Public attitudes and values about sharing economic advantages and disadvantages

10.21 The Borrin Survey provides evidence of public attitudes and values about how the economic advantages and disadvantages should be shared on separation. As we discuss in Chapter 8, 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. However, 88 per cent of respondents who agreed with the current law thought it was appropriate to depart from equal sharing in certain situations.

10.22 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.³⁹ When the

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.

³⁶ 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.

³⁷ Atkin argues that "[c]onceptually, 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].

³⁸ 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.

³⁹ 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 James should receive additional financial support dropped to 51 per cent, and when Alice was Partner A, the proportion of respondents who thought that Alice should receive additional financial support increased to 68 per cent. See discussion in I Binnie and others *Relationship Property Division in New*

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.

- 10.23 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").⁴⁰ 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.⁴¹ 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.⁴²

Results of consultation

- 10.24 A strong theme of consultation on the Issues Paper was that section 15 requires reform. Several practitioners we spoke with expressed frustration at 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.
- 10.25 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 partners' 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 the mother's contributions to the family.
- 10.26 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.

Zealand: Public Attitudes and Values – A general population survey (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [180]–[183].

⁴⁰ At 38 (Figure Eight).

⁴¹ At 39 (Figure Nine).

⁴² At [179].

- 10.27 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.
- 10.28 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.

APPROACH IN COMPARABLE JURISDICTIONS

- 10.29 The challenge in sharing economic advantages and disadvantages is not isolated to New Zealand. Comparable jurisdictions address this issue in different ways, depending on the type of property sharing regime adopted.
- 10.30 In jurisdictions that operate a discretionary regime (Australia, England and Wales, Scotland and Ireland), the court is directed to take into account economic advantages and disadvantages when exercising its overall discretion to adjust the partners' property interests on separation.⁴³ How the courts assess and quantify economic advantages and disadvantages is determined by case law.⁴⁴ In Scotland, where the courts' discretion is also guided by a statutory principle of equal sharing,⁴⁵ a recent study of family law practitioners found a perception that it was hard to obtain a departure from equal sharing in order to address economic disadvantages.⁴⁶ Practitioners felt that claims were complex to argue and difficult to prove given the difficulties of quantifying economic advantages and disadvantages.⁴⁷
- 10.31 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.⁴⁸ 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.⁴⁹

⁴³ Property division in discretionary regimes is discussed in greater detail in Chapter 8. See Family Law Act 1975 (Cth), s 79(4)(e) and 75(2)(j)–(k); Matrimonial Causes Act 1973 (UK), s 25(2)(a); Family Law Act 1995 (Ireland), s 16(2)(g); and Family Law (Scotland) Act 1985, s 9(1)(b).

⁴⁴ See, for example, *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618.

⁴⁵ Family Law (Scotland) Act 1985, ss 9(1) and 10(1). In addition, a "periodical allowance" may be ordered for a period of up to three years after divorce is granted: ss 9(1)(d) and 13(2)(b).

⁴⁶ 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.

⁴⁷ At 75.

⁴⁸ Divorce Act RSC 1985 c 3, s 15.2(6).

⁴⁹ See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) 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.⁵⁰

- 10.32 The American Law Institute also recommended compensatory spousal payments to share economic advantages and disadvantages arising from a relationship.⁵¹ For earning capacity losses, the Institute recommended rules that set a presumptive award of periodic payments calculated by applying a specified percentage to the difference between the partners' incomes, increasing with the duration of the relationship or the length of the childcare period.⁵²

OPTIONS FOR REFORM

- 10.33 In the Issues Paper, we proposed three options for reform:⁵³

- (a) **Option 1: Retain section 15 but lower the hurdles the applicant must overcome.** We proposed removing the 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 is 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 several 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.⁵⁴ Alternatively, a court could be given the power to depart from equal

⁵⁰ For example, British Columbia: Family Law Act SBC 2011 c 25, s 161.

⁵¹ American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ebook ed, Thomson Reuters, March 2019 update) at ch 5. The objective of compensatory spousal payments is to allocate financial losses that arise on separation: § 5.02(1). In § 5.03, the American Law Institute recommended compensation for (a) losses in living standard experienced at dissolution by the spouse who has less wealth or earning capacity; (b) an earning capacity loss incurred during the marriage but continuing after dissolution and arising from one spouse's disproportionate share during marriage of the care of children of the marriage; (c) an earning capacity loss incurred during marriage and continuing after dissolution arising from the care of a sick, elderly or disabled third party in fulfilment of a moral obligation of the other spouse or of both spouses jointly; (d) the loss either spouse incurs when the marriage is dissolved before that spouse realises a fair return from their investment in the other spouse's earning capacity; and (e) an unfairly disproportionate disparity between the spouses in their respective abilities to recover their premarital living standard after the dissolution of a short marriage.

⁵² At § 5.04(3) and § 5.05(4). The duration of periodic payments should reflect the duration of the relationship or the length of the childcare period and may be indefinite if the age of the partners and the length of the relationship both exceed a minimum value specified in state rules: § 5.06. The American Law Institute further recommended that these rules should apply unless they would yield a substantial injustice: § 5.04(4) and § 5.05(6).

⁵³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 19.

⁵⁴ The English Court of Appeal recently rejected an argument that enhanced earning capacity should be treated as an item of matrimonial property and subject to sharing in *Waggott v Waggott* [2018] EWCA Civ 727, [2019] 2 WLR 297. It pointed to a number of reasons, including the need to effect a clean break and the impracticalities in assessing the extent to which income was enhanced during the relationship. See also our discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [19.32]–[19.40].

sharing when satisfied that equal sharing would not fairly allocate economic advantages and disadvantages.

- (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. This option drew on the Canadian regime for spousal support and the Canadian Spousal Support Guidelines.

10.34 Submitters on the Issues Paper had mixed views on the preferred option for reform. The New Zealand Law Society (NZLS) and most practitioners who made a written submission preferred Option 1, although NZLS also saw merit in Option 3.⁵⁵ Some members of the public supported 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.⁵⁶ The Judges of the Family Court, practitioners we spoke with at public and practitioner consultation meetings and most members of the public preferred Option 3.⁵⁷ The Judges of the Family Court also expressed support for Option 1.⁵⁸

10.35 Regardless of their preferred option, submitters generally supported reform that provides a solution that is easy to understand and to apply. Submitters also noted that the need to prove that the division of functions caused a partner's economic disadvantage should be removed or reduced.

Results of consultation on the Preferred Approach Paper

10.36 Ultimately, in the Preferred Approach Paper, we proposed replacing 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 Family Income Sharing Arrangements (FISAs).⁵⁹ We proposed a partner would be entitled to a FISA in defined circumstances. The income sharing payments would be based on a formula intended to equalise the partners' combined income following separation for a limited period. Our proposal was a hybrid of Option 1 and Option 3 from the Issues Paper, drawing on some features of the Canadian regime that underpinned Option 3, such as the use of a simple and easy to

⁵⁵ The New Zealand Law Society (NZLS) 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. It did not consider an arbitrary cut-off point was appropriate, instead preferring the end date to be determined by a court.

⁵⁶ See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [19.32]–[19.40].

⁵⁷ 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.

⁵⁸ The Judges of the Family Court commented that, if Option 1 were preferred, consideration should be given to ensuring that s 15 is accessible to the "average" relationship, to ensuring there is an effective enforcement mechanism and to providing legislative guidance as to quantum.

⁵⁹ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at ch 5.

- use formula to determine the amount owing, but providing a mechanism that is more appropriate for the New Zealand context, such as a fixed rather than an unlimited duration.
- 10.37 NZLS, the Auckland District Law Society (ADLS), one law firm, a retired Judge of the High Court and 16 practitioner and academic experts expressed support for our FISA proposals.⁶⁰
- 10.38 NZLS supported FISAs as one part of the suite of changes proposed in the Preferred Approach Paper. It considered that FISAs are likely to be more widely available to New Zealanders than a current section 15 claim and so would be advantageous for children. It also considered FISAs are simple and therefore readily understandable and easier to calculate and predict than a section 15 claim. NZLS agreed with the categories of entitlement proposed in the Preferred Approach Paper and with the proposed formula for calculating an entitlement. NZLS said it would be concerned if the proposal was diluted from its current structure and duration as it is "well pitched, sensibly graduated and likely to achieve broad social justice". NZLS also noted it was important for provision to be made for urgent applications for a FISA following separation as the ability to obtain interim spousal maintenance and child support is currently an issue.
- 10.39 ADLS also supported the FISA proposal, submitting that:
- It strikes a balance between the need to take into account economic disparity when a relationship ends and the need for a predictable and workable outcome for the parties. We agree that the proposed provisions simplify the law while retaining an appropriate avenue for claims to be made, to address needs arising immediately on separation and on final settlement/division. In our view, a well drafted provision with what is akin to a formula assessment for economic disparity will subsume the role of maintenance within it.
- 10.40 ADLS noted a significant advantage of a FISA is that it can be enforced by a government agency in the same way that child support is currently managed. It also agreed that, while FISAs are not designed to achieve an exact account and division of all economic advantages and disadvantages, a compromised approach is more than compensated for in the workability, effectiveness and accessibility of a solution.
- 10.41 Academic and practitioner experts who supported FISAs generally felt that they would provide more effective assistance for an economically disadvantaged partner than relying on section 15 or the present maintenance regime, although law firm McWilliam Rennie and one practitioner signalled caution in repealing maintenance altogether. Some also expressed concerns about specific aspects of the FISA proposals, discussed below.
- 10.42 Five academic and practitioner experts did not support the FISA proposals. Dr Simon Chapple, Dr Michael Fletcher and Nikki Chamberlain raised concerns about the statutory formula for calculating the amount payable under a FISA, discussed below. Chapple also questioned whether the problems are big enough to justify reform. Chapple considered that there is, at best, only minority community support for reform. The results of the Borrin Survey, Chapple argued, used a scenario to canvas community support that is most favourable to reform. Chapple argued that, even under this most favourable

⁶⁰ We have also had the benefit of preliminary discussions with the Inland Revenue Department on the proposals put forward in *Law Commission Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018).

scenario, only 29 per cent of respondents expressed support for FISAs.⁶¹ Two practitioners preferred retaining section 15, which they felt was becoming increasingly well understood, and providing more guidance on the quantum of section 15 awards.

- 10.43 Submissions from members of the public were mixed, with six submitters expressing support for FISAs and six submitters opposing FISAs.⁶² Some members of the public who opposed FISAs did not agree with the objectives of the regime, while others thought it was not possible to develop a "one size fits all" formula.

Concerns about when an entitlement to a FISA should arise

- 10.44 Some submitters raised concerns with particular aspects of our proposals as to when a partner should be entitled to a FISA.⁶³ Professor Mark Henaghan preferred a universal entitlement over specific categories of entitlement. If specific categories are retained, Henaghan thought an entitlement should arise whenever the partners care for a child, regardless of whether that child is the child of both partners. Some submitters questioned whether an entitlement to a FISA should arise simply because a relationship lasts for 10 years or longer. Dr Fletcher and one member of the public did not think length of relationship alone should justify an entitlement. A retired Judge of the High Court thought that 10 years may be too short. ADLS, however, suggested the required length could be reduced to five years. In relation to child-free relationships of less than 10 years, Henaghan and McWilliam Rennie were concerned the requirement that a partner had reduced their earning capacity *in order to* make contributions to the relationship would invite disputes over what contributions that partner had made and would reintroduce the problems under the current law in establishing causation. Another submitter thought that all applicants should have to demonstrate that they reduced their earning capacity in order to make contributions to the relationship or that their partner's earning capacity was sustained or enhanced by their contributions in order to be eligible for a FISA. That submitter also supported some threshold of financial inequality or difference in income before an entitlement arises.

⁶¹ In the Borrin Survey, 59 per cent of all survey respondents thought that, in the situation where one partner stops work in order to care for children during the relationship, that partner should receive additional financial support from the other partner after separation. Respondents who answered positively were then asked a follow-up question to see how that support should be provided. The most common answer was that the economically disadvantaged partner should receive a share of the other's future income. This answer was given by 49 per cent of respondents who were asked this question or 29 per cent of all respondents to the survey, which is the figure Dr Chapple refers to. 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 38–39.

⁶² We also received submissions from eight members of the public that did not comment specifically on the FISA proposals but rather shared their personal experience. Some had stopped working for extended periods of time to care for their children and felt it unfair that this did not entitle them to more than an equal share of relationship property. Others gave different perspectives, sharing experiences where the other partner chose not to work for personal reasons or was supported during the relationship to obtain qualifications.

⁶³ We proposed an entitlement should arise where: (a) the partners have a child together; (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.

Concerns about the formula for determining the amount and duration of a FISA

- 10.45 Dr Chapple, Dr Fletcher and Nikki Chamberlain were opposed to a formula that used the partners' future income. Their concerns included that this goes against a clean financial break, potentially risking future or ongoing conflict between the partners over financial matters, creates disincentives and risks strategic behaviour, such as hiding income or reducing workforce participation to manipulate the amount owing under a FISA, or leaving the country to avoid making payments. These submitters were also concerned that the formula would result in financial hardship for the payer, particularly due to the impact of the proposal on the effective marginal tax rate. Two practitioners were concerned that a specific aspect of our proposals (that the first FISA payment, due within eight weeks of a partner giving notice, must include all amounts owing from the date of separation) might result in financial hardship if notice is not given until some time after separation. Dr Chapple suggested that we needed further analysis of the potential perverse unintended consequences of a FISA. Another submitter suggested halving the payments needed to equalise the partners' incomes to reduce the risk of financial hardship to the payer.
- 10.46 Professor Henaghan questioned the workability of a formula that is based on income, noting that people often conceal their true income in other contexts, such as income tax and child support. Professor Atkin supported a broad definition of income to avoid these issues but noted this may be difficult to implement. Atkin also submitted that FISA payments, like maintenance payments, ought to be exempt from income tax.
- 10.47 Other submitters thought that enforcing the regime would be an issue. McWilliam Rennie and Associate Professor Caldwell noted enforcement issues would be exacerbated by the requirement for six monthly adjustments to account for any change in the partners' income. Caldwell suggested that a partner who is found to have deliberately failed to disclose their true income could be presumptively liable in the ensuing proceedings for full indemnity costs to the other partner. Some submitters, including NZLS, ADLS, Professor Atkin and several members of the public, supported the Inland Revenue Department (IRD) having a role in administering and enforcing the regime. NZLS emphasised that IRD would need to be adequately resourced to deal with urgent applications.
- 10.48 Many submitters noted the benefits of satisfying a FISA entitlement with a lump sum payment rather than regular periodic payments over several years, including Nikki Chamberlain, Professor Henaghan and Associate Professor Caldwell. Lump sum payments, these submitters suggested, would avoid enforcement issues associated with periodic payments. However, McWilliam Rennie cautioned against capitalisation if that would require actuarial assistance, as it risks long and expensive disputes.
- 10.49 ADLS and one practitioner suggested a FISA should be able to be longer than five years in relationships that have lasted many decades. One member of the public suggested that the length of a FISA should be linked to the remaining period of dependency of any children.
- 10.50 Professor Atkin and one practitioner thought that a recipient repartnering should be relevant to their ongoing entitlement to a FISA.

Contracting out of the FISA regime

- 10.51 Several submitters did not agree that partners should be able to contract out of FISAs before or during a relationship under section 21 of the PRA.
- 10.52 NZLS submitted it should not be possible, in the same way that parties cannot contract out of child support or spousal maintenance. It did not consider that the ability to set aside an agreement on the grounds of serious injustice provides sufficient protection for vulnerable partners. It suggested alternatives to contracting out under section 21, including requiring court approval to contract out of FISAs, making FISAs an exception to contracting out or adopting a lower standard than "serious injustice" to overturn agreements, such as "unfairness" or "hardship".
- 10.53 Professor Henaghan also questioned whether contracting out should be allowed given any agreement would be vulnerable to being set aside for serious injustice. McWilliam Rennie and another practitioner noted this risk could be partially alleviated by the proposal that the court could set aside an agreement in part (discussed in Chapter 13). A retired Judge of the High Court suggested that any agreement contracting out of the FISA regime should be void where there are children of the relationship on the basis that it would be contrary to public policy. McWilliam Rennie suggested the entitlement to a FISA should only arise when the family income to be shared was over a prescribed cap.

CONCLUSIONS

RECOMMENDATIONS

R50

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

R51

The objective of a FISA is to share the economic disadvantages a partner (Partner A) suffers or the economic advantages a partner (Partner B) gains arising from the relationship or its end.

- R52** Partner A should be entitled to a FISA when:
- a. the partners have a child together;
 - 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.
- R53** The total amount payable under a FISA should usually be determined by a statutory formula that shares the family income for a period of time that is approximately half the length of the relationship up to a maximum of five years. The family income should be calculated based on what the partners earned in the period before separation.
- R54** Entitlement to a FISA should arise from the date of separation, and default implementation rules should provide for the implementation of a FISA by way of monthly periodic payments until a court orders otherwise.
- R55** A court should be able to adjust a FISA and depart from the statutory formula and default implementation rules if satisfied failure to do so would result in serious injustice to either partner, having regard to a number of specified considerations.
- R56** 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 implementation rules or as otherwise ordered by the court.
- R57** Partners should be able to make their own agreement as to the amount and implementation of a FISA before or during a relationship under a contracting out agreement or after a relationship ends under a settlement agreement.

A new limited entitlement to share family income

10.54 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 discussed above. We recommend repealing both section 15 of the PRA and maintenance under Part 6 of the Family Proceedings Act and providing in the

Relationship Property Act (the new Act) a new limited entitlement to share family income through a FISA.⁶⁴ This is broadly consistent with our proposals in the Preferred Approach Paper.

- 10.55 The objective of a FISA is to share the economic disadvantages a partner (Partner A) suffers or the economic advantages a partner (Partner B) gains arising from the relationship or its end. However, a FISA is 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 family income for a specified period, based on what the partners earned in the period before separation and subject to the courts' power to adjust the formula when necessary to avoid serious injustice. We consider this provides a workable, effective and accessible solution.
- 10.56 FISAs are not intended to be a substitute for the role of child support under the Child Support Act, which, as we discuss in Chapter 12, is to ensure that parents take financial responsibility for their children.⁶⁵ However, given that the economically disadvantaged partner is often the primary caregiver (see paragraph 10.7 above), FISAs will also benefit dependent children of the relationship.
- 10.57 In making these recommendations, we have been guided by the need to ensure FISAs:
- (a) give effect to the purpose of the new Act and the principle that the economic advantages and disadvantages arising from the relationship or its end should be shared;
 - (b) give effect to the principle of inexpensive, simple and speedy resolution of relationship property matters by enabling partners to work out whether a FISA is payable and, if so, the amount that is payable 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;
 - (d) minimise the risks of arbitrary outcomes and perverse incentives in relation to labour force participation; and

⁶⁴ 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 "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 comments on the Issues Paper, 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.

⁶⁵ Child Support Act 1991, s 4.

- (e) 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).⁶⁶

Repeal of maintenance

- 10.58 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.
- 10.59 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.
- 10.60 We recognise that, 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, who did not have children together but who suffer financial need on separation for reasons unconnected to the relationship or its end.⁶⁷ 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.⁶⁸ We consider this view to be outdated and also inconsistent with the courts' 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

⁶⁶ Carol Rogerson and Rollie 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 Cal L Rev 1.

⁶⁷ 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.

⁶⁸ 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:

... during the marriage, the vows 'for 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.

to meet those needs through the provision of social welfare where the individual is unable to do so.⁶⁹

When entitlement to a FISA arises

- 10.61 The new Act should specify the circumstances in which a partner is 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 identify easily those relationships that give rise to an entitlement, reducing the scope for dispute and promoting the inexpensive, simple and speedy resolution of relationship property matters.
- 10.62 The economically disadvantaged partner, Partner A, should be entitled to a FISA if they were in a qualifying relationship with Partner B⁷⁰ and:
- (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.
- 10.63 These circumstances (or categories of entitlement) are designed to capture situations where the partners' varying contributions can reasonably be expected to have given rise to economic advantages and/or disadvantages and, through those contributions, there was an (often implicit) expectation to share the economic advantages and disadvantages throughout the relationship. When the relationship ends, the partners' expectations are defeated.
- 10.64 Unlike under section 15, Partner A will not need to prove a difference in income and living standards that was caused by the division of functions during the relationship. Instead, causation is presumed if one of the categories of entitlement applies, and any difference in income is equalised under the statutory formula (see paragraphs 10.86–10.104). This avoids the difficulties experienced in proving causation under section 15.

⁶⁹ 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.

⁷⁰ A qualifying relationship means a marriage, civil union or a qualifying de facto relationship. A qualifying de facto relationship means a relationship that meets the definition of de facto relationship in s 2D of the Property (Relationships) Act 1976 and either satisfies the three year qualifying period or meets additional eligibility criteria. These additional eligibility criteria are either that there is a child of the relationship or the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division. Qualifying relationships are discussed in Chapter 6.

The onus is then on Partner B to apply to a court for an adjustment order if failure to grant an adjustment would result in serious injustice (see paragraphs 10.115–10.121). In addition, there may be cases where, even though Partner A meets the criteria entitling them to a FISA, income sharing under the statutory formula will not reflect the economic advantages or disadvantages the partners take from the relationship. In these circumstances, partners will be able to apply to the court for an adjustment.

- 10.65 We consider that these categories of entitlement (explained in more detail below) reflect New Zealanders' attitudes and values as to when an obligation to share economic advantages and disadvantages should arise. As noted at paragraphs 10.21–10.23 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.⁷¹ This indicates that New Zealanders place significant weight on whether a couple has children together and the extent of the partners' 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.

Category (a): The partners have a child together

- 10.66 Partner A should be entitled to a FISA under category (a) if the partners have a child together.⁷² The child must be a child of both partners (that is, a biological or adopted child of the partners). This is narrower than the concept of a "child of the relationship" that is used elsewhere in the PRA, which includes any other child who was a member of the partners' family at the time of separation.⁷³
- 10.67 When partners have a child together (or make a permanent commitment in respect of the future care of a child through the adoption process), it is reasonable to infer that they expect to share the economic advantages and disadvantages arising from satisfying the responsibilities associated with having and raising the child and make contributions to the relationship on that basis.⁷⁴ While the same expectations *may* arise in relation to other children, such as a child from a previous relationship or a whāngai or fostered child, this cannot be presumed to the same extent and does not necessarily

⁷¹ 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].

⁷² This should include a child of both partners who is born after the relationship ends, if a partner was pregnant with that child at the time of separation, for the same reasons given at paragraph 10.67.

⁷³ Property (Relationships) Act 1976, s 2 definitions of "child of the civil union", "child of the de facto relationship" and "child of the marriage".

⁷⁴ 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, Fisher's comments are also relevant to the basis for sharing the economic advantages and disadvantages resulting from the care of children of the relationship.

endure beyond the partners' separation.⁷⁵ We note, however, that the care of any other child of the relationship may give rise to an entitlement under category (c) of the entitlement criteria (see paragraphs 10.72–10.75).

- 10.68 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 under category (b), discussed below.

Category (b): The relationship was 10 years or longer

- 10.69 Partner A should be entitled to a FISA under category (b) 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.
- 10.70 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 rule that is certain and predictable and reduces the scope for dispute.⁷⁶ 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.
- 10.71 We acknowledge the contrary view of a minority of submitters that a relationship of 10 years or longer should not give rise to an automatic entitlement. However, in our view, the benefits of a bright-line rule outweigh the risk that, in some relationships of longer than 10 years, the partners did not make contributions that resulted in economic advantages or disadvantages with an expectation that those advantages and disadvantages would be shared. In such circumstances, the ability to seek an adjustment addresses the risk of unfair outcomes to Partner B.

Category (c): A partner's earning capacity has been reduced, sustained or enhanced by the relationship

- 10.72 The third category of circumstances that should 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

⁷⁵ As we explained in the Issues Paper, whāngai arrangements have been described as fluid in that the child may return to the care of their birth parents or be cared for by another relative: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.42], citing Jason Bull and Sophie Dunn (eds) *Brookers Family Law – Child Law* (online ed, Thomson Reuters) at [PA2.14.03].

⁷⁶ We note that, in some cases, there may be a dispute about when the relationship began. See the discussion in Chapter 6.

shared had the relationship continued. The PRA defines contributions to the relationship in section 18. In Chapter 8, we conclude that the section 18 definition remains sound and should be retained in the new Act.

- 10.73 An entitlement will arise where Partner A has 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. 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). We do not favour removing the requirement that Partner A reduced their earning capacity "*in order to make contributions to the relationship*" as suggested by some submitters. This would, in our view, extend an entitlement to relationships where Partner A's employment decisions had nothing to do with the family joint venture.
- 10.74 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.
- 10.75 We recognise that there is a greater risk of dispute under category (c) compared to categories (a) and (b), which depend on facts that will in most cases be readily apparent. In our view, this is unavoidable as category (c) is intended to capture relationships that do not have easily identifiable characteristics that can in every case, give rise to an entitlement to share economic advantages and disadvantages. In the absence of easily identifiable characteristics, there needs to be more direct evidence of circumstances establishing an entitlement. We note, however, that the risk of dispute is significantly reduced compared to current section 15 given that category (c) will apply to a relatively small group and that there is no need to prove a difference in income and living standards that was caused by the division of functions during the relationship, as explained at paragraph 10.64 above.

Establishing an entitlement

- 10.76 Entitlement to a FISA should be assessed as at the date of separation. Events subsequent to separation should not affect entitlement but may justify an adjustment to the amount payable under a FISA or how it should be implemented.
- 10.77 If Partner A considers they are entitled to a FISA based on one or more of the categories of entitlement and the application of the statutory formula results in an annual equalisation amount (see paragraphs 10.86–10.104 below) in their favour, they should be able to activate the FISA regime simply by giving written notice to Partner B. Notice should be able to be given at any time after separation up until the partners have resolved all their relationship property matters (either by court order or by a settlement agreement entered into under the new Act).
- 10.78 Once Partner A has given notice to Partner B, the partners would need to work out the amount payable under the FISA, guided by the statutory formula (discussed at paragraphs 10.86–10.104) and decide whether they want the FISA to be implemented in accordance with the default implementation rules (discussed at paragraphs 10.109–10.114) or to agree an alternative arrangement.

- 10.79 Partners should be given a reasonable period of time to make the necessary arrangements.⁷⁷ In the Preferred Approach Paper, we suggested a period of eight weeks from the date of notice would provide sufficient time for partners to seek advice on implementing a FISA and reach an agreement. If the partners cannot reach an agreement within a reasonable period, the statutory formula and default implementation rules should take effect, and from that point on, Partner B should be liable for interest on any unpaid amounts.
- 10.80 The partners should be able to apply to court in three situations:
- (a) Where Partner B challenges Partner A's entitlement to a FISA, Partner B should be able to apply for a declaration of non-entitlement (see paragraphs 10.82–10.85).
 - (b) Where partners cannot agree on how the statutory formula should apply, either partner should be able to apply for a formula determination (see paragraphs 10.106–10.108).
 - (c) Where a partner seeks an adjustment to the statutory formula or default implementation rules, they should be able to apply for an adjustment order (see paragraphs 10.115–10.121).
- 10.81 Partner A should also be able to take steps to enforce the FISA on the basis of the statutory formula and default implementation rules. We discuss enforcement at paragraphs 10.129–10.131 below.

Challenging an entitlement

- 10.82 Partner B should be able to challenge Partner A's entitlement to a FISA by seeking a declaration of non-entitlement from a court. Partner B should be able to seek a declaration of non-entitlement at any time up until the partners have resolved all their relationship property matters (either by court order or by entering into a settlement agreement under the new Act).
- 10.83 An intention to challenge Partner A's entitlement should not affect Partner B's obligation to pay the FISA based on the statutory formula and default implementation rules (discussed below) 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.
- 10.84 Partner B should be able to make an application under urgency to challenge an entitlement but only if payment of the FISA would result in serious and irreversible injustice. This is a high threshold. A court would 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.

⁷⁷ 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.

10.85 A court may make a declaration of non-entitlement if it is satisfied that none of the categories of entitlement apply. The onus of proof will be on the partner disputing the entitlement, Partner B. We expect that challenges will be rare and, given the objective nature of categories (a) and (b), largely 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, took a lesser paying job or declined a promotion or other career advancement opportunity we expect that it will usually 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 by Partner A's contributions to the relationship. However, Partner B could challenge the amount payable under a FISA in an application for an adjustment order.

The statutory formula for calculating the amount payable under a FISA

10.86 The amount payable under a FISA will usually be determined by a statutory formula. Under the statutory formula, Partner A will be entitled to half the family income following separation for a period of time that is approximately half the length of the relationship up to a maximum of five years.

10.87 We expect the statutory formula to resolve the majority of cases. However, there may be cases where, even though Partner A is entitled to a FISA, income sharing under the statutory formula will not reflect the economic advantages and disadvantages the partners take from the relationship. For example, Partner A's average income might have been higher than Partner B's average income, resulting in a nil payment under the statutory formula. However, this might be due to Partner B only recently completing training, enabling them to earn a significantly higher income in future, while Partner A worked full-time to support the household. In this situation, the amount payable under the statutory formula would not reflect the true extent of the economic advantages and disadvantages each partner takes from the relationship. In these exceptional cases, Partner A would need to seek an adjustment from the court. We discuss adjustments below.

Step 1: Calculate the family income

10.88 The family income should be calculated by combining each partner's average annual income over the three years prior to separation (average income).

10.89 This departs from our proposal in the Preferred Approach Paper that family income be calculated on a forwards-looking basis by using each partner's actual income in the period following separation with six monthly adjustments to reflect any changes in income. While a forwards-looking approach would best respond to future life events and reflect the reality of the partners' post-separation circumstances, we recognise the concerns raised by submitters that such an approach may disincentivise workforce participation, could result in financial hardship for Partner B as a result of unintended tax consequences and risks strategic behaviour (see paragraphs 10.45–10.47). This would increase the risk of disputes between partners, making it difficult to apply and enforce the FISA regime.

10.90 A backwards-looking approach that uses the partners' average income over the past three years prior to separation addresses these concerns and, we think, will best meet the objectives outlined at paragraph 10.57 above. It will be easier for the partners to

calculate the amount payable under the FISA as it is more likely that partners will have access to the information needed to calculate the family income. The financial consequences of separation will be more predictable. It reduces the risk of strategic behaviour because it is backwards-looking rather than forwards-looking and avoids disincentivising workforce participation as partners do not share any increases in income they earn after separation. A backwards-looking formula also avoids the need for future adjustments to take into account changes in income, which provides partners greater certainty as to the amount payable under a FISA and facilitates agreements on lump sum payments, which may have advantages over periodic payments, as we discuss below. Using past income also provides a better picture of how the partners organised their lives during the family joint venture and the economic advantages and disadvantages they shared.

Calculating the partners' average incomes

- 10.91 "Income" should be broadly defined for the purpose of calculating each partner's average income. It should include all forms of taxable and non-taxable income a partner received over the three years prior to separation.⁷⁸ This is broader than the definition of income used for child support under the Child Support Act 1991. Income, for the purposes of calculating a FISA, should also include the payment of family expenses from a trust or company controlled by either partner. It may, however, be appropriate to exclude child support payments and Working for Families Tax Credits given that these are designed to meet the needs of children.⁷⁹ It may also be appropriate to exclude any FISA payments in relation to an earlier relationship, as they relate to sharing the economic advantages and disadvantages of that earlier relationship.
- 10.92 In some situations, the family income will include income derived from an asset that is subsequently classified as relationship property, such as an interest in a partnership or a small business. Provision should be made to ensure that this income is not accounted for twice (first under a FISA and second when valuing and dividing the income-generating asset as an item of relationship property based on the income it is likely to produce going forward). Rather, the amount payable under a FISA after relationship property is divided should be adjusted to reflect the value of the future income that is shared through the division of relationship property.
- 10.93 A court may need to determine the family income, as a matter of fact, if the partners cannot agree.⁸⁰ We discuss formula determinations at paragraphs 10.106–10.108 below.

⁷⁸ In Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at [5.74], we proposed that the statutory formula should use post-tax amounts. If post-tax incomes are used, any payments made under a FISA should be exempt from income tax, similar to the treatment of child support and maintenance payments: Income Tax Act 2007, s CW32. We note that pre-tax incomes are used to determine spousal support under the Canadian Spousal Support Guidelines and that spousal payments are tax deductible for the payer and taxable for the payee: Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008).

⁷⁹ Consideration should also be given to whether eligibility for state benefits should take into account any FISA payments received.

⁸⁰ In Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), we proposed that a court should have the power to impute income if it considers the income declared by a partner did not fairly reflect all the income available to that partner. Such power would be unnecessary under a backwards-looking approach.

10.94 If the family income was unusually high or low, such as a company deliberately withholding earnings from one partner, that may be grounds for an adjustment from the formula amount, discussed below.

Income thresholds

10.95 We recommend 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.

10.96 We also recommend that the Government consider setting a minimum difference in the partners' annual incomes before Partner A is entitled to receive FISA payments in order to ensure that a negligible income difference does not give rise to an entitlement.

10.97 We do not propose an upper limit or cap on the income to be used to calculate a FISA under the statutory formula. However, either partner could still seek an adjustment from the formula amount, discussed below.

Step 2: Calculate the annual equalisation amount

10.98 The statutory formula should then equalise the family income so that Partner B is required to pay half the difference to the Partner A. We refer to this as the "annual equalisation amount".

Step 3: Calculate the length of the FISA

10.99 The statutory formula should provide that Partner A is entitled to the annual equalisation amount for a period of time that is approximately half the length of the relationship up to a maximum of five years.

10.100 We consider that the formula should take into account the length of the relationship 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.

10.101 The five year maximum is an arbitrary length of time.⁸¹ However, while we recognise the concern of some submitters that five years is too short to achieve a fair division of economic advantages and disadvantages, particularly in long relationships, we are not convinced a longer period is justifiable in contemporary New Zealand or practically achievable. We expect that a five year maximum will, in many cases, be a reasonable amount of time for Partner A to adjust to life after separation and to plan their return to work or increase their workforce participation. Those who are not able to return to the workforce may be able to apply successfully for an adjustment to the FISA. Those in

⁸¹ We note that Henaghan proposes a period of income sharing to a maximum of 10 years, while van Bohemen proposes a period of two 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.

longer relationships may also have more relationship property to share. This, together with the absence of an upper limit or cap on income used to calculate a FISA, may enable Partner A to build up a solid capital base to assist in the transition from the family joint venture. For these reasons and given the generally conservative nature of maintenance orders both in length and amount, we do not consider that the five year maximum will unduly disadvantage those who have been in a lengthy relationship prior to separation. Ultimately, if the FISA payments are low and there is little relationship property to share, Partner A may require state support.

- 10.102 We acknowledge that 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. In order to minimise this risk, we recommend that, when the duration of the relationship is halved under the statutory formula, the resulting length is rounded up to the nearest six months. 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.

Step 4: Apply a discount for contingencies

- 10.103 The statutory formula should include an annual discount to the annual equalisation amount to recognise that, after separation, the partners' expectations to share economic advantages and disadvantages decrease over time as they transition out of the family joint venture. This gives increasing priority to Partner B being able to retain the fruits of their individual labour while also reflecting the likelihood that Partner A will increase their workforce participation. For example, a discount of 10 per cent might be applied on the amount payable for each year after the first year of the FISA.
- 10.104 The discount should be prescribed at a rate that reflects relevant research on post-separation workforce participation, particularly for parents who are primary caregivers, and the impact of parenthood on income-earning capacity.⁸² Consideration should also be given to the discounts for life contingencies applied under actuarial tables such as the Ogden tables.⁸³

Example: Amy and Billy

- 10.105 The worked example below demonstrates how the statutory formula should apply in a relatively straightforward scenario. This example presumes the statutory formula will use post-tax income, so all incomes given below are references to post-tax amounts.⁸⁴

Amy and Billy have recently separated after being in a qualifying relationship for 10 years. They have one child, Christopher. At the time of separation, Amy is working part-time and earning \$30,000, and Billy is working full-time and earning \$75,000.

⁸² Relevant research is summarised in our Study Paper: Law Commission *Relationships and families in contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at 56–57 and 60–64.

⁸³ See Government Actuary's Department *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases* (7th ed, The Stationery Office, London, 2011) at 8. Ogden tables were discussed by the Supreme Court in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507.

⁸⁴ If pre-tax incomes are used, similar to spousal support under the Canadian Spousal Support Guidelines (see n 78 above), FISA payments should be tax deductible for the payer and taxable for the payee.

Amy is entitled to a FISA under category (a).

Step 1: Calculate the family income

Amy's average income is \$30,000 because Amy earned \$60,000 in Year 1,⁸⁵ did not earn in Year 2 because Amy took parental leave after Christopher's birth and earned \$30,000 in Year 3.

Billy's average income is \$70,000 because Billy earned \$65,000 in Year 1, \$700,000 in Year 2 and \$75,000 in Year 3.

The family income is \$100,000 (\$30,000 + \$70,000).

Step 2: Calculate the annual equalisation amount

Each partner is entitled to half the family income. As Amy's average income is \$30,000 Amy is entitled to an annual equalisation amount of \$20,000.

Step 3: Calculate the length of the FISA

Amy and Billy were in a qualifying relationship for 10 years. Amy is entitled to the annual equalisation amount for 5 years (and no longer because of the statutory maximum⁸⁶).

Step 4: Apply a discount for contingencies

This final step depends on the level of discount prescribed. If, for example, a discount of 10 per cent is to be applied on each annual equalisation amount after the first year of separation, the total amount payable under the FISA would be \$81,902, which is worked out as follows:

Year 1: \$20,000

Year 2: \$18,000

Year 3: \$16,200

Year 4: \$14,580

Year 5: \$13,122

Applying for a formula determination

10.106 If there is disagreement as to how to apply the statutory formula (for example, disagreements over the partners' income or the date of separation), either partner should be able to apply to a court for a formula determination.

10.107 The role of the court in making a formula determination is different to its discretion to adjust a FISA, discussed below. When making a formula determination, the court should be confined to assessing the amount payable under the statutory formula in accordance with any relevant findings of fact, such as what each partner's income was in the three years prior to separation or the length of the relationship. Given the court's limited role, in most cases, subject to the court's resources, formula determinations should be heard quickly and decisions given promptly.

⁸⁵ Year 1 is the third year prior to separation, Year 2 is the second year prior to separation and Year 3 is the year prior to separation.

⁸⁶ See paragraphs 10.99–10.101.

10.108 When making a formula determination, the court should be able to make an order for correction for any underpayment or overpayment up to the date of the order along with interest and costs, if appropriate, in order to ensure Partner B is not incentivised to defer payments altogether until a formula determination is made.

The default implementation rules

10.109 The default implementation rules should apply unless the partners agree⁸⁷ or a court orders otherwise.

10.110 The default implementation rules should provide for monthly periodic payments to be made by Partner B to Partner A of the amount and for the duration determined under the statutory formula. In the example of Amy and Billy given above, Amy would receive monthly payments from Billy of \$1,667 in the first year. These payments would then reduce in accordance with the discount applied by the formula.

10.111 The obligation to make monthly periodic payments should be activated by Partner A giving notice to Partner B. However, as explained at paragraph 10.79, partners should be given a reasonable period of time (such as eight weeks) to make the necessary arrangements before the first payment falls due. The first payment should include any amount owing for the period starting from when Partner A gave notice. This addresses submitters' concerns that the first payment might create financial hardship for Partner B if it were backdated to separation and Partner A had not given notice until some time after separation. This would not affect the total amount payable under a FISA, only when it is paid. For example, if Partner A is entitled to monthly periodic payments for two years under the default implementation rules, Partner B is under an obligation to make those payments for two years from the date of notice rather than the date of separation. As explained at paragraph 10.77, notice should be able to be given at any time after separation up until the partners have resolved all their relationship property matters.

10.112 We recommend periodic payments over a lump sum payment as a default rule, as periodic payments are likely to be more affordable to Partner B in the immediate period following separation and will ensure Partner A continues to have access to a consistent stream of income.

10.113 However, we also recommend the new Act should provide that, on the division of relationship property, a court can order the payment of any remaining amount due under a FISA as a lump sum to be satisfied from Partner B's share of relationship property and in doing so achieve a full resolution of the partners' relationship property matters. This recognises that the satisfaction of a FISA entitlement through a lump sum payment can have many advantages. Partner A may 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. The payment of a lump sum would also minimise compliance costs to the partners and reduce enforcement costs to the state. There may, however, be situations where ordering a lump sum payment and satisfying that from Partner B's relationship property share will not be appropriate, for example, if Partner B wishes to retain their share of relationship property in order to pay

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We discuss how partners can make their own agreements at paragraphs 10.121–10.127 below.

a deposit on a new home. The court should therefore exercise its discretion on a case-by-case basis.

- 10.114 Either partner should be able to seek an adjustment to the default implementation rules by making an application for an adjustment, discussed below.

Applying for an adjustment to the amount payable under a FISA

- 10.115 Either partner should be able to apply to a court for an order adjusting the amount payable under a FISA or how it should be implemented (an adjustment order). This recognises that the statutory formula will not always reflect the extent to which the partners have been economically advantaged or disadvantaged as a result of the relationship or its end, as discussed at paragraph 10.87 above.

- 10.116 A court should have the power to make an adjustment order if it is satisfied that failure to make an adjustment would result in serious injustice.

- 10.117 We recommend including a list of statutory considerations that a court must have regard to in addition to the purpose and principles of the new Act when determining any application for an adjustment order. These statutory considerations should include:

- (a) the extent to which the partners have been economically advantaged or disadvantaged as a result of the relationship or its end;
- (b) the length of the relationship;
- (c) the age of the partners;
- (d) each partner's obligations in relation to the care of any minor children or other dependants;
- (e) each partner's current and likely future employment situation;
- (f) 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;
- (g) any other agreements or orders made under the new Act in relation to a FISA or otherwise, including any payment or transfer of property between the partners or any payment of relationship debt;
- (h) any significant change in financial circumstances that has arisen since separation; and
- (i) any other relevant circumstance.

- 10.118 In general, we expect adjustments will fall into two broad categories. First, where the partners' past income used under the statutory formula significantly understates or overstates the true extent of the economic advantages and disadvantages. Second, where the statutory formula or default implementation rules would result in significant financial hardship for Partner B. The following are examples of where an adjustment might be granted:

- (a) Partner B is due to retire shortly after separation, and superannuation entitlements have been divided as an item of relationship property. In this scenario, the statutory formula may overstate the extent to which Partner B is economically advantaged because their ability to enjoy any enhanced earning capacity is limited by their imminent retirement and because superannuation entitlements have already been shared as relationship property. The statutory formula may also overstate the

extent to which Partner A is economically disadvantaged, as an expectation to share Partner B's income-earning capacity cannot endure beyond their retirement.

- (b) Shortly before separation, Partner B attained qualifications that significantly increased their income-earning capacity and their income increases significantly. In this scenario, the statutory formula may understate the value of Partner A's entitlement because it fails to recognise the true extent to which the relationship has economically advantaged Partner B.
 - (c) Partner A did not work in the three years prior to separation but their income-earning capacity upon their return to work is likely to be higher than Partner B's. In this scenario, the statutory formula may overstate the true extent to which Partner A was economically disadvantaged as a result of the relationship.
 - (d) After separation, Partner B reduces their workforce participation in order to be the primary caregiver of the children of the relationship. In this scenario, the statutory formula may overstate the value of Partner A's entitlement because it does not factor in the economic disadvantage to Partner B as a result of the relationship ending.
 - (e) Partner B cannot work after separation because of a workplace accident or illness or because they are made redundant. In this scenario, application of the statutory formula and default implementation rules may result in significant financial hardship for Partner B. It might therefore be appropriate to reduce the amount payable to Partner A or the terms on which the FISA entitlement should be implemented.
- 10.119 As a matter of policy, repartnering of itself should not be a specified consideration relevant to the court's exercise of discretion. Repartnering might improve Partner A's financial position after separation or impose additional financial responsibilities on Partner B. FISAs, unlike maintenance (see paragraph 10.58 above), are not about meeting financial need. Rather, FISAs are focused on sharing the economic advantages and disadvantages arising from the family joint venture that are not otherwise shared under an equal division of relationship property. Repartnering should be regarded as having no bearing on the extent to which these economic advantages and disadvantages arising from the family joint venture have been shared as between the partners. The effects of repartnering might, however, be relevant to when a court takes into account changes in the partners' financial circumstances (see paragraph 10.117(f)).
- 10.120 As with applications for a declaration of non-entitlement (see paragraph 10.84), urgent applications for an adjustment order may only be made on the grounds that payment of the FISA would result in serious and irreversible injustice.
- 10.121 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.

Partners can make their own FISAs on or after separation

- 10.122 Partners should be able to make their own agreement as to the amount and implementation of a FISA in accordance with the provision for settlement agreements

currently found in section 21A of the PRA. 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 be complied with by both partners.

- 10.123 In making their own agreement, partners should be guided by a clear statement of statutory entitlement to a FISA, the statutory formula for calculating the amount payable under a FISA and default implementation rules. In addition, the statutory threshold for making an adjustment order and the range of relevant considerations a court must consider will provide guidance as to when and how a court might adjust the FISA in the partners' circumstances.
- 10.124 For example, partners might agree to satisfy a FISA entitlement by the payment of a lump sum or the transfer of property. They might do so when dividing their relationship property by adjusting Partner A's share of relationship property or by vesting key items of relationship property in Partner A,⁸⁸ or partners might 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). Partners might also agree to offset a FISA entitlement against the payment of occupation rent, allowing Partner A to remain in the family home without diminishing their share of relationship property.

FISA agreements must be subject to safeguards

- 10.125 When partners make their own FISA agreements on or after separation, these agreements should be subject to the same safeguards that apply to all other settlement agreements made under the new Act.⁸⁹ In our view, this strikes the right balance between allowing partners the freedom to make their own agreements about how economic advantages and disadvantages should be shared on separation while protecting vulnerable partners by ensuring that they enter such agreements with informed consent.⁹⁰
- 10.126 In particular, in order for a FISA agreement to be enforced by a court in place of the statutory formula and default implementation rules, the agreement must be in writing and signed by both partners and each partner must have received independent legal advice before signing the agreement.⁹¹

⁸⁸ As Caldwell notes, any agreements negotiated between separated partners are likely to involve bargaining property against income support: 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 402. A less generous provision of relationship property may be offered alongside an extended FISA (and vice versa) and therefore it makes sense for the partners to resolve all of their property matters relating to both capital and income at the same time.

⁸⁹ In *Law Commission Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), we proposed that agreements that simply adjust the family income in order to reflect a change in the income of either partner during the period of the FISA should not be subject to the safeguards in s 21F of the Property (Relationships) Act 1976. Such agreements are no longer necessary given our recommendation at paragraphs 10.87–10.89 above that family income be determined by looking at the partners' past income rather than present and future income.

⁹⁰ This is discussed in greater detail in Chapter 13.

⁹¹ Section 21F.

- 10.127 These safeguards will protect vulnerable partners from making bad bargains, particularly in situations where it may be difficult to determine a partner's average income without expert assistance. The obligation to make periodic payments under the default implementation rules will ensure that failure to reach agreement does not enable Partner B to avoid their obligations.
- 10.128 A court should be able to set aside a FISA agreement wholly or in part if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.⁹² Settlement agreements are discussed further in Chapter 13.

Enforcing a FISA

- 10.129 While our recommendations seek to encourage partners to reach their own FISA agreement whenever possible, there will be situations where Partner B 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 Partner A and any dependants in their care. The stress and anxiety associated with non-payment may also inhibit Partner A's ability to recover from separation and become economically self-sufficient. The state is also directly affected as recourse to a state benefit may be necessary.
- 10.130 We therefore recommend that strict enforcement measures should be put in place to ensure FISAs are implemented in accordance with the statutory formula and default implementation rules or as otherwise ordered by the court or in accordance with the partners' agreement. The same mechanisms used to enforce maintenance and child support should be available to enforce the FISA regime.⁹³ The Government should also consider whether stricter enforcement measures should be available in circumstances where Partner B *will not* pay⁹⁴ and whether other more facilitative measures should be available in situations where Partner B *cannot* pay, such as a negotiated or mediated agreement.⁹⁵
- 10.131 The Government should also consider any role that IRD could play to support the FISA regime. This might include responsibility for making formula determinations, discussed above, similar to IRD's existing role in relation to child support formula assessments. This would rationalise the use of existing logistical support already available to support families and the transfer of finances.

⁹² Section 21J. In Chapter 13, we recommend that a court have additional powers under s 21J to set aside an agreement in part or to vary an agreement.

⁹³ This includes 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 non-payer to a term of imprisonment: Child Support Act 1991, ss 189–199. Under s 67 of the Child Support Act, these powers also apply to any order for maintenance made under pt 6 of the Family Proceedings Act 1980.

⁹⁴ Coercive or punitive enforcement measures may be ineffective and counterproductive in situations where Partner B *cannot* pay. 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, December 2016).

⁹⁵ 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.

Accessing information about the FISA regime

- 10.132 Information about the FISA regime should be easily accessible by separating partners. In Chapter 16, we recommend the development of a comprehensive information guide. This should cover matters such as who is entitled to a FISA, how partners go about establishing an entitlement and working out the amount of a FISA under the statutory formula and what the default implementation rules provide. Information should also be available about the scope for adjustments to the statutory formula and default implementation rules, including examples of where an adjustment might be made.
- 10.133 As we discuss in Chapter 16, the information guide should be widely available to separating partners at an early point in the dispute resolution process, including through community organisations and the Family Court. It should include checklists, self-help workbooks and financial calculators to enable parties to collate all the information necessary to resolve their relationship property matters. This should include calculators or checklists to enable partners to apply the FISA regime with minimal legal advice and without the need to go to court. When developing the information guide, consideration should also be given to whether information on the FISA regime should be provided by IRD.

Contracting out of the FISA regime before or during a relationship

- 10.134 Partners should be able to contract out of the FISA regime before or during a relationship in accordance with the ordinary rules for contracting out agreements currently found in section 21 of the PRA.
- 10.135 Several submitters, including NZLS, did not think that partners should be able to contract out of the FISA regime (see paragraphs 10.51–10.53). However, FISAs are an entitlement to share the economic advantages and disadvantages arising from the relationship or its end. They are not designed to respond to need. They are distinguishable therefore from maintenance and child support, which parties cannot contract out of. Partners should have the autonomy to make informed decisions as to how economic advantages and disadvantages should be shared on separation, subject to safeguards.
- 10.136 We consider the existing safeguards in section 21F and the ability to set aside an agreement for serious injustice under section 21J are adequate to protect vulnerable partners. This means 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.⁹⁶ However, given our recommendations in Chapter 13, a court would have the power to set aside only part of the partners' agreement under the

⁹⁶ Section 21J(4)(d) of the Property (Relationships) Act 1976 (PRA). A similar issue arises currently in the context of contracting out of s 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 who felt it was not possible to contract out of s 15 in advance, while the New Zealand Law Society 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.

new Act and uphold, for example, the part that deals with the division of the family home.

- 10.137 In order to minimise the risk of contracting out agreements being challenged, partners should be encouraged through information provided about the FISA regime and professional advice 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 after separation

- 10.138 The death of either partner after separation should not affect Partner A's entitlement to a FISA.⁹⁷ This departs from our proposal in the Preferred Approach Paper that Partner A's entitlement should come to an end on the death of either partner. Our earlier proposal reflected a view that, if Partner B dies, they can no longer enjoy any economic advantages arising from the relationship that ought to be shared with Partner A, and if Partner A dies, they are no longer shouldering the burden of economic disadvantage that Partner B ought to share. Our earlier proposal also reflected a preference for a simple and pragmatic approach in order to avoid adding to the complexity and costs of administering the deceased's estate. However, our recommendation to adopt a backwards-looking approach to calculating the amount payable under a FISA will provide greater certainty as to the amount payable under a FISA and will better facilitate agreements on lump sum payments. This will make it easier for the deceased's personal representative to make a claim on behalf of, or satisfy an entitlement out of, the deceased partner's estate. Such claims would be a debt due to or from the deceased's estate.
- 10.139 Our revised approach recognises that Partner A does not stop suffering economic disadvantages simply because of Partner B's death and that Partner B should not avoid sharing economic advantages on Partner A's death in the same way a surviving partner does not avoid sharing relationship property on the death of their partner. This approach also avoids the risk of anomalous or unfair outcomes if the FISA entitlement was satisfied by way of a lump sum payment or transfer of property before a partner died.

⁹⁷

Our recommendations 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.

CHAPTER 11

Trusts

IN THIS CHAPTER, WE CONSIDER:

whether, and in what circumstances, property held on trust should be divided when relationships end.

INTRODUCTION

11.1 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.

BACKGROUND

11.2 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.

11.3 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.¹

11.4 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.² Case law is still developing in this area. However, recent cases suggest that powers only constitute property under the PRA if they allow unfettered

¹ 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].

² *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

control of trust property, unconstrained by fiduciary duties.³ Few trusts will grant a partner such extensive powers, which means a partner's powers to control a trust will likely only be property in exceptional cases.

- 11.5 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

- 11.6 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.⁴

Remedies under the PRA

- 11.7 There are two remedies under the PRA that apply to dispositions of property to a trust.⁵
- 11.8 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.
- 11.9 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.
 - (c) The disposition must defeat the claim or rights of one of the partners.
- 11.10 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,

³ See *Da Silva v Da Silva* [2016] NZHC 2064 at [53]; *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529 at [73]; and *Darlow v Raymond* [2017] NZHC 269, [2017] 3 NZLR 353 at [127].

⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [20.41]–[20.71].

⁵ 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 [39]–[42], which was then 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].

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 1980

- 11.11 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.
- 11.12 Property held on trust can constitute a nuptial settlement.⁶ 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.⁷ This means there must be some connection between the settlement and the particular marriage.⁸ 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.⁹ 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.¹⁰

Remedies in trust law

- 11.13 The law of trusts also provides remedies that can be used to access property held on trust at the end of a relationship:
- (a) Invoking the High Court's supervisory jurisdiction to ensure the trust is properly administered. This may result in the Court replacing the trustees,¹¹ reviewing trustee decisions¹² or ordering that information be provided to the beneficiaries.¹³ The Trusts Bill currently before Parliament contains provisions on these matters.¹⁴

⁶ *Re Polkinghorne Trust, Kidd v Kidd* (1988) 4 NZFLR 756 (HC); *Chrystall v Chrystall* [1993] NZFLR 772 (FC); *Kidd v van den Brink* HC Auckland, CIV-2009-404-4694, 21 December 2009; *X v X* [2009] NZCA 399, [2010] 1 NZLR 601; *W v W* [2009] NZSC 125, [2010] 2 NZLR 31; and *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590.

⁷ *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [34].

⁸ At [34]. *Da Silva v Da Silva* [2016] NZHC 2064 is an example where the Court found there was an insufficient connection; and *Bethell v Bethell* [2018] NZHC 3171 is an example where the Court found there was a sufficient connection.

⁹ *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [53].

¹⁰ At [58]–[59].

¹¹ Trustee Act 1956, s 51.

¹² Section 68. Note that an application under this section cannot be initiated by a discretionary beneficiary.

¹³ 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.

¹⁴ Trusts Bill 2017 (290-2).

- (b) A claim that the trust is invalid either because the partner lacked an intention to create a trust or the trust purportedly created did not effectively alienate the settlor's beneficial interest in the property.¹⁵
- (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.¹⁶
- (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*.¹⁷ 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 such a claim is generally only used in respect of property outside the jurisdiction of the PRA, such as trust property and Māori land (which is excluded under section 6 of the PRA).

ISSUES

11.14 In the Issues Paper, we identified several problems with the relationship between the PRA and trusts.¹⁸ These issues are summarised below.

The PRA does not ensure the just division of property held on trust

- 11.15 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.¹⁹ In the 2013 Census, 14.8 per cent of households reported that their home was held on trust.²⁰ 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.²¹
- 11.16 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.

¹⁵ In two recent cases (one from England and Wales and the other from the Cook Islands), claims that a trust was invalid were successful: *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch); and *Webb v Webb* [2017] CA No 7/17 (Court of Appeal of the Cook Islands) at [56] and [65].

¹⁶ *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.

¹⁷ *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.

¹⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 21.

¹⁹ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [2.3].

²⁰ Statistics New Zealand *2013 Census QuickStats about housing* (March 2014) at 12.

²¹ Statistics New Zealand *Household Net Worth Statistics: Year ended June 2015* (June 2016) at 11. The survey excluded independent trustees.

- 11.17 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

- 11.18 We understand that many couples will divide trust property upon separation as if the trust did not exist.²² 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, 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

- 11.19 The ability for one partner unilaterally to 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.²³ If this procedure is not complied with, the agreement is of no effect.²⁴ There is no comparable procedure to govern how the partners settle property on trust during or in contemplation of a relationship.

The law on which interests in a trust constitute property under the PRA is inaccessible and complex

- 11.20 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

²² 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).

²³ Property (Relationships) Act 1976, s 21F.

²⁴ Subject to the court's power under s 21H to give effect to a non-compliant agreement if satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.

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.²⁵

- 11.21 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 a partner who is a 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.²⁶

The remedies in the PRA are limited

- 11.22 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.²⁷
- 11.23 Partners can also make dispositions that easily avoid being captured by section 44C. It only applies when a partner has disposed of relationship property to a trust after a qualifying relationship has commenced.²⁸ This limitation was illustrated in *G v G*.²⁹ 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

²⁵ 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 C* [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 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.

²⁶ 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 ed, LexisNexis) at [4.47].

²⁷ The courts will infer a partner's intention if it is shown they knew the effect the disposition would have on the other partner's rights rather than requiring proof of a motivation to bring about that consequence: *R v U* [2010] 1 NZLR 434 (HC) at [33], applying *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53] per Blanchard J. The Court of Appeal has recently upheld this approach in *P v H* [2016] NZCA 514, [2016] NZFLR 974 at [41]. On appeal, the Supreme Court affirmed the Court of Appeal's decision: *H v P* [2017] NZSC 196, [2018] 1 NZLR 638.

²⁸ See Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 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.

²⁹ *G v G* [2006] NZFLR 1119 (HC). See also *F v O* FC Hamilton FAM-2009-019-797, 3 October 2011, which was upheld on appeal in *F v O* [2012] NZHC 1021, (2012) 3 NZTR 22-010.

occurred before the qualifying relationship began and was a disposition of separate property, section 44C did not apply.³⁰

- 11.24 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 are defeated by the disposition to the trust.³¹ 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

- 11.25 The alternative avenues to access trust property do not sit happily alongside the PRA or even with each other. They are based on different principles or seek to protect different interests in the trust property. They sometimes require a partner to make claims under different statutes that, in some instances, must be filed in a different court and at a different time to an application under the PRA.
- 11.26 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.³² 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.³³ 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.
- 11.27 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 over trusts, 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 at the end of a relationship. Claims in trust law may require the partner to file separate proceedings in the High Court.
- 11.28 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

³⁰ *G v G* [2006] NZFLR 1119 (HC) at [73]–[75].

³¹ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.12].

³² Bill Atkin has described s 182 of the Family Proceedings Act 1980 as a "relic from the past": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 203. The Court of Appeal has recently described the provision as being "archaic": *Thakurdas v Wadsworth* [2018] NZCA 516, [2018] NZFLR 835 at [13].

³³ Property (Relationships) Act 1976, s 25(2)(a).

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.³⁴

It is unclear whether the notice of claim procedure is available to protect interests in trust property

- 11.29 Section 42 enables a partner to lodge a notice of claim on the title to any land in which a partner claims to have an interest under the PRA.³⁵ In the Issues Paper, we observed that it is difficult to sustain a notice of claim in respect of property legally owned by a third party, such as trust property.³⁶ The courts have held that the partner lodging the notice must have been in a qualifying relationship with either the registered proprietor of the land or a person who is beneficially entitled to the land.³⁷ This is because jurisdiction to divide property under the PRA only exists in relation to property of which the partners are beneficial owners.³⁸ There have been cases in which the courts have held a partner cannot lodge a notice of claim against land held on trust in which the other partner holds no beneficial interest or only a discretionary beneficial interest.³⁹ Further, the Court of Appeal has held that, although a partner may have an arguable case to recover against a trust under section 44, until that order is made, the partner does not have a present interest in the land and a notice of claim cannot be sustained.⁴⁰
- 11.30 Section 42 performs an important function in protecting a partner's interests under the PRA until proceedings are determined. Its failure to apply to trust property is a concern.

Results of consultation

- 11.31 We received 59 submissions on the Issues Paper 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. Trusts were discussed at 10 public consultation meetings and 13 practitioner and academic expert meetings. Several clear themes emerged from these submissions and consultation meetings.

³⁴ Section 4.

³⁵ A notice of claim takes effect as if it were a caveat lodged under the Land Transfer Act 2017: s 42(3) of the Property (Relationships) Act 1976.

³⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.91]–[14.93].

³⁷ See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [9.17]; and Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR42.03(3)].

³⁸ See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [9.17]. The position is reflected in the prescribed form for lodging a notice of claim under sch 1 to the Property (Relationships) Forms Regulations 2001. It requires the partner lodging the notice to identify the other partner as either the registered proprietor of the land or beneficially entitled to it. The form does not contemplate any alternative scenario.

³⁹ *Mulholland v Tonar* HC Auckland CIV-2005-404-6870, 30 March 2006; and *Thompson v Parlour* [2012] NZHC 3096.

⁴⁰ *H v C* [2015] NZCA 213, (2015) 30 FRNZ 521 at [49].

The protection given to trusts over the rights of partners under the PRA is problematic

- 11.32 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.
- 11.33 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.
- 11.34 Several submitters said that, in practice, most disputes over trust property arise when the family home is held on trust and it is not divided as relationship property. 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.
- 11.35 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.
- 11.36 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 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

- 11.37 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 there 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. They 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.

- 11.38 Several submitters 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 revision of the law of trusts (which is before Parliament at the present time)⁴¹ aims to make trust law more accessible to New Zealanders and it hoped 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

- 11.39 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 its experience, many New Zealand families see trusts as a protective 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 that 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.
- 11.40 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 3, means that the family home will be shared even if it was owned by one partner before the relationship was contemplated or was received by one partner from a third party as a gift or inheritance. A practitioner 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 13.

Not all trust property should be subject to PRA claims

- 11.41 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.
- 11.42 Several submitters, including NZLS and 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

⁴¹ See Trusts Bill 2017 (290-2).

mirror the underlying approach to classification in the PRA, which is discussed in Chapter 3.

- 11.43 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.⁴² However, submitters were less sympathetic where the partners had knowingly settled property on trust for the purpose of benefiting others.⁴³
- 11.44 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.
- 11.45 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 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.

⁴² This was also evident from submitter responses to scenario 1 on the consultation website. In scenario 1, the partners (Hugh and Phil) 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.

⁴³ Submitter responses to a scenario on the consultation website that explored this issue were mixed. In scenario 3, the partners (Talia and Sione) 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 Talia finds it hard to make ends meet and wants to unwind the trust. We received 15 responses. Six submitters said that Talia should not get the property held on trust, while six submitters said the court should be able to vary the trust to provide Talia with some or all of the property. Three submitters thought that Talia should get something else, such as a right of occupation over the family home and maintenance from Sione.

- 11.46 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.⁴⁴ NCWNZ submitted that people can make contributions to trust property in a variety of ways, including through non-monetary contributions, and they should be entitled to receive some benefit for those contributions 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

- 11.47 Some submitters, including Professor 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). 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.
- 11.48 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).

The notice of claim procedure should be available for property held on trust

- 11.49 In the Issues Paper, we asked for submissions on whether the notice of claim procedure in section 42 should be available in respect of property held on trust. NZLS said that there is presently confusion on how section 42 can be used regarding trust property and argued that the current approach does not enable a partner to protect their

⁴⁴ This was also evident from submitter responses to scenario 2 on the consultation website. In scenario 2, the partners (Ana and Brendon) are married and live on Brendon's family farm, which is held on a 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 childcare for the partners' children. We asked what should happen when the 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.

contingent interest in trust property. It submitted that section 42 should be amended to enable a notice of claim to be registered against the title of trust property. In contrast, one practitioner did not support reform on the basis that a discretionary beneficial interest under a trust is an insufficient property interest on which to sustain a notice of claim. Another practitioner submitted that section 42 should also apply to land owned by closely held companies, for example, in situations where company shares are relationship property but the land is owned by the company.

OPTIONS FOR REFORM

11.50 In the Issues Paper, we presented four possible options for reform:⁴⁵

- (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 a partner's beneficial interest under the trust. Any interest through which it is both likely and permissible that a 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 that 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.⁴⁶
- (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.

11.51 No clear preference for a particular option for reform emerged from consultation on the Issues Paper. 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 commented that they believed the Issues Paper canvassed all viable options and agreed that the main avenues for redress should be found solely in the PRA.

11.52 No submitter on the Issues Paper favoured Option 1. Several organisations and practitioners supported Option 2, including Perpetual Guardian, Public Trust and Chapman Tripp. NZLS favoured Option 3 on the basis that it respects the general structures of both the PRA and trusts. Chapman Tripp and several practitioners

⁴⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 22.

⁴⁶ 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.

supported 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 that ought to be shared based on the principles of the PRA and provide more clarity on when the court should exercise its discretion.

- 11.53 Many submitters on the Issues Paper, 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. Many submitters also said that partners should be able to contract out of any proposed remedy.

Results of consultation on the Preferred Approach Paper

- 11.54 In the Preferred Approach Paper, we proposed a hybrid of Option 2 and Option 3. We proposed amending section 44C 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.⁴⁷ We also proposed repealing section 182 of the Family Proceedings Act. We proposed a court should have broad powers to grant a remedy in three 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.
- (b) Where trust property has been sustained by the application of relationship property or the actions of either or both partners.
- (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.

- 11.55 Ten submitters expressed support for our proposals in the Preferred Approach Paper, including NZLS, Perpetual Guardian, Public Trust, Professor Mark Henaghan, Professor Jessica Palmer, a retired Judge of the High Court and several practitioners.

- 11.56 NZLS said it strongly supported our proposals, observing that the inappropriate, misguided or unfair use of trusts has resulted in much litigation and injustice. It observed that the effect of an amended section 44C would mirror the remaining sections of the PRA so as to not disadvantage parties where trusts have been utilised during the relationship. It said the court's powers should not be limited under section 44C but should be available to the court generally under section 33 so it has the comprehensive toolbox it needs. NZLS noted a range of consequential amendments would be needed to ancillary areas, such as notices of claim and occupation orders.⁴⁸

⁴⁷ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at ch 6.

⁴⁸ The notices of claim provisions are addressed below, while amendments to other areas of the Property (Relationships) Act 1976 in relation to trust property are addressed where relevant throughout this report.

- 11.57 Perpetual Guardian said it is appropriate that the PRA provides a single comprehensive remedy in the circumstances identified in the Preferred Approach Paper. It thought the proposal was better than the piecemeal remedies currently found throughout different legislation and in the common law. Public Trust submitted that the proposals had the flexibility to deal with the myriad of scenarios that arise within each individual PRA dispute involving trusts. It said that the various stratagems and innovative interpretations currently adopted by the parties and the courts in an effort to achieve a just result will no longer be necessary if the proposal is adopted.
- 11.58 Professor Palmer said our proposals drew together the best elements of the options presented in the Issues Paper and would ensure trusts are left unaffected unless they interfere with the policy of the PRA. Palmer noted that, in relation to dispositions to a trust, a focus on when the relationship was reasonably contemplated is appropriate given the diversity of relationships and the capacity of people to seek to avoid hard and fast rules. Palmer explained that, while uncertainty and litigation are undesirable, they are an unavoidable consequence of targeting the correct transactions. Professor Henaghan supported the court having discretion to take into account the needs of minor or dependent beneficiaries and whether both partners made contributions to the trust with informed and mutual consent.
- 11.59 Other submitters expressly disagreed with certain aspects of our proposals, including the Auckland District Law Society (ADLS), academics Professor Peart and Nikki Chamberlain and several practitioners. These submitters generally felt the proposals went too far but they were not, however, unified as to what specific aspects of the proposals they objected to.
- 11.60 ADLS submitted that the proposed amendment was too broad and was inconsistent with the spirit of trust law and the principles of equity. It said that any remedies should be limited to the extent of the relationship property within the trust that the partner would have been entitled to had the disposition of property not occurred.
- 11.61 Professor Peart also submitted that the courts' proposed powers to make orders in respect of dispositions of property to a trust were too broad. Peart was concerned that the amended section 44C could apply to a wide range of transactions, such as dispositions to trusts settled for the benefit of children or charitable trusts, and could permit a court to make orders in respect of property that it would never have had the power to make orders against if the property were not held on trust. Peart was also concerned that capturing dispositions made "when the relationship was reasonably contemplated" would lead to disputes and litigation. Peart was more supportive of our proposals to provide a remedy where trust property has been preserved or enhanced by the relationship but thought that the courts' powers should be confined to redressing the increase in value or sustenance of the trust property and, when exercising that power, a court should consider the purpose of the trust and the interests of all beneficiaries, not just minor or dependant beneficiaries. Peart noted that our draft provision did not clarify whether the actions and application of relationship property could be either direct or indirect to the trust property concerned.
- 11.62 Nikki Chamberlain submitted that trusts settled before the relationship or by a third party should be preserved. Chamberlain was concerned that the terminology in the draft provision addressing sustaining or increasing the value of trust property was too broad and would likely lead to an increase in litigation.

- 11.63 Several practitioners did not agree in principle that there should be a remedy in respect of dispositions to trusts made before rights under the PRA accrue. They submitted that a partner should have the freedom to settle property on trust before the other partner accrues rights under the PRA, even if it has the ultimate effect of defeating the other partner's rights in respect of that property. They said that a trust may be the only route to prevent assets from becoming relationship property if the other partner does not agree to a contracting out agreement under section 21 of the PRA. These practitioners were also concerned that extending section 44C to dispositions made in reasonable contemplation of a relationship would create uncertainty. They preferred that the remedy be confined to dispositions made during the relationship or within a fixed period (such as one or two years) before the relationship started. These submitters also emphasised the need to give a court express powers to appoint, remove and replace trustees and to ensure that trustees are joined as parties to proceedings under amended section 44C. They said that it was uncommon in relationship property matters for third party beneficiaries or creditors to be served with proceedings affecting a trust.
- 11.64 Most submitters were in favour of repealing section 182 of the Family Proceedings Act, including NZLS, Perpetual Guardian and several practitioners. NZLS commented that section 182 sits uneasily alongside the remedies contained in sections 44 and 44C of the PRA. Perpetual Guardian submitted that section 182 has been used well beyond how it was intended to be used historically. A small number of submitters supported retaining section 182. One practitioner said that section 182 is useful and should be extended to de facto relationships. Professor Peart, responding to the Issues Paper, submitted that there may still be scope for a provision like section 182 to remain. Peart argued that it could have wider application than our proposed remedy, because section 182 applies to all settlements, not only trusts, and because a section 182 claim could be brought by someone other than one of the spouses, such as a child of the relationship.⁴⁹

CONCLUSIONS

RECOMMENDATIONS

R58

Section 44C of the PRA should be retained in the new Act but 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.

R59

An amended section 44C should 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

⁴⁹

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.

defeating the claim or rights of either or both of the partners under any other provision of the new Act;

- 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 directly or indirectly to the application of relationship property or the actions of either or both partners.

R60

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. The court should also have ancillary powers to remove, appoint or replace trustees.

R61

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 new Act and the preservation of trusts.

R62

Where a claim is made under amended section 44C, notice must be given to the following parties granting them the right to appear and be heard in the matter as a party to the application:

- a. the trustees of the trust;
- b. the beneficiaries of the trust, including discretionary beneficiaries; and
- c. any other person with an interest in the property held on trust, including creditors of the trust.

R63

Partners should be able to agree not to make any claim under amended section 44C for the purposes of contracting out of or settling claims under the new Act.

R64

Section 44 of the PRA should be retained in the new Act, continuing to provide a remedy for other avoidance mechanisms.

R65

A partner should be able to lodge a notice of claim against land held on trust and sustain that notice of claim if they have an arguable claim under section 44 or amended section 44C.

R66

Section 182 of the Family Proceedings Act 1980 should be repealed.

- 11.65 We recommend that section 44C be extended to provide a comprehensive remedy that will give the courts 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 Relationship Property Act (the new Act).
- 11.66 Our recommendations are reflected in a draft amended section 44C set out in Appendix 3, which has been prepared with the assistance of Parliamentary Counsel.
- 11.67 The objective of this remedy (amended section 44C) is to provide relief when a partner's entitlement under the new Act 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 new Act, 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 new Act.
- 11.68 Our recommendations largely reflect our proposals in the Preferred Approach Paper and adopt elements from both Option 2 and Option 3 presented in the Issues Paper. Amended 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 new Act and the preservation of trusts. Amended 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. We have not preferred 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. We have not preferred 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.
- 11.69 We recognise the concerns raised by some submitters that amended section 44C goes too far (paragraphs 11.59–11.63). While our proposals would give the courts broader powers over a wider range of trusts, we are satisfied that the court's discretion is properly constrained in a number of ways.
- (a) First, 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 amended section 44C ought to apply.
 - (b) Second, it is clear from the jurisdictional elements of amended section 44C that a court is only concerned with that part of the trust property that has been produced, preserved or enhanced by the relationship. Case law has already established that, when a disposition of property to a trust has defeated a partner's rights, a court will make an award to place the partner in the position they would

have been in had their rights not been defeated.⁵⁰ This approach is affirmed by amended section 44C(3) (set out in Appendix 3). It requires a court to have regard to the extent to which the partner's claim or rights under the PRA have been defeated by a disposition of property or 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) Third, amended section 44C(3) requires a court to have regard to other factors that may suggest no property or a reduced amount of property be recovered from the trust. These factors are set out at paragraphs 11.96(c)–11.96(f) below.

11.70 In making these recommendations, we have been guided by the following principles for reform:⁵¹

- (a) The reform should enhance the new Act'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 new Act. Any new provision needs to be able to distinguish between trust property that should and should not fall under the new Act.
- (c) Any provision that makes trust property available to meet relationship property entitlements should interfere with the trust to the least extent practicable.
- (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.
- (e) To promote the inexpensive, simple and speedy resolution of relationship property disputes, it is preferable that the remedies in relation to property held on trust sit within the new Act.

Dispositions to a trust

11.71 The application of amended section 44C to dispositions to a trust should be extended in three key respects. It will apply to dispositions:

- (a) of *all* property, whether separate property or relationship property;
- (b) made by either or both partners 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 new Act.

11.72 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 recommendations in relation to the classification of property in Chapter 3. Compensation may, however, still be available under amended section 44C to the

⁵⁰ *Rabson v Gallagher* [2011] NZCA 459, [2011] NZFLR 1040 at [76].

⁵¹ See also Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [22.4].

extent that trust property settled by a third party was preserved or enhanced by the relationship.

Dispositions of all property

- 11.73 Amended section 44C will apply when either or both partners make a disposition of relationship property or separate property.
- 11.74 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.⁵² 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.
- 11.75 Extending amended section 44C to dispositions of separate property under the new Act aligns with our recommendations in relation 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. It also aligns with our recommendations in relation to the classification of the family home. In Chapter 3, we recommend that, if the family home was owned by one partner before the relationship was contemplated or was received as a gift or inheritance from a third party, the original net value of the home should remain that partner's separate property but any increase in value should be shared as relationship property. Consequently, if the owning partner disposed of a separate property family home to a trust during the relationship, the non-owning partner's right to share the increase in the value of the home would be defeated.
- 11.76 Whether a disposition of separate property to a trust has the effect of defeating a claim or rights under the new Act will be an objective question of fact. The closer the connection between the disposition and the trust's acquisition of property for the partners' common use or common benefit, the more likely it will be that the disposition has had the effect of defeating a claim or rights under the new Act.⁵³

⁵² 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 an 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 of Mr P's 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.

⁵³ 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".

Dispositions made in contemplation of entering a qualifying relationship

- 11.77 We recommend that amended section 44C extend to dispositions made at a time when the qualifying relationship was reasonably contemplated.⁵⁴ This might include, for example, dispositions made while the partners were dating but not before the partners had met. This aligns with our recommendations in relation to classification in Chapter 3 and will help to minimise the risk of disputes over when the qualifying relationship began.
- 11.78 We acknowledge the concern of some submitters that this recommendation risks disputes about whether a relationship was "reasonably contemplated" when a disposition was made. We are not, however, persuaded by the alternatives suggested by submitters, such as limiting the remedy to dispositions made during the relationship or within a specific timeframe (such as two years) before the relationship began. In most cases, establishing when a relationship began is already an inexact science, even in respect of marriages and civil unions, because any time spent in a preceding qualifying de facto relationship is treated as part of that relationship.⁵⁵ Limiting amended section 44C to dispositions during the relationship or during a specific timeframe before the relationship could also incentivise strategic behaviour in order to avoid the remedy.⁵⁶ For example, a partner could settle property on a trust and then delay cohabitation with their partner until the disposition falls safely outside the specified timeframe. We agree with Professor Palmer, who submitted that a focus on when the relationship was reasonably contemplated is appropriate given the diversity of relationships and the capacity of people to seek to avoid hard and fast rules.
- 11.79 Our recommendation means that a partner can no longer use a trust structure as a means of unilaterally protecting their property from future claims under the new Act once the qualifying relationship in question is contemplated. If the partners do not want to be bound by the new Act, they will need to enter into a contracting out agreement. The procedural requirements for contracting out agreements are discussed in Chapter 13.

Dispositions that defeat the entitlements of either or both partners under any other provision of the PRA

- 11.80 Amended section 44C should apply to dispositions to trusts that have the effect of defeating the claim or rights of either or both of the partners under any other provision

⁵⁴ In the Issues Paper, we suggested that s 44C could be extended to capture all dispositions, including those made before the relationship was contemplated: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [22.46]. However, this would be inconsistent with our recommendations in Chapter 3 under which the new Act would no longer classify property owned by one partner before the relationship was contemplated as relationship property.

⁵⁵ Sections 2B–2BAA.

⁵⁶ Commentators complain incentivising strategic behaviour in order to avoid the remedy is a key shortcoming of the current s 44C. See N Peart, M Henaghan and G Kelly "Trusts and relationship property in New Zealand" (2011) 17 *Trusts Trustee* 866; and Nicola Peart "Equity in Family Law" in A Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009).

of the new Act.⁵⁷ This is intended to clarify two aspects of how amended section 44C should operate.

- 11.81 First, it should not be necessary to establish that the disposition has only defeated the claim or rights of one partner. Professor 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.⁵⁸ However, 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. 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 trust.⁵⁹ However, 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 11.21 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.
- 11.82 The second clarification we propose to the operation of amended section 44C is that the claim or rights that are being defeated should not be limited to a claim for an equal share in the property that was disposed of to the trust. As NZLS said in its submission on the Issues Paper, 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,⁶⁰ a recent decision of the Court of Appeal has taken a different approach.
- 11.83 In *R v C*, the appellant sought occupation rent in respect of the respondent's occupation of the family home after separation.⁶¹ 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

⁵⁷ In contrast to s 44, s 44C focuses objectively on the effects of the disposition rather than the intention of the partner who made the disposition.

⁵⁸ Nicola Peart "Section 44C of the Property (Relationships) Act 1976: conflicting interpretations" (2003) 4 BFLJ 199.

⁵⁹ *R v R* [2010] NZFLR 82 (HC); and *N v N* [2005] 3 NZLR 46 (CA).

⁶⁰ 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).

⁶¹ *R v C* [2016] NZCA 393, [2016] NZFLR 672.

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".⁶² 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".⁶³

11.84 Our recommendation is that the new Act should be capable of providing a remedy when *any* claim or rights under it are frustrated by the use of a trust. By clarifying this in the statute, we expect that amended 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 amended 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

11.85 Amended 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
- (b) any increase in the value of trust property, or any income or gains derived from trust property, is attributable directly or indirectly to the application of relationship property or the actions of either or both partners.

11.86 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).⁶⁴ The effect of this recommendation 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.

11.87 This will also 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, a partner would have a claim in respect of the increase in value of the home that is attributable to the relationship (see Chapter 3), or if a family farm was 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.

⁶² At [14].

⁶³ At [17].

⁶⁴ In Chapter 3, we recommend extending what is currently s 9A to situations where the increase in value, or income or gains derived from one partner's separate property, is attributable to the application of the *other* partner's separate property. We make a similar recommendation in respect of s 17 in Chapter 9. It is not, however, necessary to include a reference to the application of separate property to trust property under amended s 44C(1)(b) or (c) in the new Act, because the application of separate property would likely be a disposition of property that is captured under amended s 44C(1)(a). In situations where the application of separate property to trust property does not constitute a disposition under amended s 44C(1)(a), it would be open to a court to find that it constitutes an "action" of a partner under amended s 44C(1)(b) or (c), consistent with the courts' current approach under ss 9A and 17: RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [11.46]; *Oakley v Oakley* (1980) 3 MPC 127 (HC); and *Hight v Hight* (1996) 15 FRNZ 129 (HC).

- 11.88 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 recommend the repeal of section 44A.

Powers of the court

- 11.89 We recommend giving the court broad powers under amended 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
 - (c) varying the terms of the trust or resettling some or all of the trust property on a new trust or trusts.
- 11.90 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 1976⁶⁵ and with the previous recommendations of the Law Commission in its review of the law of trusts.⁶⁶ 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.⁶⁷ However, as Professor 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.⁶⁸ In our view, it is preferable that the new Act provides a more transparent and effective remedy that is more in line with partners' entitlements under the new Act and that reflects what is occurring in practice.

Ancillary powers to remove, appoint or replace trustees

- 11.91 We agree with the submission made by some practitioners on the Preferred Approach Paper that the court's powers under the new Act should include the power to remove, appoint or replace trustees. In some cases, a court might want to exercise such powers to ensure the proper administration of a trust, such as where the relationship between

⁶⁵ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 30.

⁶⁶ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 232.

⁶⁷ 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].

⁶⁸ Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 443 at 443.

trustees has broken down or when a trustee demonstrates improper prejudice against a beneficiary.

- 11.92 The power to appoint and replace trustees sits with the High Court.⁶⁹ However, the Trusts Bill currently before Parliament proposes to grant the Family Court limited jurisdiction to appoint and replace trustees.⁷⁰ Nevertheless, we think it is preferable for these powers to be expressly stated in the new Act so that litigants do not need to turn to other legislation.⁷¹
- 11.93 In our view, the power to remove, appoint or replace trustees should be under the court's general ancillary powers, currently found in section 33 of the PRA, rather than amended section 44C. These powers are intended to ensure the effective administration of a trust and as such are more ancillary in nature. Further, the removal, appointment or replacement of trustees may be useful in other contexts under the new Act. For example, if a partner's interest under a trust is relationship property but the division of that interest is being hindered by a hostile trustee, the court should have express powers to address the situation.

Matters the court must have regard to

- 11.94 While amended section 44C will have a broader application than the current section and will provide a court with wider remedial powers, a court must still be satisfied that making a compensation order is "just", having regard to a number of specified considerations.
- 11.95 We have recommended considerations that are designed to ensure amended section 44C achieves an appropriate balance between protecting partners' entitlements under the new Act and the preservation of trusts. We also expect that they will promote consistency in the application of amended section 44C and provide a guide to settling claims out of court.
- 11.96 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 new Act have in fact 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 property was preserved or enhanced by the application of relationship property or the actions of either partner;

⁶⁹ Trustee Act 1956, s 51.

⁷⁰ Trusts Bill 2017 (290-2), cls 105–107 and 136. Clause 136 of the Bill provides that, during any proceeding that the Family Court has jurisdiction to hear and determine, the court may make any order under the Trusts Act if it considers the order is necessary to protect or preserve any property or interest until the proceeding can be properly resolved or to give proper effect to any determination.

⁷¹ We note that the Trusts Bill has other powers that may become available to the Family Court. Although we do not propose these powers be included in the Property (Relationships) Act 1976, they will be available to the Family Court when the Bill is enacted.

- (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 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.
- 11.97 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 new Act. This should be the starting point for assessing the value of any compensation under amended section 44C.
- 11.98 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 new Act may not always achieve the new Act'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 recommend giving the courts a degree of flexibility, even though it is at the cost of greater certainty, so they can consider the overall fairness of awarding compensation in the circumstances of each particular case.

Third parties' rights to be heard

- 11.99 We recommend that trustees, beneficiaries and any other person with an interest in the trust property be given a right to be heard whenever a court considers a claim under amended section 44C. This addresses the concerns raised by some practitioners on the Preferred Approach Paper, discussed at paragraph 11.63 above. In the Issues Paper, we noted that section 37(1) of the PRA already provides for limited rights for third parties to be heard in relationship property proceedings but that these rights have been held not to extend to beneficiaries with only a discretionary interest in the trust property.⁷² We are therefore satisfied that it is appropriate to clarify the rights of interested third parties to be heard in relation to claims under amended section 44C.

Contracting out of amended section 44C

- 11.100 Partners should be able to agree not to make any claim under amended section 44C for the purposes of contracting out of the new Act or to agree not to pursue any existing claims against a trust when entering into a settlement agreement under the new Act. This will provide the partners and trustees greater certainty, although any such

⁷² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [21.37]. See *H v R* [2017] NZFC 761 at [26].

agreement should still be subject to the procedural safeguards and remedies currently found in Part 6 of the PRA.

- 11.101 As we explain in Chapter 13, partners cannot agree on the division of trust property under a contracting out or settlement agreement because trust property is not owned by either partner. The partners can, however, identify trust property in the 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 44 should remain a remedy for other avoidance mechanisms

- 11.102 Our recommendations do not affect section 44, which should be retained unchanged in the new Act. The law regarding the application of section 44 is now fairly well settled and appears sound.
- 11.103 Section 44 has wider application than amended 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,⁷³ but it is appropriate that this continues under the new Act given that such a finding enables a court to set the disposition aside.
- 11.104 As Professor Peart submitted, a possible risk of our recommendations, which focus only on the use of trusts, is that people may look to other ownership structures in order to avoid the new Act. 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 new Act. 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.
- 11.105 We do not prefer this approach, 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.⁷⁴ As Professor Bill 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.⁷⁵ While other third party ownership structures may be more easily manipulated, without evidence, it is

⁷³ N Peart, M Henaghan and G Kelly "Trusts and relationship property in New Zealand" (2011) 17 *Trusts & Trustees* 866 at 869.

⁷⁴ We have identified few cases in which a substantive application under s 44F of the Property (Relationships) Act 1976 was decided: *P v P* [2003] NZFLR 925 (FC); *R v H* [2012] NZFC 3779; and *Strauss v Turner* [2014] NZHC 661.

⁷⁵ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 215.

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 they so choose.⁷⁶ 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.⁷⁷
- (c) Third, we anticipate that our recommendations to change the underpinning rules of classification set out in Chapter 3 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 it in the first place.

11.106 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. If that were to change in future and, in particular, if the use of company structures to frustrate the operation of the new Act becomes an increasingly common issue, we anticipate that the remedies we have recommended in this chapter could be adapted to apply to companies. As we note in Chapter 9, consideration could also be given to expanding the remedies available to the court under section 44. The court could be given power to order compensation to be paid by a partner when property they have disposed of in order to defeat the other partner's rights cannot be recovered.

Notices of claim and trust property

11.107 We recommend that a partner should be able to lodge a notice of claim against land held on trust and sustain that notice of claim if they have an arguable claim under section 44 or amended section 44C. Under both section 44 and amended section 44C, a court would have the power to order that property be transferred from the trust to a partner. The protective purposes of the notice of claim procedure currently found in section 42 of the PRA should therefore extend to these provisions. Further, it is likely that partners will make claims under amended sections 44C(1)(b) and 44C(1)(c) rather than claim a constructive trust over the trust property. A constructive trust of this kind already constitutes a caveatable interest.⁷⁸ It would be odd if a partner could lodge a caveat to protect a constructive trust claim but could not lodge a notice of claim in respect of amended section 44C. It could encourage partners to make claims outside the new Act, thereby undermining the efficacy of amended section 44C.

⁷⁶ 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.

⁷⁷ See discussion in *S v W* [2013] NZHC 1809 at [36].

⁷⁸ A constructive trust over trust property is based on the principles in *Lankow v Rose* [1995] 1 NZLR 277 (CA). It is an institutional constructive trust, which is sufficient to support a caveat: *Cerny v Cerny* [2015] NZHC 2256 at [33], relying on *Fortex Group Ltd (in rec and in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 178.

Section 182 of the Family Proceedings Act should be repealed

11.108 We recommend repealing section 182 of the Family Proceedings Act for two reasons.

- (a) First, we are satisfied that amended 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,⁷⁹ in practice, this is not how it is being used. Section 182 is a "relic from the past".⁸⁰ 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 amended section 44C, we are not convinced that section 182 needs to be retained.
- (b) Second, we consider the new Act should continue to operate as the principal source of law that governs property division when relationships end.⁸¹ The new Act should therefore be a comprehensive regime as far as possible. This will ensure property disputes are resolved applying the same purpose and principles.⁸² 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.

⁷⁹ 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.

⁸⁰ 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. The Court of Appeal has recently described s 182 of the Family Proceedings Act 1980 as being "archaic": *Thakurdas v Wadsworth* [2018] NZCA 516, [2018] NZFLR 835 at [13].

⁸¹ Property (Relationships) Act 1976, s 4.

⁸² 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.

CHAPTER 12

Children's interests

IN THIS CHAPTER, WE CONSIDER:

how children's interests should be recognised when parents divide property following separation.

BACKGROUND

The impact of parental separation on children

- 12.1 Parental separation can have significant and wide-ranging impacts on children.¹ 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 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 a parent who is not providing day-to-day care.
- 12.2 For some children, parental separation is associated with a prolonged period of low living standards.² 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

¹ 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. It 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).

² 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.

three years following separation.³ Fletcher also identified that responsibility for the care of children after separation plays a dominant role in influencing financial outcomes⁴ and that child support payments provide little assistance to many primary caregivers.⁵ 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".⁶

Children's interests under the PRA

- 12.3 While the PRA is primarily about how partners' property is to be divided when relationships end,⁷ it has always recognised that children have an indirect but nonetheless important interest in the division of relationship property.⁸ 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.⁹
- 12.4 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 relationship property proceedings.¹⁰ This direction is not confined to any specific provisions of the PRA. It can influence a court's discretion on a wide range of matters.¹¹
- 12.5 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

³ At 185–186.

⁴ At 151.

⁵ 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.

⁶ At 187.

⁷ Property (Relationships) Act 1976, s 1C.

⁸ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

⁹ The Property (Relationships) Act 1976 broadly defines a child of the relationship to include any child of both partners and any other child (whether or not a child of either partner) who was a member of the partners' family when their relationship ended: s 2 definitions of "child of the civil union", "child of the de facto relationship" and "child of the marriage". This has been interpreted to include 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": *GM v JL* (2005) 24 FRNZ 835 (FC) at [33]–[34]. See also *A v A* [2012] NZFC 10192 at [26]–[34].

¹⁰ 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].

¹¹ 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 Otago LR 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]).

relevant to a claim under section 13 that there are extraordinary circumstances that would make equal sharing repugnant to justice.¹²

12.6 The PRA also provides a range of tools that can be used to directly or indirectly meet children's needs following parental separation:¹³

(a) A court can settle relationship property for the benefit of any children of the relationship if it considers it just to do so.¹⁴ The High Court has clarified that:¹⁵

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) A court can make orders postponing the vesting of any share in the relationship property wholly or in part (postponement orders) if immediate vesting would cause undue hardship for the principal provider of ongoing daily care for minor or dependent children of the relationship.¹⁶ Postponement orders are typically made in order to postpone the sale of the family home.¹⁷

(c) A court can make orders granting either partner the right to occupy the family home (occupation orders).¹⁸ It can also vest a residential tenancy in either partner (tenancy orders).¹⁹ When considering an application for an occupation or tenancy order, a court must have "particular regard" to the need to provide a home for any minor or dependent child of the relationship.²⁰ Occupation orders are generally granted for a relatively short period of time or made on an interim basis pending sale or division of relationship property.²¹

(d) A court can make an order granting the use and possession of certain furniture and household effects to one partner (furniture orders), either ancillary to an occupation or tenancy order²² or when reasonably required in order to equip

¹² *M v M* [2012] NZFC 5091, discussed in Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago LR 27 at 45–46.

¹³ These tools are discussed in detail in the Issues Paper: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.27]–[29.61] (in relation to property orders, postponement of vesting and occupation, tenancy and furniture orders) and [27.15]–[27.21] (orders under the Child Support Act 1991).

¹⁴ Property (Relationships) Act 1976, s 26.

¹⁵ *B v B* (2009) 27 FRNZ 622 (HC) at [83(b)].

¹⁶ Property (Relationships) Act 1976, s 26A.

¹⁷ See *H v D* FC Gisborne FAM-2004-016-140, 21 December 2005; and *E v W* (2006) 26 FRNZ 38 (FC). The authors of Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR26A.01] note 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.

¹⁸ Property (Relationships) Act 1976, s 27.

¹⁹ Section 28.

²⁰ Section 28A.

²¹ Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 356.

²² Property (Relationships) Act 1976, s 28B.

another household.²³ When determining whether to make a furniture order in respect of another household:²⁴

... the 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], where those children live, or will be living, with the applicant.

(e) Finally, in any relationship property proceedings, a court can 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.²⁵

12.7 The PRA provides for the appointment of a lawyer to represent any minor or dependent child in relationship property proceedings if it considers there are "special circumstances" that make the appointment "necessary or desirable".²⁶ 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 for the benefit of children.²⁷ The appointment of a lawyer for child is the primary way in which minor or dependent children can independently participate in relationship property 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.²⁸

Children's interests have a low priority in decisions under the PRA

12.8 Despite the PRA's stated purpose, the mandate to have regard to children's interests in section 26, the tools available under the PRA and the provision for lawyer for child, children's interests have not played a prominent role in relationship property proceedings.²⁹ Commentators observe that the courts make "little use" of the obligation to take account of children's interests,³⁰ the tools available to benefit children under the PRA are rarely used³¹ and it is unusual for children to participate in relationship property

²³ Section 28C.

²⁴ Section 28C(4).

²⁵ Section 32.

²⁶ Section 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.

²⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online 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.

²⁸ Family Court Act 1980, s 9B(1)–(2).

²⁹ See discussion in Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago LR 27; and Bill Atkin "Children and financial aspects of family breakdown" (2002) 4 BFLJ 85.

³⁰ 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.

³¹ 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 Otago LR 27 at 50. Peart observed at 53 that successful applications under s 26A were also rare, identifying

proceedings or for a lawyer for child to be appointed.³² Instead, the focus of relationship property proceedings is on the property entitlements that the adult partners have acquired during their relationship, consistent with the primary purpose of the PRA.³³

- 12.9 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.³⁴ Most practitioners also said that children were rarely (72 per cent) or never (6 per cent) a focus of relationship property proceedings.³⁵ The survey report observed that:³⁶

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.

ISSUES

- 12.10 In light of what we know about the potential impact of parental separation on children, the low priority given to children's interests under the PRA reflects a failure to strike the right balance between partners' property entitlements and children's interests following parental separation.
- 12.11 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 how their children are to be cared for and financially supported after separation. Recourse under the PRA may therefore be unnecessary in order to recognise children's interests and meet their post-separation needs. However, 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 from their partner. It is reasonable to assume

only four successful applications out of a total of 13 applications. In relation to occupation, tenancy and 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 Otago LR 27 at 53.

³² 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 Otago LR 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 child was appointed in an application for an order to settle property on a child with special needs.

³³ 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.

³⁴ Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 19.

³⁵ At 19.

³⁶ At 19.

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.

- 12.12 We have identified four specific ways in which the PRA fails to strike the right balance between partners' property entitlements and children's interests following parental separation:
- (a) the outdated language used to promote children's interests;
 - (b) the courts' restrictive approach to prioritising children's interests;
 - (c) the financial disincentives associated with the tools to meet children's needs; and
 - (d) the narrow provision for the appointment of lawyer for child.

The PRA uses outdated language to promote children's interests

- 12.13 The language used in the PRA to promote children's interests is outdated by modern standards and does not reflect the language of the United Nations Convention on the Rights of the Child (UNCROC) to which New Zealand is a signatory.³⁷ UNCROC sets out the basic rights of children, including the right to have their "best interests" treated as a "primary consideration" in actions concerning them.³⁸
- 12.14 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".³⁹ Children's interests do not appear at all in the principles provision of the PRA.⁴⁰ This has significant implications for how the PRA is applied in practice given the important role of purpose and principle provisions in statutory interpretation.⁴¹ Skellern writes that:⁴²
- 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].
- 12.15 Further, while the obligation in section 26 is mandatory, it refers only to the interests of children, not to their "best interests". The PRA does not refer to children's interests at all in relation to postponement orders.⁴³ While a court is required to have "particular regard" to the need to provide a home for children when considering an application for an occupation or tenancy order, it is unclear whether children's needs are particularly

³⁷ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

³⁸ Article 3(1).

³⁹ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 33.

⁴⁰ Property (Relationships) Act 1976, s 1N.

⁴¹ See Interpretation Act 1999, s 5(1) and the discussion on principles provisions in Chapter 2.

⁴² Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 33.

⁴³ Rather, s 26A(1) of the Property (Relationships) Act 1976 requires a court to be satisfied that immediate vesting would cause undue hardship for the principal provider of ongoing daily care for one or more dependent children of the relationship.

relevant to the court's discretion to make a furniture order ancillary to an occupation or tenancy order.⁴⁴

- 12.16 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.⁴⁵

The courts take a restrictive approach to prioritising children's interests

- 12.17 The cases suggest that the courts typically take a restrictive approach when considering whether to give children's interests priority over partners' property entitlements.⁴⁶ This is most evident in relation to the few 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,⁴⁷ in practice, successful applications under section 26 have typically been limited to extreme cases involving criminal offending within the family or severe parental neglect.⁴⁸
- 12.18 Professor Nicola Peart argues that the court's restrictive approach to settling property for the benefit of children 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.⁴⁹
- 12.19 The courts also tend to take a restrictive approach to the PRA's tools that do not affect the partners' ultimate property entitlements but do affect their use and enjoyment of their 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,⁵⁰ recent cases have taken a more restrictive approach that tends to prioritise partners' property interests over children's interests.⁵¹ In *L v B*, the High Court said that:⁵²

⁴⁴ This is because s 28B 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.

⁴⁵ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012).

⁴⁶ In Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago LR 27, Peart observes at 27–28 that:

To the extent that children's needs and interests require protection, the courts have generally adopted a minimalist approach to avoid depriving the parties of their relationship property entitlements.

⁴⁷ *B v B* (2009) 27 FRNZ 622 (HC) at [83(b)].

⁴⁸ 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). The courts' current approach is illustrated in the recent case of *E v E* [2018] NZHC 1469, where the High Court upheld a decision declining to make a s 26 order in respect of a 20-year-old dependent child who suffered from intellectual disabilities. The application was declined on the basis that the relationship property pool available for division (\$237,000) was too small to support a s 26 order, even though the original relationship property pool, before interim distributions had been made, was around \$1.4m (at [44]). The Court also observed that the child would receive state assistance in their own right and that, should the child find themselves in difficulty, the 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" (at [45]–[46]). The modest size of the relationship property pool available for division was also grounds for refusing to make a s 26 order in *M v M* [2012] NZFC 5019 and *R v R* [2007] NZFLR 177 (FC).

⁴⁹ Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago LR 27 at 52.

⁵⁰ See *W v W* (1984) 2 NZFLR 385 (FC) at 389–390; and *N v N* (1985) 3 NZFLR 766 (HC) at 769.

⁵¹ 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

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.

- 12.20 Finally, the courts use their power to revisit child support arrangements in relationship property proceedings in a "conservative fashion".⁵³ In *H v H*, the High Court observed that lump sum child support awards were limited in all but the "most unusual circumstances" to a capitalisation of the formula assessment in any given financial year.⁵⁴

There are financial disincentives associated with the tools for meeting children's needs

- 12.21 The effectiveness of the tools available to meet children's needs is limited by the financial risks the tools pose for the applicant partner. In particular, a partner 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.⁵⁵ Such a claim might have the effect of diminishing the applicant partner's ultimate share in the relationship property pool.
- 12.22 The use of one of the tools listed at paragraph 12.6 above might also risk diminishing the amount of child support payable under the Child Support Act.⁵⁶ 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.⁵⁷

Narrow provision for the appointment of lawyer for child

- 12.23 As noted above, it is unusual for children to participate in relationship property proceedings or for a lawyer for child to be appointed.⁵⁸ This may be partly due to the high threshold for appointing a lawyer for child under the PRA (there must be "special

orders extending over several years will be regarded as "offending against the clean break principle" and will not normally be appropriate.

⁵² *L v B* [2013] NZHC 2378 at [8].

⁵³ *F v M* [2012] NZFC 7705 at [110]. The court can make orders relating to child support under s 32 of the Property (Relationships) Act 1976.

⁵⁴ *H v H* [2007] NZFLR 910 (HC) at [104].

⁵⁵ 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 they are entitled to under the Property (Relationships) Act 1976 through ss 18B and 33.

⁵⁶ See *W v W* [1997] NZFLR 543 (HC) where the High Court 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.

⁵⁷ Child Support Act 1991, ss 105(2)(c)(ii)–(iii).

⁵⁸ See *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 for a rare example where a lawyer for child was appointed. In that case, the child was an infant and the child's substantial inheritance had been intermingled with relationship property.

circumstances" that make the appointment "necessary or desirable"⁵⁹. 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.⁶⁰ This may create a financial disincentive on the partners to ask a court to appoint a lawyer for child.

- 12.24 Without independent representation, the interests of children can be easily overlooked, misunderstood or sidelined.⁶¹ This is inconsistent with the rights of children affirmed in UNCROC, including the right to express their views in matters affecting them, for those views to be given appropriate weight and for the opportunity to be heard in any judicial proceeding affecting them, either directly or through a representative.⁶²

APPROACH IN COMPARABLE JURISDICTIONS

- 12.25 Children's interests are recognised to varying degrees in property sharing regimes in comparable jurisdictions.
- 12.26 The PRA's tools are broadly consistent with those that exist in the Canadian provinces, which, like New Zealand, adopt rules-based statutory property sharing regimes and have separate statutory regimes for spousal maintenance and child support.⁶³
- 12.27 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.⁶⁴ This enables a court to consider the needs of the

⁵⁹ Property (Relationships) Act 1976, s 37A(1).

⁶⁰ Section 37A(2).

⁶¹ See 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, where they argue that children's interests are rarely pleaded by partners as "there is no incentive on the parties to put their children's interests ahead of their own".

⁶² 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 12.

⁶³ 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, 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); The Family Property Act SS 1997 c F-6.3, s 7(a); Civil Code of Quebec, arts 409–410; Family Law Act SNWT (Nu) 1997 c 18, s 55; Family Law Act RSO 1990 c F.3, ss 24(3)(a) and 24(4); and Family Law Act RSPEI 1988 c F-2.1, s 25.

⁶⁴ 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 regimes also contain provisions that enable a court to set property aside for a child'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).

family as a whole with the aim of achieving a fair or just outcome for the parties.⁶⁵ The relevant statutes in these jurisdictions deal with property division, spousal maintenance, child support and the care of children after separation at the same time, facilitating a holistic approach to the consequences of parental separation.⁶⁶ However, for the reasons discussed in Chapter 2, we do not propose that New Zealand shifts to a discretionary property sharing regime.

RESULTS OF CONSULTATION

- 12.28 We received 49 submissions on the Issues Paper and 25 submissions on the Preferred Approach Paper that addressed children's interests, including 46 submissions from members of the public, 12 submissions from organisations and 15 submissions from individual practitioner and academic experts. We also received comments from the Judges of the Family Court.
- 12.29 Submissions reflected a diverse range of views about the priority that should be given to children's interests under the PRA. Most submitters agreed that the PRA does not give adequate priority to children's interests, including the Office of the Children's Commissioner (Children's Commissioner), Barnardos New Zealand (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).
- 12.30 In its submission on the Issues Paper, Barnardos highlighted the significance of the family home and other types of property to children's wellbeing. It 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.
- 12.31 Barnardos also 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.

⁶⁵ 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.

⁶⁶ At 66.

12.32 Other submitters did not agree that children's interests should have a greater priority under the PRA, including the Judges of the Family Court, the New Zealand Law Society, Auckland District Law Society (ADLS) and some practitioners and members of the public. These submitters tended to consider that the PRA is about the partners' property entitlements and the current provisions of the PRA adequately recognise children's interests in that context. 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.

Results of consultation on the Preferred Approach Paper

12.33 In the Issues Paper, we identified a range of options for reform that were aimed at taking a more child-centred approach in the PRA.⁶⁷ We refined our proposals in the Preferred Approach Paper, proposing to:⁶⁸

- (a) elevate children's best interests to a primary consideration under the PRA;
- (b) introduce a presumption in favour of granting the primary caregiver temporary occupation of the family home;
- (c) make minor improvements to the other tools available to meet children's needs;
- (d) strengthen child participation in relationship property proceedings by lowering the threshold for appointing lawyer for child; and
- (e) recommend a review of the effectiveness of the Child Support Act in meeting children's needs and setting the level of financial support to be provided by parents for their children.

12.34 We received 16 submissions that commented on our proposals in the Preferred Approach Paper. The Children's Commissioner, Barnardos, academics Professor Peart and Nikki Chamberlain, two practitioners and four members of the public supported our proposals. Barnardos considered our proposals would give greater consideration to children's interests while striking an appropriate balance given the PRA affects children but is not specifically about children. It noted the need for a change in approach by the judiciary when dealing with relationship property matters and for the judiciary to be routinely trained and supported in working with children. The Children's Commissioner considered that, if the proposals were implemented, they would represent significant progress for the protection of children's interests. The Children's Commissioner considered that the proposals should be seen as a broader package of reforms to benefit children, sitting alongside Family Income Sharing Arrangements (FISAs), discussed in Chapter 10, and the need for adequate child support under the Child Support Act. However, the Children's Commissioner and Professor Mark Henaghan did not think our proposals went far enough in some respects.

⁶⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 29.

⁶⁸ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P34–P39.

- 12.35 NZLS supported some proposals but was strongly opposed to others. The Judges of the Family Court, ADLS, two practitioners and two members of the public did not support our proposals.
- 12.36 We explore the submitters' specific comments and concerns regarding the proposals below, as expressed in submissions on the Issues Paper and Preferred Approach Paper.

Giving greater priority to children's interests

- 12.37 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. Barnardos agreed that changing the equal sharing law was not necessary in order to ensure the PRA takes a more child-centred approach. 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. The Children's Commissioner preferred elevating children's best interests to the "first and paramount consideration". BPWNZ also submitted that children's interests should be paramount.
- 12.38 NZLS, ADLS and the Judges of the Family Court opposed giving children's interests greater priority under the PRA. NZLS was concerned that making children's best interests a primary consideration would be a significant departure from the current law. It was concerned that this would be inconsistent with the PRA's primary objective of a just division of property between the partners and may encourage strategic manoeuvring by a partner over care arrangements in order to gain an advantage in relationship property proceedings or a parent seeking to align with a child to further that parent's particular view of property entitlement. NZLS suggested that children should be a primary focus in relation to occupation of the family home (discussed below) rather than the division of relationship property. However, it supported retaining a power to settle property for the benefit of children, as under existing section 26.
- 12.39 ADLS similarly did not support giving children's interests greater priority under the PRA in general and opposed children's interests resulting in an unequal division of relationship property. It considered this would place children in the middle of the property dispute, introduce a degree of implied fault in no-fault legislation and increase litigation and prevent settlement. It submitted that section 26 and the current restrictive approach taken to settle property for the benefit of children should remain. Both ADLS and NZLS warned of the risk of increasing disputes over care arrangements, referring by way of example to the increase in disputes relating to children when the Child Support Act was introduced, giving care arrangements a financial implication.
- 12.40 The Judges of the Family Court were concerned that promoting children's interests in the PRA and the proposed enabling mechanisms would increase acrimony between partners at the time of separation, create cost and delay in proceedings and could be used as an illegitimate means to leverage a party's own position. The Judges also commented that, if procedural rules are to require parties to provide the court with information about any children of the relationship, that information must be brought to the attention of the court at the earliest opportunity so as to avoid any delay, such as in the joint Memorandum of Issues ahead of the first judicial conference.
- 12.41 Professor Henaghan argued that there should be a specific requirement on the court to check that children's needs are adequately met before making an order under the

PRA.⁶⁹ The court should have appropriate powers to ensure children's needs are met, for example, by establishing a fund using the partners' property. Requiring a judge to check the arrangements for the children and be satisfied that their needs will be met was also supported by HRC and the Children's Commissioner. The Children's Commissioner did not agree that this would increase the risk of parental conflict and delay resolution of PRA disputes, observing that view is "the very approach that has infected judicial reasoning and ultimately disadvantaged children".

Presumption granting occupation of the family home to the primary caregiver

- 12.42 NZLS, one member of the ADLS Committee, the Children's Commissioner and several other submitters supported the proposal for a presumption in favour of granting temporary occupation to the primary caregiver. The Children's Commissioner also suggested that a court should be required to give reasons when the presumption is displaced and that occupation rent should only be ordered if it is in the best interests of children. We discuss occupation rent in Chapter 15.
- 12.43 The Judges of the Family Court, one practitioner and one member of the public were opposed to a presumption in favour of granting occupation of the family home to the primary caregiver. The Judges were concerned that a presumption may lead to heightened conflict, increased litigation and subsequent delays. They noted that the risk of a claim for occupation rent may have an impact on the occupying parent. This is a very significant factor as the cost of occupation rent over a lengthy period of time would be substantial and ultimately may be detrimental to the interests of the occupying partner, who may have their capital sum eroded to the extent that they are unable to buy another home. The Judges also noted that the presumption does not adequately address low-income families where the family home will be the only substantive asset owned by the partners and where their combined income will be insufficient to meet the costs of maintenance and upkeep on the home after separation.
- 12.44 Several submitters also highlighted issues with identifying the "primary caregiver" for the purposes of the presumption. The Judges of the Family Court observed that changing family norms and arrangements can make it difficult to identify a primary caregiver and were concerned that, when both partners seek care of the children, there are likely to be competing applications for occupation that may lead to heightened conflict, greater litigation and subsequent delays. They considered a statutory definition of primary caregiver would be required if the presumption was to be implemented.

Improving other tools available to meet children's needs

- 12.45 Few submitters commented directly on our proposals to make minor improvements to the other tools available to meet children's needs. NZLS agreed with most of our proposals but questioned the proposal that an occupation or tenancy order should not be grounds for departure from formula-assessed child support. NZLS considered this might lead to unfairness for the non-occupying parent, such as where the parties' capital assets solely comprise the family home or where one party is unable to access

⁶⁹ See also discussion in 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.

their capital for some years. NZLS considered that provision of the home should be left as a factor that the child support agency is able to take into account in making a departure order.

- 12.46 ADLS did not agree with these proposals, submitting that the PRA should remain adult-focused legislation. It said children's needs should be dealt with through the parents rather than separate provision within the PRA that would effectively reduce the pool available for division between the parents, resulting in the parents having less ability to provide for their children.
- 12.47 The Children's Commissioner supported the proposals but submitted that more direction should be provided as to the types and nature of tools that should be used by partners, lawyers and judges to ensure that the views and interests of the children are available to the court (referring by way of example to section 11(2) of the Oranga Tamariki Act 1989).⁷⁰

Strengthening child participation

- 12.48 Submitters held mixed views on whether children's views should be heard more often in relationship property proceedings.
- 12.49 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. The Children's Commissioner considered that there should be a presumption in favour of appointing a lawyer for child in relationship property proceedings that is rebutted only where it is unnecessary or not in the best interests of the child. 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:

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 amount to them being treated as property to be divided or retained.

- 12.50 The Judges of the Family Court, NZLS and ADLS were firmly opposed to increasing child participation through lowering the threshold for appointing a lawyer for child. The Judges of the Family Court considered that this would increase delay in relationship property proceedings, increase costs, prolong inter-parental conflict and increase acrimony between separating parents. They were also concerned that it would

⁷⁰ Section 11(2) of the Oranga Tamariki Act 1989 provides:

(2) In proceedings or a process to which this section applies,—

(a) the child or young person must be encouraged and assisted to participate in the proceedings or process to the degree appropriate for their age and level of maturity unless, in the view of a person specified in subsection (3), that participation is not appropriate, having regard to the matters to be heard or considered; and

(b) the child or young person must be given reasonable opportunities to freely express their views on matters affecting them; and

(c) if a child or young person has difficulties in expressing their views or being understood (for example, because of their age or language, or because of a disability), support must be provided to assist them to express their views and to be understood; and

(d) any views that the child or young person expresses (either directly or through a representative) must be taken into account.

encourage parties to engage in strategic behaviour by either creating delay or intentionally increasing the other party's costs. The Judges noted that, if appointments of lawyer for child are more readily made, the financially weaker party will suffer because the parties to the proceeding must pay for the cost of appointment. NZLS and ADLS made similar submissions.⁷¹ NZLS also noted that the role of lawyer for child under the PRA has a different focus to the role of lawyer for child under the Care of Children Act and that there can be significant difficulties for the lawyer for child in explaining the nature of relationship property proceedings to children. ADLS considered limited resources would be better allocated towards other PRA initiatives, such as improving information and support available to parties.

- 12.51 The Judges of the Family Court also observed that careful consideration is required in respect of the obligation of parties and service providers to represent children's interests in family dispute resolution (FDR) should some form of FDR be extended to relationship property matters. ADLS similarly observed that, if a new dispute resolution regime is put in place, such as FDR, it would support lawyer for child appointments. We consider FDR in relation to relationship property matters in Chapter 16.

CONCLUSIONS

RECOMMENDATIONS

R67

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

- a. a statutory principle to guide the achievement of the purpose of the new Act;
- b. an overarching obligation on the courts to have regard to the best interests of any minor or dependent children of the relationship; and
- c. procedural rules to ensure a court is provided with the information it needs in order to perform effectively 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.

R68

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. The court should be directed to have particular regard to any unmet needs of the child or children during minority or dependency.

⁷¹

The New Zealand Law Society (NZLS) made a similar submission in its submission to the Independent Panel on Family Justice Reforms, where it stated:

The right balance needs to be achieved between children being able to express views and participate in matters that affect them and children not being over-involved in acrimonious adult disputes, nor over-exposed to multiple professionals.

It supported the Panel's proposal that further research be undertaken into children's safety and participation in the family justice system in order to identify the most appropriate model of child participation for New Zealand. See NZLS Submission to the Independent Panel, Family Justice Reforms (1 March 2019) at [28]–[31].

R69 There should be a presumption in favour of granting a temporary occupation or tenancy order on application by a principal 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.

R70 The other tools available to meet children's needs should be retained in the new Act and improved by:

- a. broadening the jurisdiction of furniture orders to include all family chattels 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.

R71 The Government should consider ways to strengthen child participation in relationship property proceedings in any work undertaken in response to the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms.

R72 The Government should 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.

12.52 Our recommendations aim to give greater priority to children's interests under the Relationship Property Act (the new Act) and seek to achieve a better balance between partners' property entitlements and children's interests following parental separation.

Elevating children's interests

12.53 We recommend 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 that has the potential to impact significantly on children's interests.⁷² 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 its discretion. Our recommendation is consistent with the rights affirmed in UNCROC (see paragraph 12.13 above) and with

⁷² In Chapter 2, we recommend that the statutory purpose statement of the new Relationship Property Act should be to achieve a just division of property between partners when a relationship ends on separation.

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.⁷³

- 12.54 We acknowledge the concern of the Judges of the Family Court, NZLS and ADLS that elevating the status given to children's interests may exacerbate or prolong disputes and tension between the partners and may encourage strategic behaviour in order to gain an advantage in relationship property proceedings. However, we also acknowledge the Children Commissioner's observation that this view "has infected judicial reasoning and ultimately disadvantaged children". We do not consider that the risk of increased disputes and strategic behaviour outweighs the desirability of reform. Rather, this risk should be addressed by improvements to the resolution process. In Chapter 16, we recommend a number of significant procedural changes to enhance case management and trial aspects of proceedings, including introducing strict penalties for non-compliance with directions of the court. We expect that these improvements will better enable the court to manage this risk accordingly.
- 12.55 We recommend giving effect to the higher priority accorded to children's interests in three ways:
- (a) First, the best interests of any child of the relationship⁷⁴ as a primary consideration will be a statutory principle to guide the achievement of the purpose of the new Act.
 - (b) Second, a court will be directed to have regard to the best interests of any minor or dependent⁷⁵ children of the relationship in any proceeding under the new Act (replacing the existing obligation in section 26).
 - (c) Third, procedural rules should require that:

⁷³ See Care of Children Act 2004, s 5(b); Crimes Act 1961, s 152; and Child Support Act 1991, s 4(b).

⁷⁴ In the Issues Paper (Law Commission *Dividing relationship property – Time for change? Te mātotoha 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 the 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 6. We also note the current definition of "child of the marriage" in s 2 includes a child of a preceding de facto relationship between the spouses, but this element is absent from the definition of "child of the civil union". Also, the definition of "child of the de facto relationship" does not include a child of a preceding marriage or civil union. These differences should be addressed by using relationship neutral language in the new Act and providing that a "child of the relationship" includes a child of any preceding qualifying relationship between the partners.

⁷⁵ In the Issues Paper (Law Commission *Dividing relationship property – Time for change? Te mātotoha 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 the New Zealand Law Society 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 would be possible with defined terms.

- (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) at the earliest opportunity, partners provide the court with basic information about any children of the relationship, including their age, any special needs, likely duration of 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.

12.56 We do not recommend making children's interests the "first and paramount consideration" as this would give children's best interests the highest priority in the new Act, which we do not think is an appropriate priority in a statute that is not primarily focused on children.⁷⁶ We do not propose a more interventionist approach as suggested by Professor Henaghan of 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 1980.⁷⁷ Professor Bill Atkin proposes a similar 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.⁷⁸ We do not favour either of these options because they undermine the proper role of the child support regime (see paragraph 12.59(b) below). We also note that section 45 of the Family Proceedings Act does not appear to have been a particularly effective mechanism in practice.⁷⁹

12.57 Our recommendation for procedural rules at paragraph 12.55(c) above is designed to equip 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 new Act for meeting children's needs. Acknowledging the comments of the Judges of the Family Court, we recommend that information be provided to the court at the earliest opportunity. While we do not make specific recommendations as to the form in which information about any children of the relationship should be provided to the court, we note the risk that using templates or prescribed forms akin to a checklist may undermine the value of the exercise and that an affidavit style narrative document may be more effective. We discuss the court process in Chapter 16 and make a range of recommendations aimed at promoting the

⁷⁶ Compare s 4 of the Care of Children Act 2004 and pt 2 of the Oranga Tamariki Act 1989.

⁷⁷ See also discussion in 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.

⁷⁸ Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 267–268.

⁷⁹ 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.

inexpensive, simple and speedy resolution of relationship property matters as is consistent with justice.

No new exception to the general rule of equal sharing

12.58 We do not recommend 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 new Act.⁸⁰ We consider that elevating the "best interests" of children to a "primary consideration" will promote a more focused judicial approach when exercising discretion under the new Act, 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 where there are extraordinary circumstances that would make equal sharing repugnant to justice; or
- (b) set relationship property aside for the benefit of children (see discussion below).⁸¹

12.59 We have not recommended a new exception to equal sharing, having regard to the following:

- (a) The primary purpose of the new Act, which is the just division of property between the partners on separation.
- (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. It is our view that the new Act should respect and complement the role of the child support regime, which is to ensure that parents take financial responsibility for their children.⁸² Issues about how parents take financial responsibility for their children ought to be addressed through a review of the child support regime (see paragraph 12.78 below) rather than through reform to the property sharing regime.⁸³
- (c) The role of other tools within the new Act 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 12.69–12.72).
- (d) Our recommendations for FISAs in Chapter 10, which would require partners with children to share their income for a specified period of time following separation, and the indirect benefit of these recommendations for children.
- (e) The risk that giving children's interests greater priority in property division might have negative consequences for some children. This might include increasing

⁸⁰ As discussed in the Issues Paper: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.20]–[28.23].

⁸¹ As Peart notes in Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago LR 27 at 51–52, 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.

⁸² Child Support Act 1991, s 4.

⁸³ 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.

- (f) The practical difficulties with giving children's interests greater priority in property division, including the reality of ongoing changes to care arrangements and parental income⁸⁴ and the fact that a partner's share of relationship property may need to sustain that partner well beyond the period of financial responsibility to maintain their children.
- (g) The advantages for children of a clear and certain rule of equal sharing (minimising parental conflict and promoting speedy resolution consistent with justice),⁸⁵ 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.
- (h) The need to balance parental autonomy and state direction.⁸⁶ 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.

Setting property aside for the benefit of children

12.60 We recommend that the power to settle property for the benefit of any children of the relationship should be retained in the new Act but that it should require a court to have particular regard to any unmet needs of the children.⁸⁷ This would involve identifying the child's needs (for example, any special needs arising from intellectual or physical disability), assessing whether adequate 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.

12.61 We also recommend clarifying in the new Act 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.⁸⁸ While this would exclude independent adult children who may have a need arising from parental conduct (such as criminal offending or severe neglect) that occurred during minority or dependency,⁸⁹ this group is less vulnerable due to age and independence and may have other avenues of recourse or support, such as state benefits.

⁸⁴ See, for example, Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014).

⁸⁵ 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.

⁸⁶ 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].

⁸⁷ See discussion at [29.35]–[29.37].

⁸⁸ *B v B* (2009) 27 FRNZ 622 (HC) at [83].

⁸⁹ See, for example, *R v R* [1998] NZFLR 611 (FC).

New presumption in favour of a temporary occupation

- 12.62 We recommend introducing a new presumption in favour of a temporary 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 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.
- 12.63 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 occupying partner with a temporary reprieve in order to plan an orderly transition from one household to two.
- 12.64 While we acknowledge the concerns of the Judges of the Family Court and some submitters (at paragraph 12.43), it is important to emphasise that the presumption will not be appropriate in all circumstances, nor is it designed to promote long-term occupation. 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. In light of the conservative approach taken to occupation and tenancy orders in recent years (discussed at paragraph 12.19 above) and 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 basis should have greater priority under the new Act. While we acknowledge that our recommendation may disadvantage the non-occupying partner following separation, an occupation or tenancy order only affects their ability to use and enjoy their property for a specified period of time. They do not affect underlying property rights and are rebuttable in situations where it would cause serious injustice.
- 12.65 We recommend the presumption should be available to any person who is "a principal caregiver of any minor or dependent children of the relationship". This reflects the concern raised by submitters (see paragraph 12.44) that it can be difficult to establish who is "the primary caregiver" in the context of shared care arrangements. It is also consistent with language already used elsewhere in the PRA.⁹⁰ We consider that this language is flexible enough to accommodate situations where the care is shared by the partners. If the court is satisfied that the respondent partner is also a principal caregiver, that would be directly relevant to the court's consideration of whether granting the application would be in the child's best interests.
- 12.66 We have considered but do not prefer defining principal caregiver further. We are conscious that any threshold of care would risk unfairly excluding or including some care arrangements, and we are satisfied that the presumption will still operate sufficiently for those situations where one partner provides the majority of childcare.
- 12.67 In determining the best interests of a child in the context of such an occupation order, the factors a court should have regard to should include:
- (a) the need to provide a home for the child;

⁹⁰ Section 26A of the Property (Relationships) Act 1976 refers to the "principal provider of ongoing care".

- (b) the potentially 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.⁹¹
- 12.68 When an occupation order is made, the non-occupying partner may be entitled to compensation in the form of occupation rent. The risk that occupation rent deters partners from applying for an occupation order (see paragraph 12.21 above) is mitigated to some extent by our FISA recommendations in Chapter 10, which would require partners with children to share their income for a specified period of time following separation. Where the partner occupying the home receives FISA payments, the partners could offset this against any potential claim for occupation rent. This would provide couples with more tools to negotiate an arrangement that best meets the children's needs in the period immediately following separation. Occupation rent is discussed in Chapter 15.

Improving other tools for meeting children's needs under the new Act

- 12.69 We recommend that the other tools available to meet children's needs under the PRA should be retained in the new Act and that a range of minor improvements should be made to better respond to children's needs in the period immediately following separation. We consider this is an area where the new Act 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.
- 12.70 We recommend extending the scope of furniture orders to include other types of property that would come within the definition of family chattels in the new Act.⁹² We also recommend clarifying that, when considering any application for a furniture order, a court must have particular regard to children's needs. Currently, furniture orders are available only in respect of "furniture, household appliances, and household effects". We agree with Barnardos' submission that the use of other types of chattels may benefit children pending final resolution of property division.
- 12.71 We recommend amending the provisions relating to postponement orders to require a court to grant an order if the effect of immediate vesting of property would cause undue hardship for any minor or dependent child of the relationship. This recognises that the effect on the child of immediate vesting 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.⁹³

⁹¹ 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)).

⁹² See Chapter 3 where we recommend the definition of family chattels in the new Act refer to chattels used wholly or principally for family purposes.

⁹³ 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 mātatoha 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.

12.72 We also recommend clarifying that an order settling property for the benefit of a child of the relationship or an occupation or tenancy order should not be 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 would ensure that child support is not affected by the use of one of the tools under the new Act.⁹⁴ We note NZLS's concern that this could lead to unfairness in some situations, for example, where the partners' capital assets solely comprise the family home or where one partner is unable to access their capital for some years. In our view, these factors are directly relevant to whether and, if so, how a court should exercise its discretion to utilise the tools under the new Act. We do not think that these factors should affect liability to pay child support. A court should still have an obligation, currently under section 32, to have regard to any child support payable when considering whether to utilise the tools available under the new Act.

Strengthening child participation in relationship property proceedings

12.73 We recommend that the Government consider ways to strengthen child participation in relationship property proceedings in any work undertaken in response to the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms (Independent Panel).⁹⁵

12.74 In the Preferred Approach Paper, we recommended strengthening child participation in relationship property 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.

12.75 We acknowledge, however, that this proposal has divided submitters. We have considered the views of the Children's Commissioner, Barnardos and HRC and the argument that lowering the threshold would recognise the importance of giving children a voice in matters that directly affect them, consistent with the rights affirmed under UNCROC (see paragraph 12.23 above). We have also carefully considered the concerns raised by the Judges of the Family Court, NZLS and ADLS. We recognise that the new Act, as legislation that is primarily about partners' property entitlements, will not always have a significant impact on children. We also note the concern that greater rights of participation for children runs the risk that parents may manipulate their children to support their own position, which would not be in the children's best interests.

12.76 Since publication of the Preferred Approach Paper, the Independent Panel has published its recommendations. The Independent Panel recommended that the Ministry of Justice work with experts and stakeholders in order to undertake a stocktake of appropriate models of child participation.⁹⁶ The Panel recommended the stocktake should include consideration of key principles for children's participation, how children's

⁹⁴ 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.

⁹⁵ The Independent Panel was appointed by the Government in August 2018 to examine parenting and guardianship matters following the 2014 family justice reforms and reported to the Minister of Justice in May 2019. The Independent Panel is discussed further in Chapter 16.

⁹⁶ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendation 4.

views should be taken into account in cases where there is family violence and development of a best-practice toolkit co-designed with children and young people. While the Panel's recommendations are limited to proceedings under the Care of Children Act, any future work undertaken as a result of these recommendations would have direct application to child participation in relationship property proceedings.

- 12.77 While we remain of the view that child participation in relationship property proceedings is desirable, we consider it is appropriate that this be considered within a broader review of child participation in the family justice system. We do not therefore recommend lowering the threshold for appointing a lawyer for child at this time,⁹⁷ nor do we recommend changing the requirement that fees payable to a lawyer for child are to be paid by one or more of the parties, as ordered by the court.⁹⁸

Review of the child support regime is necessary

- 12.78 We recommend that the Government review the effectiveness of the Child Support Act in meeting children's needs and setting the level of financial support to be provided by parents for their children.
- 12.79 The role of the child support regime is to ensure that parents take financial responsibility for their children. However, Fletcher's research (summarised at paragraph 12.2) identifies that child support payments are inadequate for many primary caregivers following separation. During consultation, we heard from many submitters who also pointed to the inadequacies of child support payments in meeting children's needs.
- 12.80 In our view, problems with how parents take financial responsibility for their children ought to be addressed through a review of the child support regime rather than indirectly through reform of the property sharing regime.

⁹⁷ Were we to make a recommendation, we would suggest 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 s 162(2) of the Family Proceedings Act 1980.

⁹⁸ Property (Relationships) Act 1976, s 37A(2). We note, however, that the risk of children's participatory rights being misused is greater if the partners are not required to bear the cost of the lawyer for child themselves.

CHAPTER 13

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 policy of the PRA on contracting out and settlement agreements;
- whether an agreement can govern trust property;
- the practical requirements for making valid agreements; and
- the powers of a court to give effect to non-complying agreements and to set aside complying agreements.

THE GENERAL POLICY OF THE PRA ON CONTRACTING OUT AND SETTLEMENT AGREEMENTS**Background**

- 13.1 The PRA has always allowed couples to "opt out" of the PRA by making an agreement that will govern the status, ownership and division of their property instead of the PRA's rules.¹ While our recommendations in this report are intended to align the law more closely to public values and expectations, there will still be couples who will prefer to divide their property in a different way.
- 13.2 The PRA contemplates two types of agreement. 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

¹ 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.

purpose of settling any differences that have arisen between them with respect to the status, ownership and division of their property (a "settlement agreement").²

- 13.3 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 relationship. The PRA is, however, social legislation aimed at ensuring a just division of property between partners who may be in unequal bargaining positions. The provisions in Part 6 of the PRA therefore prevent a partner from signing away their rights without appreciating their entitlements under the PRA and the implications of the agreement. Part 6 also attempts to prevent a partner from entering an agreement when the partner is under improper pressure. The provisions of Part 6 were discussed in detail in the Issues Paper and are summarised below.³
- 13.4 Section 21F is the principal mechanism through which Part 6 of the PRA attempts to safeguard partners from unfair 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;⁴ 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.
- 13.5 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.⁵
- 13.6 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:⁶
- (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:

² 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 21–21B.

³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.14]–[30.45].

⁴ In respect of agreements entered into under the Property (Relationships) Act 1976 when 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.

⁵ Property (Relationships) Act 1976, s 21H.

⁶ Section 21J(4).

- (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.
- 13.7 If a contracting out agreement is set aside under section 21J, the PRA has effect as if the agreement had never been made.⁷

Issues

- 13.8 In the Issues Paper, our preliminary view was that the general policy on 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.⁸
- 13.9 We recognised, however, that some partners may resolve relationship property matters informally without complying with the requirements under section 21F.⁹ 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 to make an enforceable agreement, or the partners might encounter practical challenges that 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 or resolve relationship property matters by agreement.¹⁰

Public attitudes and experiences of contracting out

- 13.10 The Borrin Survey made several key findings about contracting out in New Zealand:¹¹
- (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.¹²

⁷ Section 21M.

⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.51].

⁹ At [30.43]–[30.44].

¹⁰ At [30.53].

¹¹ 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].

¹² At [195]–[196]. This was often based on a verbal agreement with the other partner.

- (b) Twenty five per cent 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.¹³
- (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) or had a dependent child in their household (31 per cent).¹⁴
- (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).¹⁵
- (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.¹⁶
- (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).¹⁷ 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.¹⁸

Results of consultation

- 13.11 We received many submissions on the Issues Paper and Preferred Approach Paper 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.
- 13.12 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. It supported our proposal in the Preferred Approach Paper that partners should continue to have the ability to make their own agreements, subject to the procedural requirements in section 21F. Law firm

¹³ At [195].

¹⁴ At [197].

¹⁵ At [198].

¹⁶ At [210].

¹⁷ At 47 (Figure Eleven).

¹⁸ At 47 (Figure Eleven).

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.

- 13.13 The Auckland District Law Society (ADLS) also submitted that the requirements and formalities regarding contracting out agreements should be retained in order to ensure there are safeguards providing protection from unfair, bad, hasty and ill-considered decisions. It observed that the safeguards in section 21F are designed to provide protection in all cases, not just when there is an inequality of bargaining power. ADLS suggested, however, that the PRA could make provision for "short order" contracting out agreements to specifically deal with the use of inherited funds to pay down a mortgage over relationship property. ADLS explained that such agreements could focus only on protecting the inherited funds from becoming relationship property. In these cases, ADLS submitted, "there should be no need to go through the whole complexity of a relationship's financial affairs".
- 13.14 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.
 - (c) Partners entering into second or subsequent relationships.
- 13.15 Submissions from members of the public suggested 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. A clear theme in submissions was that contracting out is not considered an adequate substitute for fair rules relating to the division of relationship property.
- 13.16 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.
- 13.17 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 without the assistance of lawyers.

- 13.18 Many submitted that there was a need for greater public education and information around contracting out and settlement agreements, including NZLS, ADLS, McWilliam Rennie, the National Council of Women of New Zealand, the New Zealand Federation of Business and Professional Women, 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.

Conclusions

RECOMMENDATION

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The new Act 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 existing procedural requirements in section 21F of the PRA should be retained.

- 13.19 We are satisfied that the general policy of the PRA on contracting out and settlement agreements remains sound and should be retained in the Relationship Property Act (the new Act). 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. The existing procedural requirements in section 21F also ensure partners develop and retain a clear record of what has been agreed so as to guard against future misunderstandings.
- 13.20 There is, however, a need for greater public education about the ability to contract out or resolve relationship property matters by agreement and the procedural requirements for making valid and enforceable agreements under the new Act. In Chapter 2, we recommend the Government consider ways to improve public awareness of and education about the PRA and the new Act, if enacted, and in Chapter 16, we recommend the publication of a comprehensive information guide. This should include information about contracting out and settlement agreements under the new Act. We also make recommendations in Chapter 16 that are directed to ensuring appropriate access to affordable legal advice when resolving relationship property matters.
- 13.21 We do not recommend making provision for "short order" contracting out agreements for isolated transactions, such as the application of separate property funds to pay down a mortgage over relationship property. In practice, we anticipate that lawyers advising the partners would still need to assess the partners' wider financial affairs in

order to give proper advice under section 21F.¹⁹ We also note that past experience with model agreements (discussed below) indicates that an expedited or short form approach is unlikely to be effective in improving access to the contracting out procedure or minimising costs. In any event, partners can already make an agreement in respect of specific items of property²⁰ and should continue to be able to do so under the new Act.

13.22 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

Background

13.23 Partners can only make contracting out or settlement agreements with respect to property they own.²¹ As a general rule, trust property is not "owned" by the partners for the purposes of the PRA.²² 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.²³ 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.²⁴

13.24 When a relationship ends, a partner may have a claim against a trust under section 44 or 44C of the PRA, under section 182 of the Family Proceedings Act 1980 or under the law of constructive trusts. Under the current law, partners cannot bind trustees through their settlement agreement under the PRA to use trust property to settle a partner's claim.

13.25 The partners may, however, agree as between themselves not to make or pursue a claim against a trust. This is different to purporting to bind trustees to deal with the trust property in a certain way. We recommend in Chapter 11 that partners should retain this ability.

¹⁹ A lawyer must give a professional opinion on the effects, implications and wisdom of entering the agreement: *C v C* [1993] 2 NZLR 397 (CA) at 403.

²⁰ Section 21D(1)(a) of the Property (Relationships) Act 1976 provides that a contracting out or settlement agreement may provide that "any property, or any class of property" is to be relationship property or separate property.

²¹ Section 21 provides that partners can, for the purposes of contracting out of the Property (Relationships) Act 1976, 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".

²² 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 11 for further discussion.

²³ The law in relation to trustees is preserved where either partner is acting as trustee by s 4B of the Property (Relationships) Act 1976.

²⁴ *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 at [29]–[32]. 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 mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.62]–[30.64].

Issues

13.26 The widespread use of trusts in New Zealand means it is common for trust property to be bound up with relationship property matters.²⁵ The inability to deal with trust property through a contracting out or settlement agreement raises several issues.

Agreements purporting to deal with trust property

13.27 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.²⁶ The partners often record their agreement in a contracting out or settlement agreement, and the trustees will simply accept and apply the agreement.

13.28 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.²⁷

13.29 In the Issues Paper, we noted that there are ways to resolve questions about trust property in a contracting out or settlement agreement without risking invalidating the agreement.²⁸ 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

13.30 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

²⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.58].

²⁶ At [30.65].

²⁷ Nicola Peart (ed) *Brookers Family Law – Family Property* (online 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.

²⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.66]. See discussion in Nicola Peart (ed) *Brookers Family Law – Family Property* (online 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.

agreement exercised pursuant to the trustees' powers under the Trustee Act 1956²⁹ or under the trust instrument to settle claims relating to the trust.³⁰

- 13.31 The need for a separate agreement settling claims against a trust is likely to become increasingly common given our recommendation in Chapter 11 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 new Act in relation to trust property.

Is reform required?

- 13.32 The limitations on dealing with trust property in contracting out and settlement agreements mean that partners often have to contract with trustees outside the PRA framework. This can create additional and unnecessary costs and complexity, especially where the trust is a simple one and the partners are the trustees and beneficiaries of the trust. 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 entering a separate settlement agreement with the partners) or does not record the partners' overall bargain, especially if key assets, such as the family home, are trust property.³¹
- 13.33 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 reforms would be.³²

Results of consultation

- 13.34 Submitting on the Issues Paper, NZLS recognised that the proposal to enable partners to agree on 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.

²⁹ Trustee Act 1956, s 20(g).

³⁰ 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.

³¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.70].

³² At 730.

- 13.35 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 be 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 execution of the necessary trust resolutions. In tandem with the agreement, the trust lawyer prepares appropriate documentation to ensure the proper management of the trust. 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.
- 13.36 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 trust assets are treated as if they were relationship property owned by the partners. Peart 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. Few members of the public commented on this issue, and their views were mixed.

Results of consultation on the Preferred Approach Paper

- 13.37 In the Preferred Approach Paper, we proposed no change to the current law, preferring instead to retain the distinction between trust property and the partners' personal property.³³ We said, however, that we were giving further consideration to whether trustees should be able to be a party to a settlement agreement for the purpose of settling any claim against the trust.³⁴
- 13.38 NZLS, ADLS and Professor Peart submitted on this issue. All three submitters agreed with our preferred approach, observing that the current practice whereby arrangements in relation to trust property are recorded in a contracting out or settlement agreement and are given effect through separate documentation is satisfactory. ADLS commented further that any amendment to the PRA to enable partners and trustees to resolve matters regarding trusts under a contracting out or settlement agreement opens up some significant questions that would require serious consideration. No submitter specifically addressed the issue of whether trustees should be able to be a party to a settlement agreement for the purpose of settling any claim against the trust.

³³ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at [8.34].

³⁴ At [8.35].

Conclusions

- 13.39 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 during 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 and the preservation of trusts.
- 13.40 We do not recommend that trustees should be able to be a party to a settlement agreement under the new Act for the purposes of settling any claim against the trust. No submitter expressly favoured such an option. Submitters generally supported maintaining the distinction between trust property and the partners' personal property and endorsed the existing practice of trustees entering separate agreements in respect of the trust.

WITNESSING AGREEMENTS USING AUDIO-VISUAL TECHNOLOGY

- 13.41 Section 21F sets out the procedural requirements for making valid agreements (see paragraph 13.4 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.³⁵ That lawyer must also certify that they have explained to the partner the effect and implications of the agreement.³⁶
- 13.42 It is unclear from section 21F whether a lawyer can witness the signature of a partner to the agreement using audio-visual technology, such as Skype. 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, for the purposes of section 21F(4), witnessing and certifying implies the lawyer is to be in the physical presence of the party signing the agreement.³⁷

Issues

- 13.43 In the Issues Paper, we observed that a question often arises as to whether a lawyer can witness a partner signing a contracting out or settlement agreement using audio-visual technology.³⁸ The current uncertainty in the law is undesirable. If an agreement is witnessed using audio-visual technology, there is a risk that the agreement could be set

³⁵ Property (Relationships) Act 1976 (PRA), s 21F(4). The PRA defines lawyer for the purposes of pt 6 to include a lawyer as defined in s 6 of the Lawyers and Conveyancers Act 2006 as well as, in the case of a document signed in a Commonwealth country outside New Zealand, a solicitor entitled to practise in that country or a notary public and, in the case of a document signed in a country that is not a Commonwealth country, a notary public.

³⁶ Property (Relationships) Act 1976, s 21F(5).

³⁷ Relationship Property Standing Committee of the New Zealand Law Society Family Law Section cited in Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR21F.07].

³⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.83].

aside and the lawyer sued for negligence if the agreement was void for lack of compliance with section 21F.

- 13.44 There are clear advantages in allowing an agreement to be witnessed using audio-visual technology. For example, if a client and lawyer are in distant locations there are obvious savings in travel time and costs.³⁹ However, there are also risks. In particular:⁴⁰
- (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;⁴¹
 - (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 that may compromise the quality of the advice required by the PRA.
- 13.45 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 technology and, if so, what safeguards should be put in place to ensure the reliability of the witnessing process.⁴² In the Preferred Approach Paper, we proposed that a lawyer should be able to use audio-visual technology but did not propose prescribing a process that lawyers must follow in every case.⁴³

Results of consultation

- 13.46 Six submitters on the Issues Paper and Preferred Approach Paper addressed the use of audio-visual technology, including NZLS, ADLS, McWilliam Rennie and three practitioners.
- 13.47 All submitters supported reform to permit a lawyer to witness the signature of a partner to an agreement through audio-visual technology. NZLS noted that lawyers now frequently need to use Skype and other technologies in order to witness agreements. Two practitioners described the benefits for partners who are based overseas but need the lawyer who has given them advice about the effects and implications of an agreement in New Zealand to witness their signature. McWilliam Rennie also supported reform, although it anticipated audio-visual technology being used as the exception rather than the rule.
- 13.48 NZLS said in its submission on the Issues Paper that the key issue is the reliability of the lawyer's certification that they have explained the effect and implications of the

³⁹ In one of our consultation meetings with a practitioner, they said they 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.

⁴⁰ Ingrid Squire "To skype or not to skype: that is the question" *The Family Advocate* (Wellington, Autumn 2014) at 17.

⁴¹ See also Nicola Peart (ed) *Brookers Family Law – Family Property* (online 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.

⁴² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 736.

⁴³ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P41 and at [8.43]–[8.45].

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. In its submission on the Preferred Approach Paper, NZLS said it would be too burdensome and inflexible for the PRA to prescribe how audio-visual witnessing is to be managed. Instead, the onus of being satisfied that it is suitable in a particular case should be borne by the certifying lawyer. NZLS, however, submitted that any amendment in respect of the use of audio-visual technology to witness the signing of a contracting out or settlement agreement should contain the safeguards listed in the Preferred Approach Paper (replicated below at paragraph 13.53).

- 13.49 ADLS submitted that there should be safeguards on the use of audio-visual technology, including a requirement that the partner signing the agreement do so in another lawyer's office to ensure there is no duress, undue influence or other foul play in issue. For overseas jurisdictions, ADLS submitted that the person witnessing the signature using audio-visual technology could be a notary public, local lawyer, justice of the peace, judge, commissioner of oaths, Commonwealth representative, representative of the New Zealand consulate or other person authorised to take an affidavit pursuant to the Oaths and Declarations Act 1957.
- 13.50 McWilliam Rennie said that whether using audio-visual technology 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 technology.

Conclusions

RECOMMENDATION

R74

The new Act should make express provision for a lawyer to use audio-visual technology to witness a partner signing a contracting out or settlement agreement.

- 13.51 We recommend expressly providing a lawyer with the ability to witness a partner signing a contracting out or settlement agreement under the new Act using audio-visual technology.⁴⁴
- 13.52 We do not recommend prescribing a process that lawyers must follow in every case when using audio-visual technology. We agree with NZLS that 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.

44 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.

- 13.53 Consistent with a lawyer's broader duties under current 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 the new Act. This should include consideration of:
- (a) whether the partners agree to the use of audio-visual technology to witness the agreement;⁴⁵
 - (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;⁴⁶
 - (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.
- 13.54 We do not, however, recommend that this list of considerations be prescribed in legislation. Given the rapid pace of technological change, it would be undesirable to attempt to develop an exhaustive list of considerations that would apply to all forms of audio-visual technology. Rather, the legal profession should be able to develop best-practice guidance on how lawyers should comply with their broader duties under current section 21F.

MODEL AGREEMENTS

Background

- 13.55 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" such agreements.⁴⁷ Only one model agreement has been prescribed for contracting out agreements under section 21 of the PRA. It was made under the Property (Relationships) Model Form of Agreement Regulations 2001 (the 2001 Regulations).

Issues

- 13.56 In the Issues Paper, we observed that the general view is that the model contracting out agreement prescribed by the 2001 Regulations is inadequate.⁴⁸ For example, it does not address key matters such as recording the partners' relationship property and dealing

⁴⁵ 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.

⁴⁶ This may be unnecessary if the lawyer already has an established relationship with the partner signing the agreement.

⁴⁷ Property (Relationships) Act 1976, s 21E(1).

⁴⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.89]–[30.94]. See also 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 ed, Thomson Reuters) at [PR21E.02]; and Karen Harvey-Vallee (ed) *New Zealand Forms and Precedents* (online ed, LexisNexis) at [3010].

with future property. There are no clauses relating to claims under various compensation provisions like section 15. It is not expressed as being in full and final settlement, and there is no clause requiring disclosure. 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.⁴⁹

- 13.57 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

- 13.58 In submissions on the Issues Paper, NZLS, McWilliam Rennie and Professor Peart all submitted that the model contracting out agreement prescribed by the 2001 Regulations is an inadequate precedent, nor did they consider that, if its deficiencies 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. It 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 public information about the documents they are likely to need to provide to their lawyer in order to complete such an agreement.
- 13.59 NZLS, Professor Peart and ADLS all supported our proposal in the Preferred Approach Paper to repeal section 21E and the 2001 Regulations.

Conclusions

RECOMMENDATION

R75

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

- 13.60 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 section 21E and the 2001 Regulations to remove the potential risk that partners expect a model form agreement will minimise cost.

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Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR21E.03].

GIVING EFFECT TO NON-COMPLYING AGREEMENTS

Background

- 13.61 Section 21H allows a court to give effect 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.⁵⁰
- 13.62 In order to give effect to a non-complying agreement, a court must be satisfied that:⁵¹
- (a) there is a contracting out or settlement agreement in terms of section 21 or 21A of the PRA;⁵² and
 - (b) the non-compliance has not materially prejudiced the interests of either partner to the agreement.⁵³
- 13.63 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.⁵⁴
- 13.64 The High Court has confirmed on several occasions that, when exercising its residual discretion under section 21H, it is appropriate that a court have regard to the criteria it is required to have regard to under section 21J(4) when determining whether giving effect to an agreement would cause serious injustice (set out at paragraph 13.6 above).⁵⁵ 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.⁵⁶ 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.⁵⁷

⁵⁰ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [5.73].

⁵¹ *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [21].

⁵² In *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 at [29]–[32], 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.

⁵³ 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).

⁵⁴ *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].

⁵⁵ *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].

⁵⁶ *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].

⁵⁷ 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.

Issues

- 13.65 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.⁵⁸ The Borrin Survey (summarised at paragraph 13.10 above) 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).
- 13.66 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.⁵⁹

Results of consultation

- 13.67 NZLS, in its submissions on both the Issues Paper and Preferred Approach Paper, 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 on the Preferred Approach Paper that section 21H should be amended to incorporate provisions similar to those in section 21J(4) (set out at paragraph 13.6 above). It explained that the principal advantage of incorporating the section 21J(4) criteria into section 21H is that the criteria would be apparent in the PRA rather than by reference to case law. NZLS also noted that an extra consideration could be whether the parties had complied with the terms of any informal agreement throughout the relationship.
- 13.68 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, the agreement should be given effect 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.
- 13.69 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.

⁵⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.96].

⁵⁹ At [30.97].

Conclusions

RECOMMENDATION

R76

A court should continue to have the power to give effect to a contracting out or settlement agreement that is void for non-compliance with the procedural requirements under the new Act. When deciding whether to give effect to a non-compliant agreement, the new Act should direct a court to have regard to the same matters that are relevant when deciding whether to set aside an agreement for serious injustice.

- 13.70 We recommend that a court should continue to have the power to give effect to a non-complying agreement under the new Act. We are satisfied that the existing test for giving effect to a non-complying agreement in section 21H remains appropriate. While section 21H preserves a residual discretion to the 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.
- 13.71 We also recommend that the new Act expressly require a court to consider the same matters that are relevant when deciding whether to set aside an agreement for serious injustice (currently listed in section 21J(4) and subject to R78, discussed below) when determining whether to give effect to a non-complying agreement. This departs from our proposal in the Preferred Approach Paper to continue to rely on existing case law, described at paragraph 13.64 above. We are, however, persuaded by the submissions of NZLS that it would be preferable for the law to be clear from the new Act itself rather than relying on case law.

VARYING OR UPHOLDING A SERIOUSLY UNJUST AGREEMENT IN PART

Background

- 13.72 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

- 13.73 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".
- 13.74 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.⁶⁰ It may therefore better serve the partners' intentions if a court could preserve

⁶⁰ At [30.99].

some aspects of their agreement or vary the agreement rather than set the whole agreement aside.

- 13.75 This issue takes on greater significance in light of our recommendations in relation to FISAs. In Chapter 10, we recommend that partners should be able to contract out of the FISA regime and determine the amount and implementation of a FISA entitlement in a settlement agreement. Expanding the scope of contracting out and settlement agreements to include FISAs increases the risk of unfairness if a court is unable to preserve some parts of an agreement (such as an agreement on the status of a particular item of property) while remedying a serious injustice with another aspect of the agreement (such as an agreement on the amount and duration of a FISA).
- 13.76 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.⁶¹ 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.⁶²

Results of consultation

- 13.77 Submitting on the Issues Paper, NZLS and McWilliam Rennie said 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, they noted the power should only be exercised in a way that does not render the agreement unjust to one partner.
- 13.78 A practitioner also submitted that the courts need wider powers and discretions to grant 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.

Results of consultation on the Preferred Approach Paper

- 13.79 In the Preferred Approach Paper, we proposed that a court should have the power to set aside an agreement in part or vary an agreement.⁶³ We said, however, that we were giving further consideration to the need for additional safeguards to address the risk of a court imposing an unjust and unintended bargain on the partners.
- 13.80 Four submitters supported our proposal, including NZLS, McWilliam Rennie, Professor Peart and one practitioner. One practitioner did not support our proposal. That practitioner was concerned a court may not recognise all significant parts of the bargain if they were not recorded in the agreement, such as concessions made by a partner. The practitioner acknowledged, however, that recording all material factors in the introduction to an agreement could minimise the risk.
- 13.81 McWilliam Rennie had confidence the court would exercise powers to vary an agreement or uphold it in part in a way that respected the partners' original bargain. It

⁶¹ See *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235; and *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [82].

⁶² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.100].

⁶³ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aranga i Mariu ai* (NZLC IP44, 2018), P43 and at [8.68]–[8.69].

did not think additional safeguards were necessary. Another practitioner shared this view.

Conclusions

RECOMMENDATION

R77

A court should have the power to set aside a contracting out or settlement agreement wholly or 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.

- 13.82 We consider that the new Act should provide for a court to have the additional powers to partially uphold or vary an agreement if giving effect to the 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 relationship while still protecting a partner from serious injustice.
- 13.83 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. For example, one partner might agree to receive less property in return for a larger FISA entitlement or vice versa. However, we agree with the view expressed by some submitters that a court would only exercise these additional powers if varying or setting aside parts of the agreement that would otherwise render the whole agreement seriously unjust would not unfairly distort the partners' original bargain. This risk can be mitigated in practice by ensuring that all material factors are recorded in the introduction to an agreement. Consequently, we do not recommend any additional safeguards to guide how the court should exercise its powers.

CHILDREN'S INTERESTS

- 13.84 The provisions in Part 6 of the PRA do not expressly refer to the interests of children.
- 13.85 Section 26 does, however, direct a court to have regard to the interests of any minor or dependent children of the relationship in relationship property proceedings.⁶⁴ 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.⁶⁵ In Chapter 12, we recommend section 26 be replaced with an obligation to have regard to the best interests of any minor or dependent children of the relationship.
- 13.86 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

⁶⁴ 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.

⁶⁵ *McMahon v McMahon* [1990] NZFLR 37 (HC) at 42–43; and *A v W* [2012] NZFC 8640 at [26]–[27].

a contracting out agreement has been recognised as a significant matter relevant to the application of section 21J(4)(d).⁶⁶

Issues

- 13.87 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.
- 13.88 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 and no access to their former partner's income under a contracting out agreement, contrary to what they would have otherwise received under the PRA.⁶⁷ An agreement that fails to recognise or provide for children's interests also risks being set aside in future under section 21J on the grounds that it may cause serious injustice.
- 13.89 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 (alone or in combination):⁶⁸
- (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.
- 13.90 In the Preferred Approach Paper, we proposed adopting Option 2.⁶⁹

Results of consultation

- 13.91 Five submitters addressed this issue in submissions on the Issues Paper and Preferred Approach Paper, including the Office of the Children's Commissioner, NZLS, McWilliam Rennie and Professor Bill Atkin.
- 13.92 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.

⁶⁶ *A v W* [2012] NZFC 8640 at [26]–[27].

⁶⁷ In Chapter 10, we recommend introducing into the new Act an entitlement to Family Income Sharing Arrangements, which will enable partners to continue to share their income for a limited period of time in certain circumstances, including if they have children together.

⁶⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.105]–[30.110].

⁶⁹ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P44.

- 13.93 NZLS, in contrast, did not support elevating children's interests to be a consideration under Part 6 of the PRA, as the PRA is about property rights, not children's rights.⁷⁰ 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. In its submission on the Preferred Approach Paper, NZLS added that, if children's interests are to be a factor under Part 6, section 21J(4) should simply require the court to have regard to the interests of children. It did not consider that anything is added by the adjective "best".
- 13.94 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).
- 13.95 Professor Atkin supported our proposal in the Preferred Approach Paper. Atkin observed that a settlement for children under section 26 of the PRA can override a contracting out agreement. As the power is hardly ever used, however, Atkin thought children's interests could be made more prominent by being included in Part 6.

Conclusions

RECOMMENDATION

R78

The new Act should direct the court to have regard to the best interests of any minor or dependent children of the relationship in deciding whether to set aside a contracting out or settlement agreement for serious injustice or to give effect to a contracting out or settlement agreement that fails to comply with the procedural requirements under the new Act.

⁷⁰ In its submission on the Issues Paper, the New Zealand Law Society (NZLS) said that, if the interests of children are to be a consideration when entering into a contracting out or settlement agreement, it preferred Option 2 (amending s 21J(4)) over Option 1 (amending s 21D) 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. In its submission on the Preferred Approach Paper, however, NZLS did not support our proposal to adopt Option 2 and maintained its position that children's interests should not be elevated to a consideration under pt 6 of the Property (Relationships) Act 1976.

- 13.96 We recommend that the new Act clarify that the best interests of any minor or dependent children of the relationship are relevant to a court's consideration of whether an agreement would cause serious injustice. This should also be relevant to the court's consideration of whether to give effect to a non-complying agreement, consistent with R76 above.
- 13.97 This recommendation is consistent with the courts' current approach under section 21J, although we recommend referring to children's "best" interests, in accordance with our recommendations in Chapter 12. We consider that it is desirable to use the same threshold of "best interests" consistently across the new Act.
- 13.98 We do not favour imposing an express duty on partners to make adequate provision for children when making an agreement. In the case of a contracting out agreement, we note submitters' concerns that 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. We recognise that, when partners enter a settlement agreement, they may be more aware of their children's immediate needs. However, we consider that our recommendation will provide 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). It will therefore achieve much the same purpose as imposing an express duty on partners when making an agreement.
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CHAPTER 14

Tikanga Māori

IN THIS CHAPTER, WE CONSIDER:

- whether there is a need for a separate regime in accordance with tikanga Māori;
- the recognition of Māori customary marriage;
- the treatment of family homes on Māori land;
- the definition and classification of taonga; and
- resolution of relationship property matters that involve questions of tikanga Māori.

INTRODUCTION

14.1 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.¹ Tikanga Māori may be understood as Māori law, custom, traditional behaviour and 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.² We said that there is an implicit principle underpinning the PRA that a just division of property should recognise tikanga Māori and, in particular, whanaungatanga.³ It is important that the substantive rules of the PRA reflect this principle.

14.2 The response to consultation on relationship property matters where tikanga Māori is especially relevant has been limited. In response to the consultation questions in the Issues Paper regarding tikanga Māori, 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

¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [2.53]–[2.64].

² 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.

³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [3.11(g)]. Whanaungatanga may be understood as kinship, a web of relationships of descent and marriage, a sense of connection or belonging through shared experience.

from the Family Court. In response to the Preferred Approach Paper, tikanga Māori was addressed in four submissions from members of the public, four submissions from practitioner and academic experts and two submissions from organisations.

- 14.3 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. However, 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 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.
- 14.4 In developing our recommendations about 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

Background

- 14.5 In the Issues Paper, we asked whether there should be a separate regime for property division according to tikanga Māori.⁴ Our preliminary view was that the PRA framework can respond to matters of tikanga Māori, so a separate regime is unnecessary.

Results of consultation

- 14.6 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.
- 14.7 The Human Rights Commission (HRC) recommended in its submission on the Issues Paper that consideration be given to dealing with tikanga Māori issues in a separate part of the PRA. HRC 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.⁵ 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.

⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [4.17]. 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).

⁵ Manaakitanga may be understood as to look after, to care for another, to protect.

- 14.8 Professor Jacinta Ruru, submitting on the Preferred Approach Paper, supported our proposal that a separate regime is not required to deal with tikanga Māori issues. Ruru added, however, that every effort should be made to modernise the PRA in a manner that best gives effect to tikanga Māori where it is relevant. To enable a just division of property from a Māori perspective, Ruru said, requires creating a justice system that is able to understand the complexities of Māori property law and relationships.

Conclusions

RECOMMENDATION

R79

The framework of the new Act should continue to accommodate and respond to matters of tikanga Māori.

- 14.9 We do not recommend introducing a separate regime for property division according to tikanga Māori. 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. Until such time, we consider that tikanga Māori should continue to be provided for through the framework of the Relationship Property Act (the new Act), its principles and those operative provisions where tikanga Māori is especially relevant. We have considered the approach put forward in HRC's submission, but we do not prefer it because we did not receive other submissions expressing support for such fundamental change.
- 14.10 The ability of the framework of the new Act to continue to accommodate and respond to matters of tikanga Māori, taking account of the complexities of Māori property law and relationships, is supported through our recommendations in relation to the operative provisions of the PRA discussed below. It is also supported by our recommendation in Chapter 2 for a revised statement of statutory principles to guide the achievement of the purpose of the new Act. Specifically, we recommend that the principles reflect the concept that a just division of property recognises tikanga Māori.

MĀORI CUSTOMARY MARRIAGE

Background

- 14.11 Māori customary marriages have as their basis tikanga Māori and whānau approval. As we explained in the Issues Paper, traditionally it was the public expression of whānau approval, as opposed to a formal ceremony or cohabitation, that established a couple as married.⁶ It is not known how many Māori marry according to custom in contemporary New Zealand, but two court cases illustrate that the practice continues.⁷

⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [7.2]–[7.6]; and Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62.

⁷ *Re Adoption of T* (1992) 10 FRNZ 23 (DC); and *Re R (Adoption)* (1998) 17 FRNZ 498 (FC). Both were cases concerning the Adoption Act 1955 and whether the couples in question could adopt without being legally married: Jacinta Ruru

Issues

- 14.12 Māori customary marriage does not carry with it rights to property held by the other spouse,⁸ yet if a couple in a customary marriage are deemed to be in a de facto relationship for the purposes of the PRA, they may have rights to property they would not otherwise have under tikanga. Professor Ruru observes that this could allow someone in a Māori customary marriage to turn their back on the nature of the relationship and, on death or separation, claim a half-share in relationship property as an entitlement under the PRA.⁹

Results of consultation

- 14.13 In the Issues Paper, we asked to what extent Māori customary marriage should be subject to the PRA and whether different rules should apply.¹⁰ We received submissions from six members of the public and two organisations.
- 14.14 Submitters' views were mixed. Three members of the public said Māori customary marriages should be treated as marriage or de facto relationships for the purposes of the PRA. However, two members of the public felt customary marriage should not come under the PRA. One submitter explained Māori customary marriage is an uncommon practice and could create a loophole. Another submitter said the PRA should only apply if the partners registered their customary marriage under the PRA.
- 14.15 Some members of the public preferred greater recognition of the tikanga aspects of customary marriage. One submitter thought that different rules should apply, as Māori needed a place they can feel comfortable working through issues that differ from the dominant culture. Another submitter said that there should be no rights to property unless determined by the whānau.
- 14.16 Ngā Rangahautira submitted that customary marriage should be specifically provided for in the PRA and be given equal status to marriage and de facto relationships. They submitted that the current law fails to recognise the mana of a Māori customary marriage and neglects Māori who do not fall within the ambit of a de facto relationship. However, they noted that those in a customary marriage were unlikely to go to the Family Court to resolve any dispute of tikanga. They also observed that the Law Commission's approach to taonga and Māori land would directly influence the necessity to provide for customary marriage.
- 14.17 The New Zealand Law Society (NZLS) submitted that the PRA should specifically recognise that Māori customary marriage likely falls within the definition of a de facto relationship.

"Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 487.

⁸ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 450–451.

⁹ See also Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 *International Journal of Law, Policy and the Family* 327 at 335.

¹⁰ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 126.

14.18 We also spoke with the Judges of the Māori Land Court who commented that, if particular provision was to be made in the PRA, customary marriage would need to be defined in the Act. They observed that Māori were likely to be making their own property agreements rather than utilising the PRA.

Conclusions

14.19 We do not recommend reform to recognise or provide specific rules for Māori customary marriage in the new Act at this time. This is an important issue and one that has significance for other areas of law beyond the new Act. The low number of submissions on this issue makes it difficult to assess the extent of Māori support for and the nature of any desirable reform. In our view, how Māori customary marriage should be recognised under the new Act should be part of a much broader conversation about the relationship between Māori and the Crown. Such a conversation ought to consider how Māori customary marriage should be accommodated in other areas of law, in particular, the Marriage Act 1955.

FAMILY HOMES ON MĀORI LAND

Background

- 14.20 Māori land is excluded from the PRA under section 6.¹¹ 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.¹²
- 14.21 Buildings and other improvements that are not fixed to the land are chattels and so are not excluded under section 6.¹³ The main indicators of whether a building is a fixture or a chattel are the degree and purpose of annexation.¹⁴
- 14.22 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.¹⁵ 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.¹⁶

¹¹ Māori land means Māori customary land and Māori freehold land: Te Ture Whenua Māori Act 1993, s 4.

¹² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [8.30].

¹³ *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC).

¹⁴ *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL).

¹⁵ 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.

¹⁶ 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].

Issues

- 14.23 We are not aware of any issues with the exclusion of Māori land itself from the PRA, and we do not recommend any change to section 6.
- 14.24 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 relationship property matters.¹⁷ 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.¹⁸ Further, the rights of a non-owner under a constructive trust are themselves unclear and rely on the Māori Land Court exercising its discretion.¹⁹
- 14.25 The extent of the 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. 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

- 14.26 In the Issues Paper, we identified three options for reform:²⁰
- (a) **Option 1:** 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 2:** Provide a compensation mechanism under the PRA.
 - (c) **Option 3:** Provide remedies under TTWMA.

Results of consultation

- 14.27 Most submitters on the Issues Paper favoured Option 3 (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

¹⁷ Property (Relationships) Act 1976, s 1N(d).

¹⁸ *Tainui – Arahura No 2A* (2015) 30 Te Waipounamu MB 168 (30 TWP 168) at [53]. Kaupapa denotes purpose, policy, scheme, framework.

¹⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [8.35]–[8.41].

²⁰ At [8.42]–[8.55].

and expertise of the Māori Land Court in dealing with such land and ownership structures.

- 14.28 Two submitters commented on our proposal in the Preferred Approach Paper to adopt Option 3.²¹ Professor Ruru agreed that the PRA should not apply to any structures situated on Māori land. Ruru submitted that there is currently a legislative gap for family homes on Māori land. The gap could be filled by reform to TTWMA. Ruru submitted that the Māori Land Court is the specialist court equipped to deal with these issues. The Ministry for Culture and Heritage submitted that Māori land should be exempt from becoming relationship property under the PRA in any circumstances.

Conclusions

RECOMMENDATION

R80

The Government should consider providing remedies in relation to family homes built on Māori land through Te Ture Whenua Māori Act 1993.

- 14.29 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 at this time. However, we do acknowledge the increasing desire of the Government to better meet Māori aspirations to utilise their land and the development of papakāinga housing and financial arrangements, such as Kāinga Whenua loans.²² There is likely to be a greater need for clarity in the law in the future.
- 14.30 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.²³ Further consideration could be given at that time to excluding from the new Act all structures situated on Māori land (fixtures and chattels) and including them within the jurisdiction of the Māori Land Court.

TAONGA

Background

- 14.31 Taonga are specifically excluded from the definition of family chattels in section 2 of the PRA but are not excluded from the PRA.

²¹ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P46.

²² 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. The Government announced in February 2019 that the Provincial Growth Fund will invest up to \$100 million to support Māori landowners and drive regional growth: Jacinda Ardern and Shane Jones "\$100 million investment to support Māori landowners and drive regional growth" (press release, 3 February 2019).

²³ Note that Te Ture Whenua Māori Bill 2016 (126-2) was withdrawn on 20 December 2017.

- 14.32 Taonga are 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.²⁴ After reviewing the case law and Professor Ruru's writing on taonga,²⁵ 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.²⁶
- 14.33 The effect of excluding taonga from the definition of family chattels prevents taonga that would otherwise fit the definition of family chattels from being automatically classified as relationship property.²⁷ Instead, all items of taonga (except Māori land, which is excluded from the PRA²⁸) will be classified as relationship property or separate property under the other rules of classification.²⁹ Under these rules, taonga acquired by a partner from a third party as a gift or inheritance will be classified as separate property.³⁰ Taonga that are received as a gift from the other partner will also be separate property unless the gift is used for the benefit of both partners.³¹ Taonga that are otherwise acquired or produced by a partner during the relationship may, however, be relationship property.³²
- 14.34 Under the current rules, taonga or a portion of their value can also 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.³³ 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.³⁴

Issues

- 14.35 We have identified two potential issues with the PRA's approach to taonga.
- 14.36 First, whether the lack of a statutory definition of taonga is a problem. In the Issues Paper, we noted Professor Ruru's suggestion that attempts to categorise non-Māori items of property as taonga may be a result of the limited interpretation of "heirloom" in

²⁴ 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).

²⁵ Jacinta Ruru "Taonga and Family Chattels" [2004] NZLJ 297.

²⁶ *S v S* [2012] NZFC 2685 at [54] and [58].

²⁷ Property (Relationships) Act 1976, s 8(1)(b).

²⁸ Section 6.

²⁹ Sections 8–10.

³⁰ Section 10(1).

³¹ Section 10(3).

³² Section 8(1)(e). This approach will not change under our classification recommendations outlined in Chapter 3.

³³ Sections 10(2) and 9A.

³⁴ Sections 15A, 18C and 20E.

relation to items that have been passed down.³⁵ 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.³⁶

- 14.37 Second, whether the classification of taonga provides sufficient protections against taonga being drawn into the relationship property pool. Taonga are recognised as special items of property that should not be automatically classified as relationship property if they otherwise fit the definition of a family chattel, but the protection only extends so far, for the reasons set out at paragraphs 14.31–14.34. We discussed in the Issues Paper the concepts of whanaungatanga and kaitiakitanga and suggested that the division of taonga under the PRA may be inconsistent with these concepts.³⁷

Results of consultation

- 14.38 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. 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. However, the Ministry for Culture and Heritage, Professor Ruru, Ngā Rangahautira, Professor Nicola Peart and some practitioners we met with supported the inclusion of a definition in the PRA.
- 14.39 We asked on our consultation website whether an item should only become taonga under the PRA 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 of 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.
- 14.40 Almost all submitters on both the Issues Paper and the Preferred Approach Paper who responded 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. The Ministry for Culture and Heritage and Perpetual Guardian specifically supported excluding from the PRA land that is taonga. Others considered TTWMA mechanisms were a more appropriate way of protecting land that has ancestral significance.³⁸

³⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [11.65].

³⁶ At [11.57].

³⁷ At [11.42]–[11.46]. Kaitiakitanga may be understood as guardianship, stewardship, trusteeship.

³⁸ This includes protections against the alienation of land that has the status of Māori land under Te Ture Whenua Māori Act 1993.

Conclusions

RECOMMENDATIONS

R81 Taonga should be defined in the new Act within a tikanga Māori construct, but the definition should exclude land.

R82 The new Act should ensure that taonga cannot be classified as relationship property in any circumstances and that a court cannot make orders requiring a partner to relinquish taonga as compensation to the other partner.

A definition of taonga

14.41 While the response to consultation was limited, we consider there is support for narrowing the concept of taonga in the new Act and defining 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.³⁹ An example of such a definition was first suggested by Professor Ruru in 2004:

A valued possession held in accordance with tikanga Māori and highly prized by the whānau, hapū or iwi.

14.42 The Judges of the Māori Land Court commented that, if taonga was to be defined, the Waitangi Tribunal's definition of "taonga work" in its *Ko Aotearoa Tēnei (Wai 262) Report* may be useful to consider in this context:⁴⁰

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.

14.43 We recommend that land should not be included as taonga for the purposes of the new Act. We acknowledge that taonga is an expansive concept in the Māori worldview and may include land that has ancestral significance but that has general title status under TTWMA. However, treating land that does not have the status of Māori land under TTWMA as taonga and excluding it from division under the new Act would exceed the

³⁹ We discuss ways that could better enable the court to resolve matters of tikanga later in this chapter.

⁴⁰ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – 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 (at 239).

protections given to it under TTWMA.⁴¹ The policy of the new Act towards land that has ancestral significance could therefore be inconsistent with the policy under TTWMA. 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.⁴² 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.

- 14.44 Māori should be consulted to inform the drafting of any definition of taonga, including whether taonga should apply pan-culturally or be limited to items of Māori significance and/or items possessed by Māori.
- 14.45 We have also considered whether the term "taonga tuku iho" should be used instead of "taonga".⁴³ We understand that the term refers broadly to "cultural property or objects"⁴⁴ 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 relationship property context as, like the current interpretation of heirlooms, it may prevent newly created taonga from being considered taonga under the new Act.⁴⁵

Classification of taonga

- 14.46 We recommend that the new Act provide that a court cannot require taonga to be relinquished on separation in any circumstances. This could be achieved either by treating taonga as a special item of separate property that can never become relationship property or be used to compensate the other partner, or by excluding taonga from the new Act entirely in the same way as Māori land is presently under section 6. However, as explained above, we do not recommend including land within the definition of taonga.
- 14.47 Although the number of submissions was limited, the level of support for prioritising kaitiakitanga over division for taonga indicates reform is desirable. We consider this reform simply reflects the Māori worldview and how Māori treat taonga outside of the rules of a property sharing regime when partners separate or when one partner dies.

⁴¹ The protections under Te Ture Whenua Māori Act 1993 against alienation of Māori land only apply to land that has the status of Māori land. There is, however, provision under s 133 of Te Ture Whenua Māori Act 1993 for owners of general land 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. The provisions of s 133 require the court to be satisfied there is sufficient consent between the owners for the change of status.

⁴² 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.

⁴³ This term was suggested by the Ministry for Culture and Heritage in its submission on the Issues Paper, but in its submission on the Preferred Approach Paper, the Ministry agreed that the term was too limiting in the context of the Property (Relationships) Act 1976.

⁴⁴ The Legal Māori Resource Hub "A Dictionary of Māori Legal Terms" <www.legalmaori.net>.

⁴⁵ See further the evidence of Paul Tapsell, Professor of Māori Studies at the University of Otago, to the Family Court in *S v S* [2012] NZFC 2685 at [56]–[57] on what constitutes taonga.

14.48 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 have been 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 recommend reform at this time. We note, however, that consultation to inform the drafting of the definition of taonga could also include consultation on whether a partner should be compensated under the new Act for their contributions towards taonga.

RESOLUTION OF RELATIONSHIP PROPERTY MATTERS THAT INVOLVE QUESTIONS OF TIKANGA MĀORI

Background

14.49 Māori customary law is part of the common law in New Zealand.⁴⁶ What constitutes Māori custom or tikanga in any particular case is a question of fact that may require expert evidence unless it is agreed or 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".⁴⁷

Issues

14.50 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.⁴⁸ Because of this, Māori may rarely use the court to enforce their rights under the PRA.

14.51 Providing measures that would enhance the court's ability to resolve questions of tikanga Māori would give better effect to the principle that a just division of property should recognise tikanga Māori. Māori may then have greater confidence that the court is sensitive and responsive to tikanga Māori. While understanding tikanga and te reo Māori are important elements in the ongoing education of the judiciary, in the Issues

⁴⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 per Elias CJ at [95]; Richard Boast "Māori Customary Law and Land Tenure" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [2.2.5]; and *Law Commission Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001). See also Joseph Williams, Judge of the High Court of New Zealand "The Harkness Henry Lecture: Lex Aotearoa – An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1. For discussion on the status of tikanga Māori as the first law of New Zealand with respect to which all other law must be negotiated, see Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330; and Valmaine Toki "Tikanga Māori in criminal law" [2012] NZLJ 357 for tikanga Māori in the criminal law context.

⁴⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.116].

⁴⁸ At [23.15]–[23.21].

Paper, we identified the following potential measures that could better enable a court to resolve questions of tikanga Māori:⁴⁹

- (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

- 14.52 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.
- 14.53 The Judges of the Māori Land Court commented 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. The Judges 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 as a Commissioner alongside the Family Court judge to hear and determine any question of tikanga. This would align with the practice in the Environment Court. The Judges supported the other measures in paragraph 14.51 above and considered that those in paragraphs 14.51(c)–14.51(e) should be available both on direction of the Family Court and by consent of the parties. The Judges 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. The Judges acknowledged that resourcing of the Māori Land Court could be a practical issue.
- 14.54 HRC submitted that there is merit in either of the measures identified in paragraphs 14.51(c) and 14.51(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".

⁴⁹

At [26.118]–[26.135].

- 14.55 Of the measures identified, the Judges of the Family Court preferred to seek assistance from experts via cultural reports. The Judges submitted that the measures identified in paragraphs 14.51(d)–14.51(f) above could increase costs and/or delays in proceedings. They observed that it is rare for proceedings to concern only tikanga issues. The Māori Land Court and the Māori Appellate Court are not specialist courts in relationship property matters. The Judges cautioned that separating tikanga issues and relationship property matters between the courts could hinder efficacy in practice. The Judges of the Family Court 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.
- 14.56 NZLS 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". It considered that the Family Court should have sole jurisdiction in respect of PRA cases.
- 14.57 Ngā Rangahautira supported the use of cultural reports and advisers, noting the use of cultural advisory panels in other judicial fora. It 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.
- 14.58 In a submission on the Preferred Approach Paper, Professor Ruru agreed with the comments of the Judges of the Māori Land Court at paragraph 14.53 above. Ruru supported measures to enable the Family Court to appoint a person to report on matters of tikanga Māori rather than relying on parties presenting expert evidence in court as suggested by NZLS. Professor Ruru also supported Family Court judges receiving extensive training on tikanga issues. Ruru said this would require "a deliberative and ongoing willingness to upskill on tikanga Māori, te reo Māori, te ao Māori, New Zealand history and colonisation". Professor Ruru favoured warranting Māori Land Court judges to sit alongside Family Court judges, similar to how Māori Land Court judges can sit as alternate judges in the Environment Court under section 250 of the Resource Management Act 1991.

Conclusions

RECOMMENDATIONS

- R83** The Family Court should be able to appoint a person to make an inquiry into matters of tikanga Māori and report to the Court.
- R84** Family Court judges should receive education on tikanga Māori.
- R85** The Government should give further consideration 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.

- 14.59 We recommend 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 new Act. 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. The Court and the parties should have discretion in determining the appropriate process to adopt in the particular case. Section 38 currently empowers the Court to appoint a person to make an inquiry and report on matters of fact in issue. In Chapter 16, we recommend broadening this power to enable the Court to inquire into any matter that would assist the Court 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.
- 14.60 We also agree with submitters that judicial education on tikanga Māori is vital. We note that general judicial education on tikanga Māori is currently available⁵⁰ 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.⁵¹
- 14.61 We acknowledge the concerns of some submitters about measures that involve experts other than Family Court judges in decision making within the Family Court or a greater role for the Māori Land Court judges. We do not therefore recommend reform along the lines of the measures in paragraph 14.51(b)–14.51(f) above.
- 14.62 We do, however, see merit in the Government 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.⁵² 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 principle that a just division of property under the new Act 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 duration of

⁵⁰ See the Institute of Judicial Studies *Prospectus 2017* available at <www.ijs.govt.nz>.

⁵¹ We note that the Independent Panel appointed by the Government in August 2018 to examine parenting and guardianship matters following the 2014 family justice reforms recommended that the Chief District Court Judge consider requiring all new Family Court judges to spend one week observing Māori Land Court proceedings and requiring all Family Court judges to attend the tikanga Māori programme delivered by the Institute of Judicial Studies: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendation 6. The Panel also recommended a strategic framework to improve family justice services for Māori be developed, including a tikanga-based pilot for the Family Court: Recommendation 7.

⁵² Consideration would need to be given to the constitution of the Family Court when a Māori Land Court judge is sitting, including the member of the Court who makes the decision of the Court if there is no agreement: see, for example, Resource Management Act 1991, s 265.

proceedings with both judges sitting, but any potential delay would need to be balanced against the benefits of the measure.⁵³

Resolving matters out of court

- 14.63 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.⁵⁴ 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.
- 14.64 For the purposes of resolving relationship property claims, in our view, the principles of the Rangatahi Courts 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.⁵⁵ Some mediators currently offer services that are based on traditional Māori values and respect te reo, tikanga and kawa and the role of whānau.⁵⁶ A number of submitters supported improved information, mediation and other out of court services that can help Māori resolve disputes according to tikanga Māori. In Chapter 16, we discuss these measures further.

⁵³ The Independent Panel appointed by the Government to examine the 2014 family justice reforms recommended that, until sufficient Māori judges are appointed to the Family Court, the Chief District Court Judge consider appointing some Māori Land Court judges to sit in the Family Court: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendation 6.

⁵⁴ See Youth Court of New Zealand "Rangatahi Courts and Pasifika Courts" <www.youthcourt.govt.nz>.

⁵⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.35].

⁵⁶ Kawa refers to protocols. The Independent Panel recommended a strategic framework to improve family justice services for Māori be developed, including providing adequate funding for culturally appropriate FDR processes: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendation 7.

CHAPTER 15

Property orders

IN THIS CHAPTER, WE CONSIDER:

the orders a court should be able to make to:

- implement a final division of relationship property;
- grant interim distributions of property;
- divide superannuation and KiwiSaver entitlements;
- protect property prior to division; and
- grant a partner the right to occupy or possess property.

IMPLEMENTING A FINAL DIVISION OF RELATIONSHIP PROPERTY**Background**

- 15.1 Once a court has decided the value¹ of each partner's share in the relationship property and any compensation owing under the rules contained in sections 8–20F, the court implements its decision by redistributing existing assets between the partners and making orders as to sale, possession and payment.²
- 15.2 Section 25 of the PRA gives a court the power to make a range of orders to implement a division of relationship property.
- 15.3 Section 25(1)(a) is the primary source of jurisdiction for implementing a final division of all of the partners' relationship property.³ It empowers the court to make "any order it considers just" in order to determine the share of each partner in the relationship

¹ In the Issues Paper, we noted the Property (Relationships) Act 1976 does not define what value means: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [13.5]. We noted the courts usually value property based on a fair market value standard (at [13.7]). We asked whether the courts should be more willing to value property against a different standard of value, such as a fair value standard (at [13.32]–[13.38]). We are satisfied no reform is needed to address the appropriate standard of valuation. No submitter thought change was needed. Further, the Supreme Court has recently clarified that the purpose of valuation is to ensure a fair and just division of relationship property, and in some cases where there is no ready market, a fair value standard may be more appropriate than a fair market standard: *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [99]–[100] and [137].

² RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [18.25].

³ At [18.26].

property or divide the relationship property between the partners. Section 25(1)(b) recognises the court's wider powers under the PRA by providing that the court may make any other order that it is empowered to make by any provision of the PRA.

- 15.4 A court can only make orders under section 25(1) in circumstances where:⁴
- (a) the relationship has come to an end;⁵
 - (b) one partner is endangering relationship property or seriously diminishing its value by gross mismanagement or by wilful or reckless dissipation of property or earnings; or
 - (c) where either partner is an undischarged bankrupt.
- 15.5 Section 25(3) gives a court the power to make orders relating to specific items of property. It provides that a court can make any order or declaration relating to the status, ownership, vesting or possession of any specific property as it considers just. The jurisdictional requirements that apply to orders under section 25(1) (set out at paragraph 15.4 above) do not apply to orders made under section 25(3). This means a partner can seek an order in relation to a specific item of property at any time, including while the partners are still in a relationship.⁶
- 15.6 Section 33 provides a court with ancillary powers to make all such other orders and give such directions as may be necessary or expedient to give effect or better effect to any order made under section 25. Without limiting the court's general ancillary powers, section 33(3) sets out a list of orders that the court can make.

Issues

- 15.7 We did not receive any submissions that raised concerns about the court's general powers to implement a final division of relationship property. We have, however, identified several minor issues.
- 15.8 First, we note there is no consistency in the drafting of the PRA rules. Some provisions expressly state that a court may only exercise its powers under that section "on the division of relationship property"⁷ or "in any proceedings for an order under section 25(1)(a)".⁸ Other provisions expressly allow a court to exercise its powers regardless of whether the partners have made an application for division of relationship property.⁹

⁴ Property (Relationships) Act 1976, s 25(2).

⁵ In the case of a marriage or civil union, where the spouses or civil union partners are living apart or are separated or the marriage or civil union has been dissolved (s 25(2)(a)). In the case of a de facto relationship, where the de facto partners are no longer in a de facto relationship with each other (s 25(2)(b)).

⁶ *Re Williams* [2004] 2 NZLR 132 (HC) at [59]; and *Kennedy v Kennedy* [2017] NZHC 168, [2017] NZFLR 149 at [52]. See also Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at [6.2.2(b)]. The courts have warned that s 25(3) cannot have been intended to provide a "back-door" method for the court to order the division of all of the partners' relationship property without meeting the jurisdictional requirements in s 25(2): *S v W* [2006] 2 NZLR 669 (HC) at [133].

⁷ Sections 15–15A and 26A.

⁸ Sections 44B and 44E.

⁹ Sections 28 and 28C. These provisions state "[r]egardless of section 23 ...", which is a provision that sets out who may apply for orders under s 25.

Several provisions are silent on when a court may exercise its powers under that section.¹⁰

- 15.9 Second, it is unclear how the provisions relating to the implementation of a division of certain types of property (property subject to hire purchase agreements, insurance policies and superannuation rights)¹¹ interact with the court's general ancillary powers under section 33.

Conclusions

RECOMMENDATIONS

R86

A court should retain under the new Act the broad powers to implement a final division of relationship property under section 25 of the PRA and the general ancillary powers under section 33 of the PRA.

R87

The new Act should be drafted in a way that resolves the current inconsistencies in how the PRA rules provide for powers to be exercised by the court.

- 15.10 We consider that the court's existing powers to implement a final division of relationship property under sections 25 and 33 of the PRA remain appropriate and should be retained under the Relationship Property Act (the new Act). We note, in particular, the broad wording of section 25(1), which allows a court to make "any order it considers just" and the broad ancillary powers under section 33.
- 15.11 When drafting the new Act, consideration should be given to reconciling the drafting inconsistencies identified above and clarifying the relationship between the court's general ancillary powers and the specific provisions relating to certain types of property. In particular, consideration should be given to each provision in order to determine whether it should apply independently or only in the context of an application for the division of relationship property.

INTERIM DISTRIBUTIONS

Background

- 15.12 Section 25(3) provides that a court may make orders regarding the status, ownership, vesting or possession of specific items of property "at any time". This enables a court to classify a specific item of property as relationship property and divide and distribute that property between the partners in advance of a final division being determined.¹²

¹⁰ For example, ss 17–17A, 18B–18C and 20E.

¹¹ Sections 29–31.

¹² In addition, s 25(4) also provides that the court, if it considers it just, may make an interim order under s 25(3) for the sale of any relationship property and may give any directions it thinks fit with respect to the proceeds.

- 15.13 The PRA does not provide any guidance on when an interim distribution should be made under section 25(3). The courts have, however, recognised a range of relevant factors, including:¹³
- (a) the purposes and principles of the PRA;
 - (b) the needs and circumstances of the applicant;
 - (c) the purpose for which interim distribution is sought;
 - (d) the applicant's likely share of relationship property;
 - (e) the respondent's ability to give effect to an order;
 - (f) the length of time until the hearing of the substantive issues;
 - (g) delays to date and who has caused them;
 - (h) any uncertainty as to the applicant's entitlements under the PRA;
 - (i) the effect of an order on the parties' willingness and determination to finalise their claims;
 - (j) whether or not the respondent has dissipated relationship property;
 - (k) any possible prejudice that might arise from making a proposed order; and
 - (l) whether an interim distribution will cause further delays in finally determining the relationship property claim.

Issues

- 15.14 In the Issues Paper, we identified several limitations with the power to make interim distributions under section 25(3).¹⁴
- 15.15 First, orders under section 25(3) can only be made in relation to specific items of property. A court cannot make an interim distribution by ordering the payment of a specified sum of money that represents part of the net value of the partners' relationship property.¹⁵ Instead, a court can only order that a specific item of property vest in a partner or be sold and the sale proceeds distributed. In one case, the High Court held that an interim distribution could not be made in respect of funds in a bank account, because those funds could move out of the account and be replaced with funds of a different character.¹⁶ The funds could not therefore be characterised as "specific property" in terms of section 25(3).
- 15.16 Second, it is unclear whether a court can order interim distributions of separate property. The courts have suggested an interim distribution of separate property can only be made if a court is satisfied the separate property should be available to the other partner under another PRA rule, such as sections 9A, 15A or 17.¹⁷ In the recent

¹³ These factors were identified in *H v P* FC Tauranga FAM-2009-070-817, 11 January 2011 at [26] as being factors commonly taken into account when a court considers the issue of interim distribution. See too the factors listed in *M v B* [2013] NZHC 1056 at [30].

¹⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.48]–[14.53].

¹⁵ *Munro v Munro* [1997] NZFLR 620 (FC) at 623; and *Burton v Burton* [2002] NZFLR 172 (HC) at [16].

¹⁶ *O v T* [2014] NZHC 2200 at [29].

¹⁷ At [25]; and *B v B* [2018] NZCA 546, [2018] NZFLR 854 at [95].

case of *B v B*, the High Court had ordered a partner to make an interim distribution to account for the value of the relationship property home and superannuation investments.¹⁸ The Court had in mind that the partner would account for the value of that property by making a distribution from their separate property funds.¹⁹ On appeal, the Court of Appeal questioned whether this was possible.²⁰ The Court of Appeal allowed the interim distribution, however, because the applicant partner had a relationship property claim in the property under the partner's control, including a share in the partner's separate property under section 9A. The Court of Appeal left open the question of whether it is possible to order an interim distribution from property that the court has already classified as separate property.

- 15.17 Finally, there is no ability to revisit or recall an interim distribution order when determining the final division of relationship property.²¹ The effect of an interim distribution order is final. It converts the distributed property into the recipient partner's separate property. A court must therefore be certain that any interim distributions will not exceed the partners' ultimate entitlements under a final division of relationship property. It must have sufficient information regarding both the value of the specific item of property that is the focus of the application for interim distribution and the net value of all the partners' relationship property. This can be challenging when there are unresolved disputes about the nature and extent of the relationship property.

Results of consultation

- 15.18 Interim distributions were raised by 13 submitters in submissions on the Issues Paper and Preferred Approach Paper.
- 15.19 Several submitters said that interim distributions should be easier to obtain. The New Zealand Law Society (NZLS) emphasised that interim payments can produce a great measure of justice, reduce the apparent size of the dispute to realistic proportions (which encourages settlement) and mitigate power imbalances during negotiations and litigation. Members of the public shared the difficulties they experienced when applying for an interim distribution because the other parties to the dispute were obstructive. Some submitters recognised that interim distributions are most useful when partners have cash assets.
- 15.20 The Judges of the Family Court commented that the requirement for interim distributions to be made from specific property should be amended to permit distributions from the net value of the partners' relationship property. NZLS submitted that the court should have power to order interim payments on a pragmatic and just basis, subject to such conditions as the court sees fit. One practitioner submitted that, in practice, they had not experienced any impediment to an interim distribution on the grounds that the payment must be associated with a specific item of property.
- 15.21 NZLS submitted the court should be able to order an interim distribution from a partner's separate property in some circumstances, such as where one partner has had

¹⁸ *B v B* [2018] NZHC 1592, [2018] NZFLR 580.

¹⁹ At [401].

²⁰ *B v B* [2018] NZCA 546, [2018] NZFLR 854 at [95].

²¹ *B v B* [2012] NZHC 1951 at [12]; and *Burton v Burton* [2002] NZFLR 172 (HC) at [22].

access to relationship property and spent it. NZLS added the court should have regard to the legal costs the partners have paid to date and the financial resources available to the partners. The Judges of the Family Court were of the view that the property available for interim distributions should be confined to relationship property. The Judges further commented that interim distribution orders are intended to provide short-term and immediate relief to the partners. Lengthy litigation, as in *B v B* (discussed above), would defeat this purpose.

Conclusions

RECOMMENDATION

R88

The new Act should make express provision in a stand-alone provision for a court to order interim distributions of property. The court should be able to:

- a. make interim distributions in respect of any property it has determined is relationship property; and
- b. require a partner to pay a sum of money or transfer property that is their separate property to the other partner to account for the relationship property they retain in their possession.

15.22 We recommend that, under the new Act, a court should have broad powers to make interim distributions on a pragmatic and just basis. We agree with submitters that interim distributions can achieve justice, reduce power imbalances and encourage settlement of disputes.

15.23 The court's powers to grant interim distributions should be in a stand-alone provision in the new Act. The court should have power to order distributions in respect of property the court has ascertained is relationship property, regardless of whether it fits the description of a "specific" item of property. We consider that the current focus on specific items of property under section 25(3) is unduly restrictive.

15.24 The court should have the power to order an interim distribution of relationship property by requiring a partner to source the distribution from their separate property to account for the value of the relationship property they retain in their possession. This may involve paying an amount of money, transferring property or selling property and distributing the sale proceeds. We note the courts' cautions about depriving a partner of their separate property in a way not permitted through final orders for division. However, provided the court can be certain about the applicant's interest in the relationship property retained by the other partner, there are advantages in allowing the applicant partner to access the value of that interest on an interim basis. The court should have wide discretion to order payments of separate property on terms that will ensure the order will not cause unfairness.²² For example, in *B v B*, the Court of Appeal

²²

We note also that the court has ancillary powers under s 33(3)(n) of the Property (Relationships) Act 1976, in respect of money or other property that is part of the separate property of a partner, to order that partner to pay the money or property to the other partner.

observed that, given the paying partner's means, the payment would not embarrass him financially.²³ The Court also ordered that the paying partner was to be reimbursed when sale proceeds from the family home were available.²⁴

SUPERANNUATION SCHEME AND KIWISAVER ENTITLEMENTS

Background

- 15.25 The proportion of the value of a partner's superannuation scheme entitlements that is attributable to the relationship is relationship property under the PRA.²⁵ This would remain the case under our classification recommendations set out in Chapter 3.²⁶
- 15.26 Implementing a division of superannuation scheme entitlements under the PRA can be complicated by the fact that the benefits from a superannuation scheme will usually not accrue until some point in the future. There are three options for implementing a division of superannuation scheme entitlements:
- (a) Offsetting the relationship property component of the superannuation scheme entitlement against other property of equivalent value. For example, the member partner may retain their superannuation scheme entitlements and pay the other partner a lump sum out of other property to account for their interest in the superannuation scheme entitlement.
 - (b) Deferring payment from the member partner to a time when the superannuation benefits are actually received by that partner.
 - (c) Direct payment to the non-member partner from the superannuation scheme manager, either immediately or on a deferred basis, as ordered by the court under section 31 of the PRA.
- 15.27 Section 31 enables a court to make an order requiring the superannuation scheme manager to pay the non-member partner directly out of the scheme. The court's order is conditional on the partners entering a deed or arrangement that binds the manager of the scheme.
- 15.28 KiwiSaver is not expressly addressed in the PRA. KiwiSaver consists of managed investment schemes that are regulated under the KiwiSaver Act 2006. Members will typically make contributions straight from their pay. Employers also make contributions, and the Government will pay an annual tax credit. The purpose of KiwiSaver is to encourage members' long-term saving habits, thereby providing financial benefits, particularly in retirement.²⁷ A member's KiwiSaver funds are usually "locked in" to the

²³ *B v B* [2018] NZCA 546, [2018] NZFLR 854 at [95].

²⁴ At [97].

²⁵ This includes any entitlements derived wholly or in part from contributions made to the scheme after the relationship began or from employment or office held since the relationship began: Property (Relationships) Act 1976, s 2 definition of "superannuation scheme entitlement" and s 8(1)(i).

²⁶ Under our classification recommendations in Chapter 3, superannuation scheme entitlements acquired during the relationship would be relationship property. If a partner's superannuation scheme entitlement was acquired before the relationship but it increases in value because of the application of relationship property or the other partner's separate property, the resulting increase in value, income or gains would also be relationship property.

²⁷ KiwiSaver Act 2006, s 3.

KiwiSaver scheme and are not accessible to most people until they turn 65²⁸ although this is subject to exceptions, such as using a member's KiwiSaver contributions to purchase a first home or in times of financial hardship.

- 15.29 It is unclear how a division of KiwiSaver entitlements should be implemented under the PRA. The Court of Appeal has observed that the definition of superannuation scheme entitlement in the PRA is broad enough to include KiwiSaver entitlements but has not ruled definitively on the matter.²⁹ The KiwiSaver Act also provides that a partner's interest in a KiwiSaver scheme can be released or assigned to another person in accordance with a court order under section 31 of the PRA.³⁰ In several cases the courts have treated KiwiSaver entitlements as the equivalent of money in a bank account that can be split evenly, ignoring the contingent nature of KiwiSaver entitlements.³¹

Issues

- 15.30 We have identified two issues with implementing a division of superannuation scheme and KiwiSaver entitlements.³²
- 15.31 First, there are issues with the process contemplated under section 31. The benefit of requiring the partners to enter into a deed is unclear when all relevant terms of the implementation could be contained in the court order.
- 15.32 Second, it is unclear how a division of KiwiSaver entitlements should be implemented. While KiwiSaver is not mentioned in the PRA, the KiwiSaver Act clearly anticipates that KiwiSaver entitlements may be treated as a superannuation scheme entitlement under the PRA. The Banking Ombudsman has interpreted section 31 of the PRA and the relevant provisions of the KiwiSaver Act to mean that, if the partners wish to require a KiwiSaver scheme manager to implement the division of one partner's KiwiSaver funds, they must obtain a court order under section 31.³³ In the Issues Paper, we also questioned whether it was appropriate to treat KiwiSaver entitlements as the equivalent of money in a bank account for the purposes of division when the actual funds cannot usually be accessed for many years.

Results of consultation

- 15.33 We received 11 submissions that addressed the division of superannuation scheme and KiwiSaver entitlements. Most submitters were concerned, in particular, with the PRA's approach to dividing interests in a KiwiSaver scheme.
- 15.34 Some submitters recognised that KiwiSaver is a long-term investment that is intended to provide income in retirement. They were concerned that, by offsetting an interest in

²⁸ Schedule 1 cl 4.

²⁹ *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224 at [53]. That case was not concerned with dividing entitlements under a KiwiSaver scheme under the Property (Relationships) Act 1976.

³⁰ KiwiSaver Act 2006, s 127(2).

³¹ See, for example, *S v S* [2012] NZFC 2685; *B v C* [2015] NZFC 8940; and *R v L* FC Gisborne FAM-2011-016-147, 6 October 2011.

³² See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.28]–[14.33].

³³ Banking Ombudsman Scheme "Court order necessary to effect agreement" <www.bankomb.org.nz>.

- a KiwiSaver scheme against other property, some partners might be giving up an interest in retirement income in exchange for property that does not provide the same long-term financial benefits. For example, a partner may exchange an interest in the other's KiwiSaver for cash that is then spent or for a depreciating asset.
- 15.35 Four submitters said the PRA should not allow the division of KiwiSaver entitlements through offsetting against other property. These submitters argued that the PRA should require that any KiwiSaver entitlements be divided by way of transfers between the partners' KiwiSaver accounts.
- 15.36 Other submitters did not agree with such a restriction. Workplace Savings NZ (WSNZ), for example, submitted that the court or the partners should be left to decide how best to divide KiwiSaver entitlements in a way that is fair and equitable. There were good reasons, it said, why a partner may prefer a settlement of funds rather than a transfer from one partner's KiwiSaver account to the other. For example, there may be a practical necessity to help fund mortgage costs, reduce debt or facilitate a clean break. There may also be significant differences in age and therefore the period of time before each partner will reach the qualifying age when KiwiSaver funds can be withdrawn. WSNZ also observed there will be cases where one partner is not eligible for KiwiSaver. WSNZ did not think that KiwiSaver should be treated any differently to other superannuation schemes that expressly permit dealings with a superannuation scheme entitlement pursuant to a contracting out or settlement agreement.³⁴
- 15.37 ANZ likewise did not support restricting the division of KiwiSaver entitlements to transfers between KiwiSaver accounts. It had no objection to the current approach of treating KiwiSaver entitlements as the equivalent of money in a bank account that could be divided through offsetting or a transfer of funds.
- 15.38 Several submitters supported reforms to enable partners to divide KiwiSaver entitlements without the need to obtain a court order under section 31, such as when the partners had reached their own agreement in accordance with Part 6 of the PRA. These submitters included WSNZ, ANZ, Auckland District Law Society (ADLS) and NZLS. Submitters noted that KiwiSaver entitlements will become an increasingly important component of most couple's relationship property division. They discussed the burden of filing court proceedings just to obtain orders regarding KiwiSaver and said it inevitably adds cost and delay to settling relationship property matters. These submitters also pointed to the benefits of dividing KiwiSaver interests over deferred payments from KiwiSaver schemes, which they did not support.
- 15.39 Several submitters emphasised that the instructions to scheme managers regarding division would need to be clear, including the precise amount to be released from the member's KiwiSaver account and where the funds are to be paid.
- 15.40 WSNZ submitted that an agreement executed in accordance with section 21F of the PRA would provide meaningful protections against a person ill-advisedly dealing with their KiwiSaver entitlement. It would also provide clarity as to the extent of the interest to be transferred from the KiwiSaver account.

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See, for example, Government Superannuation Fund Act 1956, s 92(3).

Conclusions

RECOMMENDATIONS

R89

A court should have the power under the new Act to make orders in relation to the division of superannuation scheme or KiwiSaver entitlements, and those orders should be binding on the scheme manager regardless of the provisions of any other Act or rules governing the scheme.

R90

The new Act should make express provision for the implementation of a division of KiwiSaver entitlements and should permit the partners to instruct a KiwiSaver scheme manager to:

- a. transfer a specified amount from one partner's KiwiSaver account to the other partner's KiwiSaver account; or
- b. directly pay a specified amount from one partner's KiwiSaver account to the other partner if the other partner is ineligible to join KiwiSaver.

R91

An instruction under R90 should be binding on the KiwiSaver scheme manager without the need for a court order provided the partners have agreed to the instruction under a contracting out or settlement agreement executed in accordance with the new Act.

- 15.41 We consider that partners should have flexibility to divide superannuation scheme and KiwiSaver entitlements in a way that best suits their individual circumstances. When partners cannot agree on the division of superannuation scheme or KiwiSaver entitlements, the partners should be able to seek orders from the court. A court should be able to make any order it considers just to give effect to a division using its general ancillary powers (see R86).
- 15.42 We recommend reform to clarify the court's powers in relation to ordering payments directly from a superannuation or KiwiSaver scheme. We recommend removing the current requirement under section 31 that partners enter an arrangement or deed. We see no practical reason why partners should be required to go to this additional expense when an order of the court could be sufficient to require the scheme manager to make the payment as ordered. Should an arrangement or deed be necessary on the facts of a particular case, a court could make such an order exercising its general existing ancillary powers.
- 15.43 We also recommend making additional specific provision in relation to KiwiSaver. KiwiSaver is increasingly becoming a significant item of relationship property. As at March 2019, 2,942,731 members were enrolled in KiwiSaver schemes.³⁵ The average member's balance in the 2018 financial year was \$17,130, which was a 14.4 per cent

³⁵ KiwiSaver "KiwiSaver monthly statistics" <www.kiwisaver.govt.nz>.

increase on the previous year.³⁶ It is therefore important that the new Act provides the appropriate tools for implementing a division of KiwiSaver entitlements that facilitates the inexpensive, simple and speedy resolution of relationship property matters.

- 15.44 Partners should be able to implement a division of KiwiSaver entitlements by instructing the scheme manager to transfer a specified amount from one partner's KiwiSaver account to the other partner's KiwiSaver account. When one partner is ineligible to join KiwiSaver, the partners should be able to instruct the scheme manager to make a direct payment to that partner. The partners should be able to implement a division of KiwiSaver entitlements in such a way without a court order provided they have agreed on the instructions under a contracting out or settlement agreement executed under the new Act. The current view that a court order is necessary to require a KiwiSaver scheme manager to give effect to the partners' agreement adds unnecessary cost and delay. We agree with submitters that the procedure for entering a contracting out or settlement agreement under the new Act will provide the appropriate safeguards to ensure partners are fully aware of the effect and implications of their agreement.
- 15.45 A court order would still be necessary if the recipient partner was eligible for KiwiSaver but the partners want to divide the KiwiSaver entitlement by withdrawing funds from the KiwiSaver scheme. This reflects the limited rights members have to withdraw KiwiSaver funds. It also promotes the retention of KiwiSaver funds within a KiwiSaver scheme consistent with the purpose of KiwiSaver described at paragraph 15.28 above. A court order should also be necessary to require a KiwiSaver scheme manager to make a deferred payment or payments to the non-member partner once the KiwiSaver benefits become available to the member partner upon reaching 65. The need for a court order recognises the undesirability of deferred payments from the scheme manager's perspective.
- 15.46 In giving effect to our recommendations, consideration should be given to whether the KiwiSaver scheme rules under Schedule 1 of the KiwiSaver Act should be amended to set out the process for dividing KiwiSaver entitlements under the new Act. For example, rules may state what information a contracting out or settlement agreement would need to include and what ancillary documentation may be needed to enable a KiwiSaver scheme manager to transfer funds.
- 15.47 Partners should continue to have the freedom to agree to offset KiwiSaver entitlements against other forms of property as they do with other types of superannuation scheme entitlements. We have considered but do not favour requiring partners to always implement a division of KiwiSaver entitlements through a transfer between KiwiSaver accounts. In our view, this would be too restrictive. While we note submitters' concerns about this practice, professional advisers should be able to point out the potential disadvantages of dividing a KiwiSaver entitlement by offsetting.

³⁶

Financial Markets Authority *KiwiSaver Annual Report 2018* (2018) at 2.

PROTECTION OF PROPERTY PRIOR TO DIVISION

Background

15.48 The PRA contains several mechanisms to prevent or recover dealings with property prior to division:

- (a) 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 (notice of claim). A notice of claim can be registered even though no relationship property proceedings are pending or in contemplation.³⁷ The effect of a notice has been described as a "stop sign" because, once registered, it prevents dealings with land.³⁸ Once lodged, notices of claim can only be removed by order of the Family Court, District Court or High Court.³⁹ A notice of claim will be removed if a court is satisfied that the claimed interest is unsustainable or suspicious or that the notice has done its work.⁴⁰
- (b) Section 43 applies when it appears to the court that a disposition of property is about to be made in order to defeat a partner's claim or rights under the PRA. A court has the power to restrain the impending disposition or order that any proceeds from the disposition be paid into court. If a person disposes of property knowing an order under section 43 has been made, the disposition will be void.⁴¹
- (c) Section 44 applies when a partner has disposed of property in order to defeat the other partner's claim or rights under the PRA. A court may order the property be transferred back or that the person who received the property pay compensation.
- (d) Section 45 provides that, where proceedings are pending under the PRA, no party may sell, charge or dispose of the family chattels without the leave of the court or the written consent of the other partner, nor may a partner remove the family chattels that are household appliances, effects or furniture from the family home. Any person who breaches this section commits an offence and may be liable on conviction to imprisonment for a term not exceeding three months or a fine not exceeding \$2,000 or both.

15.49 These mechanisms, other than the notice of claim procedure, are deliberately limited and are typically used as a last resort. That is because the PRA is a regime of deferred property sharing. Subject to limited exceptions, nothing prevents a partner from dealing with their property until the court makes orders dividing that property under the PRA.⁴²

15.50 Instead, the PRA provides ways for the consequences of a partner's dealing with property that has affected the other partner's interests to be reflected in the final division of relationship property. For example, if relationship property was used to

³⁷ Property (Relationships) Act 1976, s 42(5).

³⁸ *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 registrable 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.

³⁹ Section 42(3).

⁴⁰ See *Gregan v Gregan* [1983] NZLR 555 (CA) at 558; *Laing v Laing* (1988) 4 NZFLR 629 (HC); *Doyle v Doyle (No 2)* [2004] NZFLR 43 (CA) at [13]; *Mulholland v Tonar* HC Auckland CIV-2005-404-6870, 30 March 2006 at [10]–[11].

⁴¹ Section 43(2).

⁴² Section 19.

purchase new property, the new property may be classified as relationship property,⁴³ or if a partner has dissipated relationship property after separation intending to materially reduce its value, the other partner may have a claim to compensation.⁴⁴ The PRA also contains remedies for when a partner has disposed of relationship property to a trust or company.⁴⁵

Issues

15.51 In the Issues Paper, we observed that the section 42 notice of claim procedure was widely used, suggesting that many people find it a useful mechanism.⁴⁶ We observed that section 42 is another example of the PRA giving special protection to the family home in circumstances where rates of home ownership in New Zealand are decreasing. We also noted the issue of the unavailability of the notice of claim procedure in relation to trust property, which we address in Chapter 11.⁴⁷ In Chapter 9 and Chapter 11, we also consider the operation of section 44 and conclude that the application of section 44 is fairly well settled and appears sound.

15.52 We have identified some issues with section 43 and section 45. which we discuss below.

Restraining dispositions of property

15.53 There are three potential issues with section 43.

15.54 First, the threshold to obtain a restraining order under section 43 may be too high. Section 43 focuses on a partner's intention to defeat the other partner's claim or rights under the PRA. The courts have held that, when the partner knows the disposition would expose the other partner to a significantly enhanced risk of not receiving their entitlement under the PRA, they must be taken to have intended that consequence even if it was not actually their wish to cause the partner loss.⁴⁸ In the Issues Paper, we observed that the requirement to show a partner's intention to defeat the other's claim or rights under the PRA in relation to a specific and impending transaction may be difficult to establish.⁴⁹

15.55 Second, the wording of section 43 does not seem appropriate for interim restraints of property dispositions pending the final resolution of relationship property matters. The focus on defeating a partner's claim or rights under the PRA suggests it must appear to

⁴³ A partner may be able to make a claim under ss 8(1)(l), 9(4) or 9A. See discussion in Chapter 3.

⁴⁴ Section 18C, discussed in Chapter 9.

⁴⁵ Sections 44C and 44F, discussed in Chapter 11.

⁴⁶ See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.84]–[14.89].

⁴⁷ In Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.89], we also noted that concerns had been expressed about the prescribed form for s 42 notices of claim because it does not clearly contemplate that the parties may have separated or that one of them has died. See Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR42.05]. We do not, however, consider that this concern warrants reform.

⁴⁸ *R v U* [2010] 1 NZLR 434 (HC) at [33], applying *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53] per Blanchard J; *P v H* [2016] NZCA 514, [2016] NZFLR 974 at [41] and on appeal *H v P* [2017] NZSC 196, [2018] 1 NZLR 638.

⁴⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.95]–[14.97].

the court that the impending disposition will in fact defeat a partner's rights. This requires the court to make findings of fact about the relationship and the property involved. The Family Court has recognised that, in an interlocutory context, evidential issues cannot be fully tested.⁵⁰ Instead, the Family Court has preferred to treat a section 43 application as analogous to an application for an injunction and assess whether the applicant had an arguable case.⁵¹ This test is not evident in the wording of section 43.

- 15.56 Third, section 43 sits uncomfortably alongside the interlocutory injunction procedure in the Family Court Rules.⁵² An interlocutory injunction may be in the form of a restraint or a mandatory order requiring particular actions to be taken to protect property. It may be a freezing order preventing a partner from removing assets from New Zealand or otherwise dealing with them in New Zealand.⁵³ The court will decide whether to grant an application for an interlocutory injunction by applying principles established in case law.⁵⁴ The applicant must file an undertaking that they will abide by any order the court makes in respect of damages that are sustained by the other partner through the granting of the interim injunction.⁵⁵
- 15.57 Section 43 and the interlocutory injunction procedure rely on different principles.⁵⁶ Section 43 requires an assessment of the intention to defeat the applicant partner's rights and the likelihood of a specific disposition of property being made. Interlocutory injunctions, on the other hand, look to the strength of the applicant's case in the substantive proceedings and the balance of convenience. Consequently, interlocutory injunctions are likely to be available in a broader range of circumstances than section 43 orders. This undermines the general freedom given to partners to deal with property prior to division and the deliberately narrow scope of section 43. It also undermines the concept that the PRA is intended to operate as a code.⁵⁷
- 15.58 The overlap between section 43 and interlocutory injunctions also gives rise to a question of priority. The Family Court has held that it is appropriate to consider its jurisdiction under section 43 before turning to remedies under the Family Court Rules.⁵⁸ However, in other cases, the courts have made interlocutory injunctions without appearing to consider whether it should have exercised its section 43 powers.⁵⁹

⁵⁰ *D v D* [2010] NZFLR 542 (FC) at [20].

⁵¹ At [20] and [24].

⁵² Family Court Rules 2002, r 182. If the application is made in the District Court or the High Court, the rules of that Court will apply.

⁵³ Rule 184 provides specifically for freezing orders.

⁵⁴ The leading cases are *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) and *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC and CA). Although these are cases in the civil law context, they have been applied in proceedings under the Property (Relationships) Act 1976: *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 547; and *L v J [Injunction]* [2010] NZFLR 936 (HC) at [37].

⁵⁵ Family Court Rules 2002, r 183.

⁵⁶ For further discussion, see J Guest "Practice note: Emergency injunctive relief in Property (Relationships) Act 1976 cases – two different horses for different courses" (2009) 6 NZFLJ 256.

⁵⁷ Property (Relationships) Act 1976, s 4.

⁵⁸ *D v D* [2010] NZFLR 542 (FC) at [11].

⁵⁹ See, for example, *Shaw v Narain* [1992] 2 NZLR 544 (CA); and *L v J [Injunction]* [2010] NZFLR 936 (HC).

Unauthorised disposal or removal of family chattels

- 15.59 There are several minor issues with section 45. First, it only applies when proceedings are pending under the PRA. It may be some time after separation that a partner commences court proceedings. Section 45 could be made more effective by prohibiting unauthorised dealings with or removals of family chattels at an earlier stage.
- 15.60 Second, section 45 appears to be rarely used, and we consider that many if not most partners are unaware that removing or disposing of family chattels without consent is likely to constitute an offence. This is problematic as the main purpose of the section 45 offence is its deterrence effect.

Results of consultation

- 15.61 Submitters generally supported the PRA continuing to provide partners with the ability to lodge notices of claim under section 42, including NZLS and ADLS. 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.
- 15.62 The New Zealand Bankers' Association (NZBA) and one member of the public expressed concern about situations where a partner registers a baseless claim under section 42. NZBA thought the process for challenging a notice of claim should be simplified, thereby reducing the cost of removal and helping to minimise the erosion of equity on the property. Alternatively, NZBA suggested that a partner be required to provide evidence to support a notice of claim.
- 15.63 Three submitters addressed the threshold in section 43. One practitioner favoured a lower threshold. They submitted that a partner should have the right to restrain dispositions of relationship property as if they were a co-owner of that property. NZLS and Professor Nicola Peart did not support reform of section 43. Peart questioned whether a lower threshold could adversely affect creditors or other bona fide third parties and disrupt commercial dealings.
- 15.64 The Judges of the Family Court commented that the remedies under sections 18C, 42, 43 and 45 and the power to injunct under the Family Court Rules are sufficient for purpose. However, they commented that the law may not be readily accessible given that these powers are contained in a patchwork of statute, common law and the Family Court Rules. They suggested the PRA could clarify the specific orders available and the court's powers.
- 15.65 We did not seek submissions on section 45 in either the Issues Paper or the Preferred Approach Paper. We have, however, sought advice from the Ministry of Justice on the penalty under the provision. The Ministry considered that the penalty of imprisonment for a maximum term of three months or a fine not exceeding \$2,000 was appropriate. However, it said the ability for the Court to set down both a fine *and* a term of

imprisonment is harsh.⁶⁰ The Ministry considered it unlikely that a court would impose both penalties and so it was unnecessary for such an option to be included.

Conclusions

RECOMMENDATIONS

R92

A court should have broad powers under the new Act to make interim restraining orders, replacing section 43 of the PRA. The powers and the principles on which the court should exercise them should be consistent with the court's powers to make interlocutory injunctions under rules 182–184 of the Family Court Rules 2002. The court should have the power to waive the requirement that the applicant give an undertaking as to damages or otherwise order that a partner should not be liable for damages.

R93

It should be an offence under the new Act, punishable by a term of imprisonment not exceeding three months or a fine not exceeding \$2,000, for one partner to:

- a. sell, charge or dispose of any family chattels; or
- b. remove from the family home or homes any of the family chattels that are household appliances or effects or that form part of the furniture of that home or those homes;

without the leave of the court or the written consent of the other partner when relationship property proceedings are pending or where one partner has given notice to commence pre-action procedures under the new Act (see R100).

15.66 We are satisfied the notice of claim procedure under section 42 and the provision for setting aside dispositions under section 44 are generally working well and do not require reform. While we note the concerns raised by NZBA and one member of the public, the great majority of submitters did not find issues with the notice of claim procedure. In Chapter 11, however, we recommend that the notice of claim procedure be available when a partner has a claim in respect of property held on trust under the new Act. In Chapter 9, we also suggest that section 44 could be amended to give a court compensatory powers to remedy a disposition if in the future reform is justified.

Restraining dispositions of property

15.67 We recommend replacing section 43 with a new provision in the new Act equipping the court with broad powers to make interim restraining orders consistent with the court's jurisdiction under rules 182–184 of the Family Court Rules. We agree with the Judges of the Family Court that it is desirable to consolidate and simplify the court's powers to restrain dispositions of property. It is unsatisfactory for the two remedies to sit alongside each other while resting on different principles and arising under different sources of law.

⁶⁰ Advice to the Law Commission from the Ministry of Justice (May 2019), on file with the Law Commission.

- 15.68 The principles on which the court should exercise its powers to make interim restraining orders should be clearly set out in the new Act and should require a court to consider:
- (a) whether the applicant has an arguable case; and
 - (b) the balance of convenience.
- 15.69 By bringing this inquiry into the new Act, we anticipate the court would exercise its discretion with the ultimate goal of ensuring a just division of property between the partners. The court would also recognise the injustice of preventing a partner from dealing with their property in a way otherwise permitted by current section 19. The balance of convenience test is therefore a useful test in this context.⁶¹ We prefer these considerations over the existing narrow focus under section 43 on there being a specific impending disposition that is made in order to defeat a partner's claim or rights under the PRA.
- 15.70 In addition, we consider an applicant partner should usually be required to give an undertaking as to damages consistent with rule 183 of the Family Court Rules. We note, however, that the applicant partner's interest in relationship property under the new Act may be different to the interests at stake in civil disputes in which undertakings as to damages are usually given. The court should therefore have power to waive the requirement or order that a partner should not be liable for damages.

Unauthorised disposal or removal of family chattels

- 15.71 Although section 45 appears to be rarely used, it provides a useful mechanism to deter one partner from dealing with family chattels or stripping the family home of its furnishings in a way that may prejudice the other partner. Instead, it encourages partners to reach agreement on these matters. It is not onerous to require written consent between the partners. This could be done, for example, through email or text messages.⁶² However, we think that section 45 should be reformed in several ways.
- 15.72 First, we recommend that the prohibition on unauthorised disposal or removal of family chattels in section 45 should apply at an earlier stage when resolving relationship property matters. In Chapter 16, we recommend that pre-action procedures should be developed for relationship property matters and included in the Family Court Rules. The pre-action procedures should commence by one partner giving notice to the other of an intention to engage in dispute resolution to resolve a relationship property dispute. We consider that the prohibitions on unauthorised disposal or removal of family chattels should apply from the time one partner commences pre-action procedures by giving notice to the other. The terms of that notice should include notification that the prohibitions apply.
- 15.73 Second, we agree with the Ministry of Justice that the maximum penalty should be either a term of imprisonment not exceeding three months or a fine not exceeding \$2,000 but not both.

⁶¹ J Guest "Practice note: Emergency injunctive relief in Property (Relationships) Act 1976 cases – two different horses for different courses" (2009) 6 NZFLJ 256 at 259.

⁶² Section 18 of the Electronic Transactions Act 2002 enables a legal requirement that information be in writing to be met by information that is in electronic form if the information is readily accessible so as to be usable for subsequent reference.

- 15.74 In Chapter 16, we recommend the publication of a comprehensive information guide. That guide should include information about the prohibitions on unauthorised disposal or removal of family chattels and the consequences for breaching those prohibitions. Information could also be provided in guidance on pre-action procedures and how to complete court documents and by community support organisations, dispute resolution providers and lawyers.

RIGHTS TO OCCUPY OR POSSESS PROPERTY

Background

- 15.75 The PRA contains several provisions that enable a court to grant a partner exclusive occupation or possession rights to certain items of property.
- 15.76 Section 27 provides that the court may grant one partner the right to personally occupy the family home or any other premises forming part of the relationship property to the exclusion of the other partner (an occupation order). The court has wide discretion to make an occupation order on terms and conditions it thinks fit.
- 15.77 Section 28 provides that a court may grant an order vesting in either partner the tenancy of a dwellinghouse (a tenancy order). In contrast to the wide powers the court has to make occupation orders, under section 28, the court only has power to vest the tenancy in one partner.
- 15.78 When making occupation or tenancy orders, the court must have particular regard to the need to provide a home for any minor or dependent children of the relationship.⁶³ The court is also likely to have regard to a wide range of other factors.⁶⁴ In Chapter 12, we recommend there should be a presumption in the new Act in favour of granting a temporary 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 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.
- 15.79 When an occupation order is made, the occupying partner is sometimes required to pay the non-occupying partner compensation (occupation rent). Occupation rent compensates the non-occupying partner for denied or delayed access to capital they are entitled to under the PRA.⁶⁵ Occupation rent can be awarded under section 18B or as interest. Section 18B allows the court to grant a partner compensation for the post-

⁶³ Property (Relationships) Act 1976, s 28A.

⁶⁴ See *R v R FC Oamaru* FAM-2010-045-11, 17 February 2010, cited in Nicola Peart (ed) *Brookers Family Law – Family Property* (online ed, Thomson Reuters) at [PR27.03]. In this case, the Family Court identified relevant factors from previous cases and commentary: health of the partners; age of the partners; the desirability of finality; the desirability of releasing capital to the partners; whether or not one partner has had rent-free accommodation; whether or not the non-occupying partner has paid outgoing on the home; the partners' need to improve their present accommodation; any relationship between the partners' home and the occupant's business; any gross and palpable misconduct that has affected the value or extent of relationship property; and the partners' child support obligations.

⁶⁵ See *E v G* HC Wellington CIV-2005-485-1895, 18 May 2006 at [21]; and Patricia Courtney "Adjustments following resolution of substantive property dispute" (paper presented at New Zealand Law Society PRA Intensive conference, February 2013) at 89.

separation contributions to the relationship they have made.⁶⁶ Interest, on the other hand, is payable under section 33(4).⁶⁷ An award under either section 18B or section 33(4) may be based on a calculation of interest on the non-occupying partner's share of the property that the occupying partner had the use of.⁶⁸

15.80 In addition to occupation orders and tenancy orders, a court can grant an order giving one partner exclusive possession of furniture, household appliances and household effects (furniture orders). The court can make furniture orders either as ancillary to an occupation order or a tenancy order⁶⁹ or to equip another household in which the applicant partner will be living.⁷⁰ In Chapter 12, we discuss reforming the court's powers to make furniture orders in order to give children's interests greater priority. We recommend extending the scope of the orders to include other types of property that would come under the definition of family chattels in the new Act.

15.81 There is some overlap with the Family Violence Act 2018. That Act, effective as of 1 July 2019, also enables a court to grant occupation and tenancy orders. The court's jurisdiction to grant such orders is contingent on the applicant having applied for a protection order under the Family Violence Act.⁷¹ A protection order prevents the respondent from doing certain things, including engaging in any form of family violence or having any contact with the protected person. On or after making a protection order, the court may make an occupation or tenancy order if satisfied that:⁷²

(a) the order is reasonably necessary to:

- (i) meet the accommodation needs of the applicant, a child of the applicant's family or both; or
- (ii) enable the applicant to continue existing childcare, education, training or employment arrangements for that person, a child of the applicant's family or both; or

(b) the order is in the best interests of a child of the applicant's family.

15.82 There may be situations where a partner could seek occupation or tenancy orders under both the PRA and Family Violence Act. Although there is overlap between the two regimes, it is unlikely to cause any significant difficulties in practice. The Family Violence Act clearly operates in situations of violence where a protection order is needed. Occupation orders and tenancy orders under the PRA will generally be sought when a couple have separated and are in the process of dividing their property.

⁶⁶ Compensation under s 18B is available in respect of anything that would have been a contribution to the relationship, as defined in s 18 of the Property (Relationships) Act 1976. In Chapter 8, we conclude that the s 18 definition remains sound and should be retained in the Relationship Property Act.

⁶⁷ It is not clear whether there is a difference between awards of interest and occupation rent. The courts have, however, cautioned that an award of interest should not be confused with occupation rent as an award of both would amount to double counting: *T v G* [2013] NZHC 2976 at [81].

⁶⁸ *Griffiths v Griffiths* [2012] NZFLR 327 (HC) at [37]–[38].

⁶⁹ Property (Relationships) Act 1976, s 28B.

⁷⁰ Section 28C.

⁷¹ Family Violence Act 2018, ss 116 and 122.

⁷² Sections 116 and 122.

Issues

- 15.83 We have identified several potential issues relating to:
- (a) the inability to make occupation orders in relation to a home that is not relationship property;
 - (b) the lack of statutory guidance on when to order occupation rent and how it should be calculated; and
 - (c) the uncertainty as to when a partner may apply for an occupation order.

Occupation orders when a home is not relationship property

- 15.84 In the Issues Paper, we observed that a court may not have jurisdiction to grant occupation orders over the family home when the home is held on trust or owned by a company.⁷³ That is because the court may only grant occupation orders over the family home if one or both partners are the beneficial owners of that home.⁷⁴ Where neither partner has a beneficial interest in the trust or merely discretionary beneficial interests, the Family Court has held occupation orders are not available under section 27.⁷⁵ The courts have, however, granted an occupation order when a partner has powers to control a trust based on the principles in *Clayton v Clayton [Vaughan Road Property Trust]*.⁷⁶
- 15.85 The Family Court has held that it has no jurisdiction to make an occupation order if a company owns the family home unless the company is a sham.⁷⁷
- 15.86 In some cases, it has also been suggested that an occupation order cannot be ordered over the family home if it is one partner's separate property.⁷⁸ If that is the case, our recommendations in respect of the classification of the family home in Chapter 3 would have significant implications for the availability of occupation orders. This is because the family home would be separate property if it was owned by one partner before the relationship was contemplated or was received as a gift or inheritance from a third party.
- 15.87 In the Issues Paper, we asked whether an occupation order should be available in relation to property that is not relationship property. The need to provide a home for any minor or dependent children of the relationship may be just as great regardless of whether the home forms part of the couple's relationship property. On the other hand,

⁷³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.70]–[14.76].

⁷⁴ *Keats v Keats* [2006] NZFLR 470 (FC) at [4]; and *R v R* [2010] NZFLR 555 (FC) at [43].

⁷⁵ *Beric v Chaplain* [2018] NZFC 3885 at [43].

⁷⁶ *Bell v Sutton* [2017] NZFC 5741. On appeal *Sutton v Bell* [2017] NZHC 2370, [2017] NZFLR 779. See too *R v R* [2010] NZFLR 555 (FC) at [60] where the Family Court said there is a continuum of interests in different trusts and each case must be considered to see where it falls on this continuum.

⁷⁷ *S v S* [2008] NZFLR 711 (FC) at [11].

⁷⁸ *S v N* FC North Shore FAM-2010-044-1254, 30 June 2011, cited in Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 357. See too *R v R* [2010] NZFLR 555 (FC) at [44] where the Family Court held that the family home must be relationship property for the courts to grant an occupation order under s 27 of the Property (Relationships) Act 1976.

when a home is not relationship property, an occupation order may unduly interfere with the owning partner's property rights.

The calculation of occupation rent

- 15.88 The courts will take into account many factors when deciding whether to award occupation rent under section 18B, such as:
- (a) the contributions the other partner has made, including care of children and paying outgoings on the family home;⁷⁹
 - (b) the value of relationship property each partner holds post-separation;⁸⁰
 - (c) the condition of the home and its potential to be rented to other tenants;⁸¹ and
 - (d) whether the occupying partner has obstructed a sale process.⁸²
- 15.89 In the Issues Paper, we questioned whether the PRA gave sufficient guidance to the court on how it should calculate occupation rent.⁸³ We also noted the conflicting approach to grace periods. In some cases, the Family Court has allowed a grace period before imposing occupation rent, acknowledging that the partners need time to readjust their affairs after separation.⁸⁴ However, in other cases, the High Court has rejected a grace period on the basis that, the moment one partner has exclusive occupation of the home, the other must incur their own rental costs.⁸⁵

When a partner may apply for an occupation order

- 15.90 Section 27 does not specify when a partner may apply for an occupation order. This is in contrast to section 28, which expressly allows a court to make a tenancy order "at any time". It therefore is unclear whether a partner can apply for an occupation order before the partners separate⁸⁶ or before proceedings are filed for a division of relationship property under section 25.⁸⁷
- 15.91 We question the appropriateness of precluding an occupation order while the partners are still living together. If the partners' relationship has deteriorated to the point where one partner had applied to the court for an occupation order, it would be odd for the court to claim it had no jurisdiction because the partners had not separated. Parents

⁷⁹ *C v E* [2013] NZHC 1502; *Dale v Dale* [2016] NZFC 4029; and *Wills v Catsburg* [2016] NZFC 581.

⁸⁰ *S v W* [2014] NZHC 333, affirmed on leave to appeal in *S v W* [2014] NZCA 199.

⁸¹ *Caie v Caie* FC Auckland FAM-2009-057-186, 10 October 2011.

⁸² *C v C* HC Auckland CIV-2007-419-1313, 26 June 2008.

⁸³ Law Commission *Dividing relationship property – Time for change? Te mātatoa rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [14.77]–[14.82].

⁸⁴ *King v King* FC Lower Hutt FP032/105/02, 26 November 2003; and *M v M* [2012] NZFC 680 at [49]–[50].

⁸⁵ *Griffiths v Griffiths* [2012] NZFLR 327 (HC) at [39]; and *Dyas v Elliott* (2010) 11 NZCPR 252 (HC) at [32]. See too Patricia Courtney "Adjustments following resolution of substantive property dispute" (paper presented at New Zealand Law Society PRA Intensive conference, February 2013).

⁸⁶ In some older cases, the courts refused to grant occupation orders before the partners had separated for reasons including that it could not be considered just to use an occupation order to require one partner to leave the family home pending the determination of the separation proceedings: *Stocker v Stocker* (1978) 1 MPC 200; *Sergeant v Sergeant* (1978) 2 MPC 168, cited in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [18.69].

⁸⁷ See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [18.69].

may also want to be sure they have secure accommodation for their children before separation. The approach is also inconsistent with the court's freedom to grant tenancy orders at any time under section 28.

Results of consultation

- 15.92 Several submitters commented on the restrictions on granting occupation orders when the home is held on trust or by a company. Professor Peart observed that occupation orders in respect of trusts is an issue that needs clarifying but it also needs to be considered in light of other property used by the partners that is held by a third party.
- 15.93 NZLS submitted that, where either or both partners had a licence or other occupation right in respect of a home before separation, even an informal one (for example, if the family home was held on trust or owned by a company without any formal arrangements for rental or licence), the court should be able to make occupation orders over that property. NZLS noted the Family Court and High Court's decision to grant an occupation order in *Sutton v Bell* based on the principles in *Clayton v Clayton [Vaughan Road Property Trust]*, but NZLS cautioned that it was not certain that this interpretation will hold, particularly at the Court of Appeal level.⁸⁸
- 15.94 Other submitters preferred that a court's jurisdiction to grant occupation orders over trust property be dependent on the nature of the partners' beneficial interest under the trust. One practitioner submitted that an occupation order should be available where the property has been used in the course of the relationship and either partner or their children were beneficiaries. Other submitters supported occupation orders being available for homes held on trust but did not articulate the jurisdictional basis for such orders.
- 15.95 Most submitters who addressed occupation rent favoured it being available in appropriate cases. Some submitters considered that there should be more guidance around occupation rent. However, there was no consensus as to when it should be awarded. One practitioner said that occupation rent should always be automatic. The Office of the Children's Commissioner submitted that occupation rent should not be automatic. NZLS said that the court should have an express power to adjust for post-relationship use of property where it is just to do so. Where the home is principally used for children, NZLS considered that no adjustment or limited adjustment should be made. A similar submission was made by another practitioner.

⁸⁸

Bell v Sutton [2017] NZFC 5741. On appeal *Sutton v Bell* [2017] NZHC 2370, [2017] NZFLR 779.

Conclusions

RECOMMENDATIONS

R94

A court should have powers under the new Act to grant an occupation order at any time in respect of:

- a. the family home, regardless of whether it is relationship property or separate property;
- b. property held on trust, when:
 - i. either or both partners or any child of the relationship are beneficiaries of the trust (including discretionary beneficiaries); or
 - ii. either or both partners are trustees of the trust; or
- c. any other premises forming part of the relationship property.

R95

The new Act should expressly refer to the court's powers to award occupation rent when appropriate in the circumstances as a condition of any occupation order.

15.96 We recommend that the new Act should continue to allow a court to grant occupation orders over any premises forming part of the relationship property. A court should also be able to grant occupation orders over property that is not relationship property in some circumstances. We consider a court should have the power to make an occupation order *at any time*, consistent with its existing power in relation to tenancy orders under section 28. If, for whatever reason, a partner has applied for an occupation order at a time when it would be inappropriate for the court to grant the order, we consider the court has sufficient discretion to decline the application.

Extending occupation orders to separate property and trust property

15.97 We consider that a court should be able to grant occupation orders in situations where the family home is separate property. We also agree with submitters that a court should have limited jurisdiction to grant occupation orders in respect of property held on trust. We are mindful of the widespread use of trusts in New Zealand to hold residential property.⁸⁹ It is important that the court have adequate powers to ensure partners and children who depended on the trust during the relationship for accommodation should not suffer hardship when relationships end. We consider that the court should not be constrained by a requirement that the partners have a relationship property interest in the trust.

15.98 There are, however, cases where it would be inappropriate to make occupation orders over trust property. Occupation orders, for example, should not improperly prejudice the interests of other beneficiaries of the trust. Alternatively, there may be cases where the trust is unconnected with the family that occupies the home. For example, a home

⁸⁹ For example, in the 2013 Census, 14.8 per cent of households reported that their home was held on trust: Statistics New Zealand *2013 Census QuickStats about housing* (March 2014) at 12. See Chapter 11.

may be held on trust but operated as a private rental property and the family may be tenants under a tenancy agreement and otherwise unconnected to the trust. Clearly, an occupation order should not be awarded in these circumstances.

15.99 We therefore recommend that the court have jurisdiction under the new Act to grant occupation orders over property held on trust when:

- (a) either or both partners or any child of the relationship are beneficiaries of the trust that holds the home, even if they are only discretionary beneficiaries; or
- (b) either or both partners are trustees of the trust.

15.100 These criteria should identify trusts with an appropriate connection to the relationship. When a court is satisfied that it has jurisdiction to make an occupation order over a home held on trust, the presumption in favour of granting a temporary occupation order for the benefit of any minor or dependent child of the relationship, recommended in Chapter 12, would apply. The court should otherwise retain a broad discretion to make or withhold an order having regard to the circumstances of the trust, including the interests of other beneficiaries.

15.101 We note the suggestion that an occupation order should be available when the partners have a property interest in the form of a use and occupation right that enables them to possess the home held on trust.⁹⁰ We do not favour this approach. Situations where the home is owned by a third party but the partners have a use and occupation right already come within the court's jurisdiction to grant tenancy orders.⁹¹ In our view, it is preferable not to confuse these powers.⁹²

15.102 When the court grants an occupation order, it should have discretion to order the occupant partner to pay occupation rent to the trustees. Occupation rent can return value to the trust to ensure that other beneficiaries are not prejudiced.

15.103 We do not recommend reform to enable a court to grant occupation orders over homes owned by companies. We do not have evidence that families use company ownership structures to own homes in the same way they use trusts, nor have we been presented with evidence that the court's limited powers in respect of company property are causing problems. If in the future it appears company ownership is a problem that should be addressed, we suggest a provision could be introduced to target companies closely connected to families, similar to our recommendation regarding trusts.⁹³

⁹⁰ See Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356. The New Zealand Law Society also supported this approach in its submission to the Issues Paper.

⁹¹ We note that, under the Family Violence Act 2018, the legal interest on which an occupation order can be granted depends on use and enjoyment rights rather than ownership rights. Section 115(3) expressly states that a legal interest includes a tenancy. Section 27 of the Property (Relationships) Act 1976 does not use this concept of legal interest.

⁹² Importantly, the court's powers under s 28 of the Property (Relationships) Act 1976 only extend to vesting the tenancy in a partner. The order cannot otherwise alter the terms of the tenancy, meaning the tenancy can be terminated in accordance with its terms. For occupation orders, on the other hand, the court can bind the property owner to allow a partner occupation on such terms and conditions as it sees fit. It would be undesirable for the court to bind a third party landlord through an occupation order in a manner not permitted through a tenancy order.

⁹³ The concept of a qualifying company under s 44D may provide a useful guide.

Occupation rent

- 15.104 We do not recommend including guidance in the new Act for how a court should calculate occupation rent. We agree with NZLS's submission that the decision will depend on many factors and the court should continue to have a broad discretion to take all relevant matters into account.
- 15.105 We also consider that one partner's occupation of property in which the other partner has an interest after separation should continue to be considered a post-separation contribution to the relationship for the purposes of making an adjustment to equal sharing. We address adjustments for post-separation contributions in Chapter 9. A court should be able to consider both partners' post-separation contributions in the round. Often the partner who occupies the home will have performed some post-separation contributions, such as the care of children or paying outgoings on the property. It is preferable that the court awards occupation rent at an amount that reflects the contributions of both partners.
- 15.106 We are concerned that, on a plain reading of section 27, there is nothing to alert the reader to the court's power to award occupation rent. We recommend that the new Act should expressly refer to the court's powers to award occupation rent when appropriate in the circumstances as a condition of the occupation order.
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CHAPTER 16

Resolution

IN THIS CHAPTER, WE CONSIDER:

the resolution of relationship property matters and the need for reform in relation to:

- access to information on the PRA and how to resolve relationship property matters;
- access to affordable legal advice;
- resolving relationship property matters out of court;
- resolving relationship property matters that go to court; and
- partners' disclosure obligations.

INTRODUCTION

16.1 One of the principles of the PRA is that matters "should be resolved as inexpensively, simply, and speedily as is consistent with justice".¹ This means that division of property at the end of a relationship should be just and the process for achieving that should be efficient.²

16.2 Although there is a lack of data about how relationship property matters are resolved in New Zealand, our research and the submissions we have received indicate that the vast majority of relationship property matters are resolved out of court.³

¹ Property (Relationships) Act 1976, s 1N(d).

² We consider there are four important elements in achieving a just and efficient resolution of relationship property matters: understanding of legal entitlements, access to property and 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].

³ Citizens Advice Bureaux New Zealand (CABNZ) submitted in February 2018 that, in the past financial year, CABNZ had 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. 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

- 16.3 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.⁴ The recommendations in this chapter are therefore largely focused on encouraging partners to resolve their relationship property matters out of court whenever appropriate. Importantly, this requires efficient court processes and strict consequences for non-compliance with procedural rules in court so that the threat of court action and court-imposed penalties effectively deters partners from engaging in bad behaviour when resolving relationship property matters out of court.
- 16.4 A strong theme from consultation was that the PRA does not facilitate inexpensive, simple and speedy resolution of relationship property matters. Lengthy delays and unaffordable costs can exacerbate what is already a deeply traumatic time of anxiety, uncertainty and conflict for many.⁵ We received 126 submissions that raised issues about the resolution of relationship property matters in response to our Issues Paper and Preferred Approach Paper. This included 86 submissions from members of the public, 14 submissions from dispute resolution service providers and other organisations and 23 submissions from individual practitioner and academic experts. We also received comments from the Judges of the Family Court. Resolution was also discussed at 16 public meetings and 18 practitioner and academic expert meetings. In this chapter, we focus on the issues that prevent the just and efficient resolution of relationship property matters.
- 16.5 We have developed our recommendations having regard to other ongoing work in the family justice sector and, in particular, the recommendations of the Independent Panel appointed to examine parenting and guardianship matters following the 2014 family justice reforms (the Independent Panel).⁶ The Independent Panel reported to the Minister of Justice in May 2019 and recommended a raft of changes to strengthen and connect family justice services, including the Family Court, so that children, parents and their whānau are treated with dignity and respect, listened to and supported to make the best decisions for them.⁷ While focused on parenting and guardianship matters, these recommendations and the Government's response are likely to have implications for the resolution of relationship property matters, including on common issues such as

practitioners, mediation by 57 per cent of practitioners 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.

⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [23.8]–[23.9].

⁵ 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.

⁶ The 2014 reforms resulted in the most significant changes to New Zealand's family justice system since the establishment of the Family Court, including the introduction of Family Dispute Resolution (FDR) and the removal of lawyers from the early stages of some Family Court proceedings. The Independent Panel was appointed in August 2018: Andrew Little "Panel appointed to re-write 2014 Family Court reforms" (press release, 1 August 2018). In January 2019 the Panel released a discussion document following public consultation: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Strengthening the family justice system: A consultation document released by the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019). In May 2019 the Panel released its final report and recommendations: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019).

⁷ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 2.

access to information, legal advice and dispute resolution processes, availability of legal aid and the efficiency of court processes.⁸ We have also had regard to the recent report of the Australian Law Reform Commission on the Australian family law system.⁹ That report made a range of recommendations to improve the resolution of property and financial matters on separation.

- 16.6 We also note the upcoming research into how separating couples divide their property and resolve disputes at the end of a relationship. This research will be carried out by an interdisciplinary research team led by University of Otago and funded by the Borrin Foundation. It will provide evidence that will be invaluable in determining how the state can best support just and efficient outcomes in relationship property matters. The results of this research are due to be published in 2020.¹⁰

ACCESS TO INFORMATION ON THE PRA AND HOW TO RESOLVE RELATIONSHIP PROPERTY MATTERS

Background

- 16.7 People need to understand their property entitlements and obligations and the different options for resolving relationship property 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 Bureau, the New Zealand Law Society (NZLS) and the Commission for Financial Capability.¹¹

Issues

- 16.8 In the Issues Paper, we sought feedback on whether the range of publicly available information about the PRA and options for resolving property matters was sufficient.¹² We also asked who should be responsible for providing information on the PRA and in what form this information should be available.¹³

Results of consultation

- 16.9 Several submitters commented that there is a lack of easy to understand and accessible information for separating partners. Dispute resolution service providers, in particular, submitted that there is a lack of timely information about the different options for

⁸ The Independent Panel recognised in its final report that the impact of the 2014 reforms could not be considered in isolation from other areas of family law, such as legislation governing family violence, care and protection and relationship property: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 5.

⁹ Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019).

¹⁰ Michael and Suzanne Borrin Foundation "Relationship property division research" <www.borrinfoundation.nz>; University of Otago Children's Issues Centre, "Research Activities" University of Otago <www.otago.ac.nz>.

¹¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.4].

¹² At 527.

¹³ At 527.

resolving disputes, including likely costs, advantages and disadvantages and timeframes associated with each option. Some submitters, including Citizens Advice Bureaux New Zealand (CABNZ), considered that there was sufficient information about the PRA. However, they considered there is 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.

- 16.10 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 on the PRA and help to make arrangements with banks, creditors and other parties involved in the resolution process. CABNZ observed that, over the past four years, the number of relationship property enquiries it received had increased by 44 per cent. It said that, if organisations like it are fulfilling this role, it is important that they are appropriately resourced and equipped to do so.

Results of consultation on the Preferred Approach Paper

- 16.11 In the Preferred Approach Paper, we proposed that the Government develop a comprehensive information guide and consider funding community organisations to provide person-to-person support for people with difficulties in accessing, navigating and applying the information guide.¹⁴ We also proposed that the Government provide clearer guidance to parties about how to complete key court documentation and develop process guides to better prepare self-represented litigants for court processes.¹⁵
- 16.12 NZLS supported our proposals but cautioned against the provision of information and individualised advice on substantive legal matters by non-lawyers. Information should not attempt to provide legal advice or suggest that relationship property matters can be dealt with on a "DIY basis". NZLS said that, given the complex issues often associated with relationship property matters, there is a risk that parties receiving inaccurate initial advice will be disadvantaged in the resolution process. NZLS submitted that better access to early legal advice, including improved provision for legal aid funding, would be a positive step in ensuring that parties have sound legal advice from the outset about resolving their particular relationship property matters.
- 16.13 The Auckland District Law Society (ADLS) also supported more information being publicly available. It said a key consideration was whether the appropriate information and support is available to parties seeking to resolve their dispute outside the court system. It submitted that clear information is needed about legal entitlements under the PRA, the range of options available for the resolution of disputes and the court process and associated costs.

¹⁴ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P52–P53.

¹⁵ P61.

Conclusions

RECOMMENDATIONS

R96

The Government should develop a comprehensive information guide that explains the new Act and provides information about the different options for resolving relationship property matters.

R97

The Government 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.

R98

The Government 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.

A new comprehensive information guide

16.14 We recommend that the Government develop and publish a comprehensive and easy to understand information guide. The object of the information guide should be to promote out of court resolution as far as possible by giving separating partners the information they need to participate effectively in the resolution of relationship property matters. The Government should consider developing the information guide with community organisations, NZLS and dispute resolution service providers.

16.15 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 relationship property 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 relationship property matters;¹⁶ and

¹⁶

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 *Parenting Through Separation Programme Information: Making arrangements for your children*.

- (d) direct partners 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.
- 16.16 The information guide should be widely available to separating partners at an early point in the dispute resolution process. In Chapter 2, we also identify a broader need for greater public awareness of and education about partners' rights and obligations to share property at the end of a relationship and we recommend that the Government consider ways to improve public awareness. Consistent with that recommendation, the Government 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 and buying a house).
- 16.17 The information guide should be available online¹⁷ and in a variety of formats, including podcasts and videos, and in different languages.¹⁸ It should also be available in print to those without access to the internet, including at Citizens Advice Bureau locations, Community Law Centres, other relevant community organisations and centres and the Family Courts. Particular consideration should be given to reaching people with disabilities and low literacy and audiences who, for cultural reasons, do not traditionally seek out advice and assistance. We note the Independent Panel's recommendation for a joined-up family justice service, Te Korowai Ture-ā-Whānau, to provide quality accessible information on parenting and guardianship matters.¹⁹ Should those recommendations be adopted, such a service could be extended to provide similar information for relationship property matters.

Consider funding person-to-person support in relation to the information guide

- 16.18 We recommend that the Government consider funding community organisations to provide person-to-person support for people who have difficulty accessing, navigating and applying the information guide. Person-to-person support should enable people to take the first steps in the resolution process. It is not intended to replace the need to obtain legal advice or to encourage partners to self-represent in court. Rather, the service should be designed to enable partners to identify what information they need to resolve their dispute, reach their own agreements to the greatest extent possible and be better prepared should they need to seek legal advice.
- 16.19 We consider that person-to-person support is necessary because 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

¹⁷ 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) 131 at 145.

¹⁸ 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>.

¹⁹ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendations 1 and 25.

complex legal and non-legal needs.²⁰ 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.²¹

- 16.20 Providing person-to-person support 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 or scope.²² We note the Independent Panel's recommendations for the family justice service to provide connections to community agencies, including Community Law Centres and Citizens Advice Bureau, to encourage a more integrated approach to service delivery.²³ Should those recommendations be adopted, such a service could be extended to provide similar information and support for relationship property matters.

Better information about the court process

- 16.21 We recommend that the Government provide clearer guidance to parties about how to complete key court documentation.²⁴ We also recommend the Government develop process guides to better prepare self-represented litigants for court processes.²⁵ We acknowledge NZLS's concerns that information should not attempt to provide legal advice nor suggest that relationship property matters can be dealt with on a DIY basis. We hope that changes resulting from the Independent Panel's examination of the 2014 family justice reforms and our recommendations will go some way to reversing the rise of self-represented litigants in relationship property proceedings. Nonetheless, we consider it appropriate that process guides should be available for those who cannot afford or choose not to be represented in relationship property proceedings.

²⁰ Law Council of Australia *The Justice Project Final Report– Part 2 People: Building Legal Capability and Awareness* (August 2018) at 10.

²¹ See "Services: Outreach Services" Community Law Canterbury <www.canlaw.org.nz>.

²² 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.

²³ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendations 40 and 41.

²⁴ This should include guidance on completing the P(R) 1 form, discussed at n 83 below, and supporting affidavit and complying with the disclosure requirements.

²⁵ See, for example, the "How to run your family law case kit" from Victoria Legal Aid available at <www.legalaid.vic.gov.au>; and "Representing Yourself at Your Family Law Trial – A Guide" from the Ontario Court of Justice available at <www.ontariocourts.ca>. 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. The Independent Panel refers to workbooks for self-represented litigants in overseas jurisdictions noting "[i]f introduced here, this will have a positive impact on the efficiency of the court process, therefore saving court staff and judicial time": Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at [176].

ACCESS TO AFFORDABLE LEGAL ADVICE

Background

16.22 Many people want and need tailored legal advice in order to resolve relationship property matters.²⁶ The PRA recognises the importance of legal advice in ensuring a just division of property by requiring partners to receive independent legal advice before entering into any contracting out or settlement agreement in order for that agreement to be enforceable in court.²⁷

Issues

16.23 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.²⁸

16.24 There is limited access to free or subsidised legal advice on relationship property 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 relationship property matters. Community providers, such as Community Law Centres and Citizens Advice Bureau, are generally limited to providing non-individualised advice and support on relationship property matters, as discussed above. Legal aid is only available to people on very low incomes.²⁹ It is considered a loan and may need to be repaid in full. Legal aid for relationship property matters is available on a fixed fee basis for pre-proceedings advice and assistance, the preparation and execution of a contracting out agreement or settlement agreement and court proceedings.³⁰ There is no separate provision for legal assistance in relation to private dispute resolution processes, such as mediation, although in its submission on

²⁶ 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].

²⁷ 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.

²⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.9].

²⁹ 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.

³⁰ See Ministry of Justice *Family Fixed Fee Schedules* (July 2018) at 33–36.

- the Preferred Approach Paper, NZLS noted that legal aid will typically be extended to cover private mediation as part of the pre-proceedings fixed fee, currently set at \$850.³¹
- 16.25 In 2018, the Ministry of Justice reviewed the policy settings for legal aid.³² Feedback during that review identified that cost and other barriers to access to justice exist for particular groups, including women, Māori, disabled people, refugees and migrants, young people and self-represented litigants.³³ Feedback 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.³⁴ Specific problems with the legal aid framework identified in feedback included the low eligibility thresholds, the fixed fee rates paid to legal aid lawyers for relationship property matters, the low number of lawyers providing advice on legal aid and the unavailability of legal aid for dispute resolution processes.³⁵

Results of consultation

- 16.26 There was a strong message from submitters that the resolution of relationship property matters is expensive and legal fees are a significant cost. Submissions indicated that cost is 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.
- 16.27 Some members of the public 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 partners and hindered simple and speedy resolution. These submitters wanted more freedom to resolve disputes themselves and according to their own sense of fairness.
- 16.28 Several members of the public raised concerns regarding the limited availability of legal aid for relationship property matters. Some expressed concern that the eligibility thresholds were too low. 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. While we do not have data on the size

³¹ At 33.

³² Ministry of Justice "Legal Aid Review" (26 July 2018) <www.justice.govt.nz>.

³³ Ministry of Justice *Broader Access to Justice Issues* (September 2018) at 1–3.

³⁴ Ministry of Justice *Legal aid eligibility and application process* (September 2018) at 2.

³⁵ At 2–3; Ministry of Justice *Legal aid providers and quality assurance* (September 2018) at 2–3; and Ministry of Justice *Legal aid grants* (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 Project: Finding Free and Low-Cost Legal Services* (University of Otago, May 2018).

of what the Australian Productivity Commission termed the "missing middle";³⁶ one practitioner told us that the gap between the two groups was "huge". Some practitioners also expressed the concern that the fixed fees paid to legal aid lawyers for relationship property matters were too low. Practitioners told us that many lawyers do not offer to act on relationship property matters under legal aid as it was not economically viable to do so given the complexity of the issues 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 relationship property matters.

Results of consultation on the Preferred Approach Paper

16.29 NZLS and ADLS supported our proposal that the Government review the existing provision and funding of legal advice on relationship property matters.³⁷ NZLS did not, however, think that the Family Legal Advice Service should be extended to relationship property matters. It thought that this would be a backwards step as lawyers would not be able to undertake the due diligence required in order to properly provide legal advice and discharge their professional obligations. In relation to legal aid, NZLS submitted that the issue is not the unavailability of legal aid but that "most legal aid providers will not undertake relationship property work due to the inadequate time allowed in the legal steps and the remuneration provided". ADLS made a similar submission, saying that it is generally accepted that legal aid funding is inadequate and that there has been a consequent rise in self-represented litigants.

Conclusions

RECOMMENDATION

R99

The Government should reconsider the current policy settings for the provision and funding of legal advice on relationship property matters in order to ensure the appropriate availability of affordable legal advice.

16.30 Access to affordable legal advice is essential to ensure access to justice for relationship property matters, especially as the PRA requires partners to obtain legal advice if they want their agreements to be enforceable. While we acknowledge that some submitters did not think that legal advice should be necessary in order to make enforceable agreements, we do not propose removing this as a procedural requirement given the complexity of the law in this area and its impact on partners' rights and responsibilities.³⁸ We discuss contracting out and settlement agreements further in Chapter 13.

³⁶ Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 1, 5 September 2014) at 20.

³⁷ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P54.

³⁸ We have given consideration to the proposal raised by some submitters on the Issues Paper and Preferred Approach Paper 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 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

- 16.31 Since the publication of our Preferred Approach Paper, the Ministry of Justice has announced that there will be no substantive changes to the legal aid policy settings following its recent legal aid review due to a lack of Budget funding.³⁹ We appreciate that the allocation of public funds to legal aid is ultimately a matter of policy for the Government to determine, and we do not make specific recommendations on how access to affordable legal advice ought to be ensured in relationship property matters. Nonetheless, given the critical need for partners to access legal advice in order to ensure access to justice, we recommend that the Government reconsider the existing policy settings for the provision and funding of legal advice on relationship property matters in order to ensure the appropriate availability of affordable legal advice. Specific consideration should be given to:
- (a) whether the income thresholds for legal aid for relationship property matters strike an appropriate balance between access to justice and responsible government spending;
 - (b) whether the rates of remuneration for legal aid providers for relationship property matters are adequate;
 - (c) improving access to legal aid lawyers undertaking relationship property work; and
 - (d) providing free or subsidised legal advice and assistance for out of court dispute resolution processes, including through extending the scope of the Family Legal Advice Service and/or legal aid.⁴⁰
- 16.32 This work should take into account the findings of the Borrin Foundation research into how separating couples resolve their relationship property disputes, discussed in paragraph 16.6.

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. Under s 79(2) of the Family Law Act 1975 (Cth) referred to by one submitter, the court cannot make such a consent order unless it is satisfied that it is just and equitable to do so, and it may be difficult to demonstrate this requirement in the absence of independent legal advice.

³⁹ Ministry of Justice "Legal Aid Review" (31 May 2019) <www.justice.govt.nz>. However, the Ministry has announced a number of operational improvements to legal aid: Ministry of Justice "Legal Aid Triennial Review" (29 November 2018) <www.justice.govt.nz>. The legal aid debt interest rate also was reduced from 8 per cent to the default public sector discount rate, currently 6 per cent: Legal Services Amendment Regulations 2018, reg 4; and The Treasury "Discount Rates" (22 June 2018) <www.treasury.govt.nz>.

⁴⁰ We acknowledge the New Zealand Law Society's concerns about the Family Legal Advice Service (FLAS), discussed above, and note that the Independent Panel recommended repurposing FLAS and other measures to ensure that an ongoing lawyer/client relationship can exist for those people who are eligible for both FLAS and legal aid: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendation 38.

RESOLVING RELATIONSHIP PROPERTY MATTERS OUT OF COURT

Background

- 16.33 As noted above, most partners resolve their relationship property matters out of court. Partners can resolve their relationship property matters out of court in a range of different ways, including by lawyer-led negotiation or by using a dispute resolution service such as mediation, collaborative law, arbitration or online dispute resolution.⁴¹
- 16.34 Currently, there is no publicly funded provision of out of court dispute resolution services for relationship property matters. However, parents can raise relationship property matters during Family Dispute Resolution (FDR) if it will help them resolve parenting disputes.⁴² FDR is a publicly funded mediation service that must normally be completed before a person can apply to the Family Court for a parenting or guardianship order.⁴³ FDR mediators do not need to be legally trained, and lawyers for the parties do not usually attend FDR.

Issues

- 16.35 In the Issues Paper, we sought feedback on whether there is appropriate access to dispute resolution services for relationship property matters.⁴⁴ We noted that access to dispute resolution services for low-value relationship property 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.⁴⁵ We identified two possible options for reform, namely, extending FDR to all relationship property matters or developing a specific dispute resolution service for relationship property matters.⁴⁶
- 16.36 We also asked whether partners should be required to attempt out of court dispute resolution before going to court.⁴⁷ We noted that a good example is the pre-action procedures that apply to the resolution of relationship property matters in Australia.⁴⁸ Those procedures provide a framework for out of court resolution and require partners to make a genuine effort to resolve the dispute by:⁴⁹
- (a) participating in a dispute resolution process, such as negotiation, conciliation, arbitration and counselling;

⁴¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.32]–[24.51].

⁴² At [24.19]–[24.31].

⁴³ Care of Children Act 2004, s 46E.

⁴⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 543.

⁴⁵ At [24.53]–[24.54].

⁴⁶ At [24.55]–[24.61].

⁴⁷ At 549.

⁴⁸ At [24.71]–[24.72]. 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).

⁴⁹ Family Law Rules 2004 (Cth), sch 1 cl 1(1).

- (b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and
 - (c) complying, as far as practicable, with a duty of disclosure.
- 16.37 The pre-action procedures must be complied with before a party can go to court unless there are good reasons for not doing so, and there may be serious consequences, including costs penalties, for non-compliance with the pre-action procedures.⁵⁰

Results of consultation

- 16.38 A number of submitters commented on the positive attributes of dispute resolution services and mediation, in particular. Submitters noted the informality, flexibility and less confrontational nature of mediation and its ability to promote party self-determination and 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 to resolve relationship property matters. Arbitration and other dispute resolution services were also viewed favourably by some submitters.
- 16.39 The cost of mediation was raised as a barrier by a number of submitters. The cost of legal advice and dispute resolution services for low-value or debt-only relationship property matters was also raised as a particular problem by some submitters. They considered there should be a speedy, low-cost or free service for such disputes.
- 16.40 There was a strong response from submitters that FDR in its current form would not be appropriate for relationship property matters due to the complex legal and factual issues often involved in these matters.⁵¹ The most common concern among submitters was the lack of lawyer involvement and legally trained mediators.⁵² The New Zealand Family Dispute Resolution Centre (FDR Centre) and the Resolution Institute proposed an extension of the FDR service or preferably a similar service modified to better meet the needs of relationship property disputes for disputes involving property valued at under \$100,000.⁵³ 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.

⁵⁰ Family Law Rules 2004 (Cth), sch 1 cl 1(2)–(3). We note that the Australian Law Reform Commission has recommended that the Family Law Act 1975 (Cth) be amended to require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders. In addition, it recommends that the Act should be amended to specify that a court must not hear an application unless the parties have lodged a genuine steps statement and a failure to make a genuine effort to resolve a matter should have costs consequences: Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019), Recommendation 21.

⁵¹ 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 that make these disputes unsuitable for an FDR-type process.

⁵² 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 mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.28].

⁵³ In its submission, the Family Dispute Resolution 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.

- 16.41 Several submitters suggested different ways that existing dispute resolution services could be improved for relationship property matters. Some practitioners and representatives from community organisations we spoke with supported a service similar to the Disputes Tribunal for low-value claims.⁵⁴ One practitioner suggested an arbitration-type service that could be available for all relationship property matters (not just low-value disputes) and that 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.⁵⁵ Another practitioner recommended that an online dispute resolution service should be provided by the Ministry of Justice.
- 16.42 NZLS submitted there may be scope for out of court dispute resolution or 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.
- 16.43 Several submitters and practitioners we spoke with at meetings supported the state encouraging parties to engage in out of court dispute resolution. 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.⁵⁶ 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 favoured a requirement to meet with a mediator for initial screening. Divorce Partners (an Australian dispute resolution provider) favoured a form of compulsory arbitration involving 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.
- 16.44 However, NZLS, FDR Centre, one member of the public and practitioners at two meetings specifically considered that out of court dispute resolution should not be

⁵⁴ 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.

⁵⁵ 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 Ministry of Business, Innovation and Employment "Mediation, arbitration and adjudication" (21 March 2016) Building Performance <www.building.govt.nz>.

⁵⁶ 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.

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, they have 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.

- 16.45 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 with, were particularly concerned about protecting victims of family violence in the out of court dispute resolution process. Some raised the need for access to expedited resolution and said that processes should not enable abusive behaviour and deprivation from property to continue.
- 16.46 Some submitters also commented on the benefits of publicly funded counselling, which was available prior to the 2014 reforms to the family justice system.⁵⁷ A number of submitters advocated a return to publicly funded support to help people reach a point where they can have useful settlement discussions. One meeting attendee said that, following separation, they were unable to open letters or answer the phone because they were so scared of what they might be told and was incredulous that they were expected to deal with lawyers and the resolution process at that time.

Results of consultation on the Preferred Approach Paper

- 16.47 Submitters generally agreed with our proposals to promote voluntary dispute resolution for relationship property matters. Our proposals included introducing new pre-action procedures requiring parties to make a genuine effort to resolve relationship property matters out of court and considering extending a voluntary modified FDR service or some other form of publicly funded dispute resolution service to relationship property matters, following the outcome of the Independent Panel's examination of the 2014 family justice reforms.⁵⁸
- 16.48 NZLS supported our proposals, although it did not think they would make a significant difference in practice given that court proceedings are already a last resort and that lawyers already routinely use out of court dispute resolution processes. NZLS encouraged the provision of information about pre-action procedures. It noted that an exemption from the requirement to comply with pre-action procedures would be required for urgent applications, for example, to preserve property.
- 16.49 One member of the public and one practitioner submitted that participation in dispute resolution should be compulsory prior to bringing court proceedings. However, the Judges of the Family Court commented that out of court dispute resolution should not be mandatory for relationship property matters. The Judges noted the Ministry of Justice's research regarding the family justice reforms, stating:

What we have learned from the [Care of Children Act (COCA)] reforms is there is a reasonable proportion of the population who do not see FDR as an appropriate means to

⁵⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.26].

⁵⁸ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P55–P56.

resolving their issues. If it is a requirement, as opposed to being voluntary, a sizeable proportion of applicants will seek to circumvent mediation. The impact this would have on the Court is that it will lead to delays as it has in COCA proceedings.

- 16.50 Several submitters, including NZLS, ADLS, Professor Bill Atkin and two practitioners, agreed that FDR in its current form was not appropriate for relationship property matters. ADLS expressed concern that FDR would be used to trade off property matters for childcare arrangements. NZLS agreed with our proposal not to provide a separate dispute resolution service for some or all relationship property matters such as low-value claims. However, one member of the public felt that their case would not have escalated if there had been a small claim type family court. Four members of the public referred to the benefits of separation counselling.
- 16.51 The Judges of the Family Court highlighted the current inability of the court to monitor the progress or outcomes of pre-court proceedings, including FDR, and made suggestions regarding court referral and legal representation in mediations. The Judges were also concerned about the expectations we had for the role of mediators given our proposal that mediators should have sufficient legal training and experience in relationship property matters. The Judges noted that a mediator cannot and should not give legal advice. They commented that a mediator should have a working knowledge of what is required to assist in steering discussion into fruitful areas, but this knowledge did not necessarily need to come from formal legal training.

Conclusions

RECOMMENDATIONS

R100

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

- a. including in the new Act endorsement of voluntary out of court dispute resolution to resolve relationship property matters;
- b. introducing new pre-action procedures in the Family Court Rules 2002 that will provide a clear process for partners to follow when attempting to resolve relationship property matters out of court; and
- c. requiring applicants to court to acknowledge in court application forms that they have received information about the pre-action procedures and the availability of dispute resolution services.

R101

The Government should consider extending a voluntary modified Family Dispute Resolution service or other form of publicly funded dispute resolution service to relationship property matters in light of the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms and the Government's response to those recommendations.

- 16.52 In our view, partners should be encouraged to voluntarily participate in out of court dispute resolution processes. This was a view shared by several submitters on the Issues Paper and Preferred Approach Paper. We have considered but do not recommend compulsory participation in dispute resolution. Compulsory dispute

resolution raises important ethical issues as it conflicts with core principles of out of court dispute resolution, such as voluntary participation by the parties, their empowerment in and ownership of their dispute and self-determination in its resolution.⁵⁹ As the Judges of the Family Court observed, 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.⁶⁰ In this regard, the Independent Panel concluded that FDR is, in effect, mandatory in name only given the low participation and high exemption rates.⁶¹ The Panel considered that alternative settings, including FDR being free and accessible at different times, are likely to increase FDR participation.⁶² We agree. Dispute resolution works best when both parties want to engage and reach agreement and are supported to do so.⁶³

- 16.53 We recommend promoting voluntary dispute resolution by including in the Relationship Property Act (the new Act) a statutory endorsement of the use of voluntary dispute resolution to resolve relationship property matters out of court.⁶⁴ This would also resolve the current uncertainty as to whether relationship property matters can be determined through arbitration.⁶⁵

New pre-action procedures for relationship property matters

- 16.54 We recommend introducing new pre-action procedures for relationship property matters. These should set out a clear process for partners to follow when attempting to

⁵⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.63].

⁶⁰ 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 did not participate between 1 July 2016 and 30 June 2017 did so because one of the parties would not participate. The most common reasons for lack of participation were that the second party would not engage (40 per cent), that the second 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.

⁶¹ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at [203].

⁶² At [203]. We discuss the Independent Panel's recommendations regarding FDR further below.

⁶³ 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].

⁶⁴ Similar statutory endorsements are found in comparable jurisdictions. See, for example, s 4 of the British Columbia Family Law Act SBC 2011 c 25, 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 s 3 of the Ontario Family Law Act RSO 1990 c F-3, which endorses voluntary mediation as a process for resolving any matter that the court specifies.

⁶⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.81]–[24.83].

resolve relationship property matters before making an application to court. We consider the Australian pre-action procedures provide a good model for relationship property proceedings in New Zealand.⁶⁶ The pre-action procedures should cover:

- (a) giving notice to the other party of an intention to engage in out of court dispute resolution to resolve a relationship property dispute, which would provide an opportunity to put the parties on notice of their disclosure obligations and of other matters such as the prohibition on disposing of family chattels without the other partner's consent;⁶⁷
- (b) the process for disclosure (see discussion below); and
- (c) participation in out of court dispute resolution, such as negotiation, counselling, mediation, arbitration and other recognised dispute resolution services.⁶⁸

16.55 A party should comply with the pre-action procedures before they can go to court unless there are good reasons for not doing so, such as where urgent orders are needed to preserve property, as submitted by NZLS.⁶⁹ The Family Court should be able to impose penalties for non-compliance with the pre-action procedures at its discretion.⁷⁰ We discuss penalties for non-compliance with procedural requirements at paragraph 16.110 below and penalties for non-compliance with disclosure obligations at paragraphs 16.147–16.149 below.

16.56 The pre-action procedures should be developed by a Family Court Rules Committee and should sit within a new sub-part of the Family Court Rules 2002 for relationship

⁶⁶ Family Law Rules 2004 (Cth), sch 1. See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.71]–[24.72]. We noted in the Preferred Approach Paper 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: Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at [10.77], n 613. This appears to relate to mediation processes and the requirement to attend FDR before commencing proceedings: Submission by the NSW Young Lawyers Family Law Committee, Law Society of New South Wales at 6, referred to in Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [8.16]. As we explain below, we do not recommend participation in out of court dispute resolution processes be mandatory.

⁶⁷ Property (Relationships) Act 1976, s 45. In Chapter 15, we recommend extending s 45 to apply whenever the pre-action procedures have been engaged.

⁶⁸ 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 and settlement agreements. We discuss contracting out and settlement agreements in Chapter 13.

⁶⁹ In Australia, 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). The Australian Law Reform Commission has recommended that the Family Law Act 1975 (Cth) be amended to require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders. The Commission recommends an exception where there is urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day-to-day needs: Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [8.57]. 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.

⁷⁰ In the absence of a publicly funded FDR service for relationship property matters, we prefer to leave consequences for non-compliance with pre-action procedures including participation in out of court dispute resolution to the court's discretion. See also the discussion in paragraph 16.62.

property matters (see paragraphs 16.99–16.100 below).⁷¹ This will keep all rules relating to the resolution of relationship property matters in one place, ensure currency and consistency with the rules governing practice in court and ensure ongoing supervision by the Family Court Rules Committee.

- 16.57 Applicants under the new Act should be required to acknowledge in court application forms that they have received information about the pre-action procedures and the availability of dispute resolution services.⁷²

Consider extending a voluntary modified FDR service to relationship property matters in future

- 16.58 We do not recommend extending FDR in its current form to relationship property matters. As we observed in the Issues Paper, relationship property 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.⁷³ Several submitters raised similar concerns during consultation (see paragraph 16.40 above).
- 16.59 We note, however, the recommendations of the Independent Panel examining the 2014 family justice reforms. The Panel recommended that FDR be fully funded for all participants, that legal assistance be available for pre-proceedings up to and including FDR and that a party should be able to apply to the Family Court without requiring prior attendance at FDR.⁷⁴ Instead of mandatory pre-court FDR, the Panel recommended that a party be required to provide evidence about genuine attempts made to reach an agreement and that the Family Court be required to direct a party to FDR if it has not been attempted already unless there is a good reason not to.⁷⁵ The Independent Panel also recommended making counselling available to parents and caregivers at an early stage of a dispute about care of children.⁷⁶ Depending on the Government's response, these recommendations may lead to an FDR service (or the introduction of some other publicly funded service) that is more appropriate for relationship property matters.⁷⁷

⁷¹ 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)).

⁷² 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.

⁷³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.57].

⁷⁴ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendations 32–33 and 38.

⁷⁵ Recommendation 32.

⁷⁶ Recommendation 26.

⁷⁷ We also note the Minister of Justice has commented that the Family Court reform that 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>.

- 16.60 Extending a voluntary modified FDR service may be an efficient and effective way to provide a funded dispute resolution service for relationship property matters, with the additional benefit that parenting matters and relationship property matters could be resolved at the same time by the same dispute resolution service provider if the parties preferred.⁷⁸ Extending FDR to relationship property matters would also enable the development of standard processes for relationship property mediation.⁷⁹
- 16.61 If FDR was extended to relationship property 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 mediation, be aware of their property entitlements and obligations, have sufficient information and have met the proposed disclosure requirements for dispute resolution processes. Parties must also have access to independent legal advice during the process, and mediators must have sufficient legal training and experience in relationship property matters. We agree with the Judges of the Family Court that this should not necessarily extend to formal legal qualifications.
- 16.62 If FDR (or some other publicly funded service) is made available for relationship property matters, the Family Court should be able to refer parties to dispute resolution services in suitable cases at the time an application is filed and monitor the progress or outcome of that process. Non-compliance with a referral could give rise to an order for costs, at the Court's discretion. As the Judges of the Family Court noted, Court referral and monitoring would likely result in greater participation in FDR and would enable the Court to keep the proceeding moving forward if one of the parties is a reluctant participant.
- 16.63 We have also considered but do not recommend providing a specific dispute resolution service for some or all relationship property matters such as low-value claims. This is for several reasons:
- (a) There is no "one size fits all" dispute resolution process that is appropriate for or best meets the needs of parties in all relationship property matters. Each process has different strengths and weaknesses.⁸⁰ The nature of the dispute and the parties' personal circumstances will determine whether out of court resolution is appropriate in any given context and, if so, what dispute resolution service should

⁷⁸ In Australia, the Australian Law Reform Commission and the Productivity Commission have recommended that family dispute resolution be extended to property and financial matters: Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [8.71] and [8.72]; and Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 2, 5 September 2014) at 875–877. We also note the observation of the Independent Panel that having one judge case manage a file ensures consistency and familiarity, is likely to promote better judicial decision making and, it was suggested to the Panel, is likely to promote better outcomes for children: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at [321]. We consider these benefits are also likely to accrue in FDR processes.

⁷⁹ 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 1976 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.

⁸⁰ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.32]–[24.51].

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 relationship property 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 current position. Often, dispute resolution services are quicker and cheaper than court resolution because processes are simple and parties may be required to self-represent.⁸¹ However, relationship property matters are often complex, and many people want and need legal advice and assistance. Also, because parenting disputes and relationship property matters often overlap, it would be inefficient to require parties to participate in two different dispute resolution services when the issues may be able to be properly resolved in one. It is also unclear whether there would be a sufficiently high volume of relationship property matters that would warrant the cost of setting up and running a new dispute resolution service.

16.64 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 elsewhere, namely, in improving access to legal advice, improving efficiencies in the Family Court processes to reduce costs and delay and, if appropriate, extending a modified FDR service for relationship property matters.

RESOLVING RELATIONSHIP PROPERTY MATTERS IN COURT

Background

16.65 When separating partners cannot resolve relationship property matters through out of court dispute resolution processes, they can apply to the Family Court for orders dividing their property.⁸²

16.66 The Family Court Rules 2002 regulate the practice and procedure of the Family Court in relationship property proceedings. The Rules set out the requirements for filing an application for orders under the PRA including the P(R) 1 form⁸³ and serving that

⁸¹ 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 that is binding on the parties if they cannot agree between themselves. For more information, see Disputes Tribunal Act 1988; and Ministry of Justice "Disputes" (14 March 2017) Disputes Tribunal of New Zealand <www.disputestribunal.govt.nz>.

⁸² We address issues in relation to the jurisdiction of the Family Court and High Court to hear and decide relationship property matters in Chapter 17.

⁸³ 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

application and related documents on the other partner and the requirements on the other partner to file a response.⁸⁴ The Rules also provide for disclosure (discussed below). There is, however, no prescribed case management process that all relationship property proceedings must follow.⁸⁵

- 16.67 Applicants will usually need to pay a \$700 filing fee when filing an application under the PRA. The Family Court also has 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.⁸⁶

Issues

- 16.68 There are several practical issues with the Family Court process that can hinder the just and efficient resolution of relationship property proceedings.

Delays in the Family Court

- 16.69 Relationship property proceedings take a long time to resolve.⁸⁷ 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".⁸⁸
- 16.70 Relationship property matters have distinctive characteristics that are likely to contribute to delays.⁸⁹ They are different from most other Family Court matters because they "are not so much about personal relationships as they are about property".⁹⁰ Relationship property 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. Relationship property 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".⁹¹ Tactics aimed at

⁸⁴ Family Court Rules 2002, rr 388–398.

⁸⁵ The Family Court Caseflow Management Practice Note outlines best practice for managing cases through the court system. Judges are, however, ultimately responsible for the way in which they run their cases. See Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011).

⁸⁶ Property (Relationships) Act 1976, s 40. In exercising its discretion to award costs, the court may apply the provisions of the District Court Rules 2014: Family Court Rules 2002, r 207.

⁸⁷ In the Issues Paper, we observed that, of cases that proceeded to a hearing in 2015, 93 per cent took more than 40 weeks from filing to disposal, and 50 per cent took more than 105 weeks from filing to disposal: data provided by email from the Ministry of Justice to the Law Commission (16 September 2016). See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.24].

⁸⁸ Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive Seminar, October 2016) 151 at 152. 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 relationship property 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.

⁸⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.30]–[25.34].

⁹⁰ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 25.

⁹¹ *Brown v Sinclair* [2016] NZHC 3196 at [3].

delaying the court process and forcing the other party to incur added expense are evident in some relationship property 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.⁹²

16.71 Because of the distinctive characteristics of relationship property matters, Family Court processes must facilitate timely progression of 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 relationship property proceedings:⁹³

(a) First, relying on affidavit evidence in the P(R) 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 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.⁹⁴

(b) Second, there is no structured case management process with prescribed timeframes that all relationship property 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".⁹⁵

(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.

16.72 Broader, systemic problems in the Family Court will also impact on relationship property matters. The Independent Panel examining the 2014 family justice reforms observed that "delay is endemic and impacts on almost every other issue in family justice services".⁹⁶ The Panel also stated that there has been a system-wide lack of resourcing

⁹² 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].

⁹³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.36].

⁹⁴ At [25.38].

⁹⁵ 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 16.5, in August 2018, the Government appointed an Independent Panel to examine these and other reforms.

⁹⁶ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 7. See also Catherine Hutton "Family Court's lawyer spend rises, despite 'cost-cutting' reforms" (2 April 2019) Radio New Zealand <www.rnz.co.nz>.

and investment.⁹⁷ The Panel made specific recommendations for judicial resourcing, including the transfer of appropriate areas of responsibility to court registrars to increase judicial hearing time and that consideration be given by the Chief District Court Judge to an immediate increase in the number of Family Court judges available in order to reduce delays.⁹⁸

16.73 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. The Chief Judge observed that the combination of several factors was "placing unsustainable pressure on workloads", and that "[i]n the Family Court especially, the unrelenting pressure is now creating unacceptable delay".⁹⁹
- (b) The Judges of the Family Court have introduced a new "docket system" for relationship property proceedings in a number of the larger Family Courts around the country.¹⁰⁰ The system is designed to address delay in relationship property proceedings through closer case management of PRA cases.

Other issues with the Family Court process

16.74 We have identified several other issues with the Family Court process that may be preventing the just and efficient resolution of relationship property matters:

- (a) **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 inquiries in practice to discrete topics, such as valuation issues, and the potential delay and expense resulting from undertaking an inquiry.¹⁰¹
- (b) **Court fees for relationship property proceedings may be a barrier to accessing justice for some vulnerable parties.** Court fees for relationship property proceedings are high compared to other Family Court matters.¹⁰² The number of

⁹⁷ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 26.

⁹⁸ Recommendations 44 and 45.

⁹⁹ Chief District Court Judge Jan-Marie Doogue "Pressures spell redeployment of judicial workforce" (24 May 2018) New Zealand Law Society <www.lawsociety.org.nz>.

¹⁰⁰ The New Zealand Law Society's submission on the Issues Paper stated:

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.

¹⁰¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.63].

¹⁰² Under the Family Courts Fees Regulations 2009, 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 (sch 3). In contrast, the fee to apply for a Dissolution Order is \$211.50 (sch 1), while the fee to apply for a Parenting Order (or to vary or discharge a Parenting Order) is \$220 (sch 2). Other applications to the Family Court do not have a fee.

relationship property matters going to court declined following the introduction of filing fees for applications under the PRA in 2012¹⁰³ and resulted in a noticeable reduction in the proportion of female applicants.¹⁰⁴

- (c) **The distinctive characteristics of relationship property matters may justify a different approach to costs.** Outside of imposing penalty costs, traditionally, the Family Court took the view that relationship property proceedings were a "mutual approach to the court for assistance in dividing property" and therefore each party should bear their own costs.¹⁰⁵ More recently, however, the growing trend is for the Court to apply the civil costs regime in the District Court Rules 2014 to relationship property proceedings, and the guiding principle of this regime is for the party who fails to pay costs to the party who succeeds.¹⁰⁶ The distinctive characteristics of relationship property proceedings (see paragraph 16.70) may, however, justify a different approach.

Results of consultation on issues with resolving relationship property matters in court

- 16.75 Unreasonable delay in the Family Court and its impact on relationship property 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 six 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".
- 16.76 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. 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.¹⁰⁷ NZLS submitted that this is exacerbated in relationship property proceedings due to the triage system that prioritises Care of Children Act, Hague Convention and Domestic Violence Act cases

Under reg 7, an applicant can ask for the court to waive the fee if they are experiencing financial hardship (including if the applicant receives legal aid).

¹⁰³ Family Courts Fees Amendment Regulations 2012.

¹⁰⁴ The Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution has undertaken provisional analysis of the Ministry of Justice Family Court Case Management System data. This found an 18 per cent drop in applicants to the Family Court under the Property (Relationships) Act 1976 between 2012 and 2013 following the introduction of the new fee structure in mid-2012 and that the proportion of female applicants dropped from 65 per cent in 2012 to 60 per cent in 2016: provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution provided by email to the Law Commission (26 September 2017).

¹⁰⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.21]–[25.23].

¹⁰⁶ 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.

¹⁰⁷ The New Zealand Law Society noted, however, that causes of delay can differ from registry to registry.

(and the significant number of without notice cases filed in these proceedings) ahead of relationship property matters. Practitioners also noted the impact of the triage system on relationship property 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".

- 16.77 There was broad agreement that the lack of a prescribed case management process with specific timetabling for relationship property 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.
- 16.78 Several submitters thought that the fees for filing relationship property 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 relationship property 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 in the Family Court under which costs are awarded against the unsuccessful party had "serious and scary consequences" for applicants, particularly applicants for maintenance.

Options for reform

- 16.79 In the Issues Paper, we identified several options for reform to improve the Family Court process for relationship property proceedings and reduce delay:¹⁰⁸
- (a) Introducing pleadings (such as a statement of claim and statement of defence) 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.¹⁰⁹
 - (b) Introducing a more structured case management process.
 - (c) Encouraging better use of section 38 inquiries.

Results of consultation

- 16.80 Consultation on the Issues Paper identified a range of views on the preferred option(s) for reform.

¹⁰⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.37]–[25.65].

¹⁰⁹ Currently, there is no requirement to file a statement of claim when making an application under the Property (Relationships) Act 1976 (PRA) in the Family Court. Instead, an applicant must fill in a general application form, which is not specific to the PRA and which requires the applicant to state the nature of the order sought.

Mixed response to introducing pleadings for relationship property proceedings

- 16.81 There was a mixed response as to whether pleadings should be introduced for relationship property proceedings. Practitioners at three meetings and one member of the public supported pleadings, potentially in conjunction with improvements to the P(R) 1 form. One judge of the Family Court commenting separately supported pleadings provided the Court could remove the statement of claim or response if inappropriately drafted. However, pleadings were not supported by NZLS, the Judges of the Family Court and one practitioner. NZLS submitted that pleadings in relationship property proceedings are neither necessary nor desirable and that the current documents are useful and appropriate provided they are properly completed. The Judges of the Family Court observed that issues and entitlements cannot always be identified until parties have received full disclosure. One practitioner considered that introducing pleadings would be "too hard" on lay litigants.
- 16.82 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 the list of issues should be able to be amended if required as the case progresses.¹¹⁰ The Judges considered that the Family Court Rules should be amended 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.

More prescriptive case management is necessary

- 16.83 The introduction of more prescriptive case management processes and timetabling was broadly supported. The Judges of the Family Court commented, 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' rosters would create practical limitations to implementing a similar scheduling regime in relationship property proceedings in the Family Court.
- 16.84 NZLS and the Judges of the Family Court supported adapting aspects of the District Court Rules tailored to relationship property proceedings. Both also referred to the PRA docket system trial. The Judges of the Family Court commented 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. The Judges commented that any case management tool introduced for the purposes of managing PRA cases needs to take into account the practical differences of each court.
- 16.85 Other suggestions for improved case management procedures included:

¹¹⁰ The New Zealand Law Society 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).

- (a) improving access to judicial settlement conferences;¹¹¹
- (b) making specific provision for single issue hearings in the Family Court Rules;
- (c) having an associate judge, master¹¹² or highly qualified registrar to deal with case management and/or interlocutory matters;
- (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.

The scope of section 38 inquiries requires clarification

16.86 The Judges of the Family Court commented that the PRA or the Family Court Rules should be amended to clarify the powers the court have to authorise a section 38 appointee to address specific issues.¹¹³ The Judges 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.

16.87 The Judges of the Family Court also commented 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. The Judges proposed that costs of a section 38 inquiry 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 commented separately that it is not justified that the New Zealand taxpayer has to pay for these inquiries and noted that they have often required both parties to make payment into court. The Judge noted the issue can be avoided by appropriate case management directions and timetables, including instructing forensic accountants. The Judge did not consider that amendment of section 38 was necessary. NZLS did not consider that

¹¹¹ 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 Court 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].

¹¹² The Family Court does not currently have designated associate judges or masters. Associate judges of the High Court (formerly known as masters) have extensive jurisdiction in interlocutory matters including summary judgment applications: see Courts of New Zealand "History and role" <www.courtsofnz.govt.nz>.

¹¹³ The Judges of the Family Court 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.

enabling the court to direct parties to pay the costs of any inquiry would encourage better use of section 38.

Better penalties and enforcement for non-compliance needed

16.88 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 commented that there are little or no consequences for intentional delay tactics, such as holding off on discovery and bringing interlocutory applications as tactical manoeuvres. The Judge 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. We discuss submitters' views on the need for stricter consequences for non-disclosure, in particular, at paragraphs 16.132–16.135 below.

Clarifying the proper basis for costs

16.89 NZLS submitted that costs available in relationship property proceedings should have their own particular scale to recognise the different nature of relationship property proceedings.¹¹⁴ It considered retaining court discretion was appropriate, 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.

Reconsidering Family Court fees

16.90 Some practitioners noted a common experience where one partner simply does not respond to the other partner's attempts to resolve relationship property matters and does not engage a lawyer. The partner seeking to resolve relationship property 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.

16.91 NZLS submitted that reform options should be investigated to address the "unreasonable impediments" that filing and hearing fees in relationship property proceedings create. Practitioners suggested reducing the fees, sharing the fees equally

¹¹⁴ Rule 207 of the Family Court Rules 2002 incorporates, at the discretion of the court, the civil costs regime in the District Court Rules 2014. This includes a scale of costs that is allocated by the court if costs are to be awarded. The scale allocated will depend on the complexity of the proceedings and the amount of time the court considers reasonable for each step reasonably required in the proceedings: District Court Rules, rr 14.3–14.5 and schs 4–5.

between the parties, paying by instalments or recovery of fees through costs if these are ordered.

Results of consultation on the Preferred Approach Paper

- 16.92 In the Preferred Approach Paper, we proposed that the Family Court Rules should be amended to include case management procedures tailored to the needs of relationship property proceedings.¹¹⁵ We proposed establishing a Family Court Rules Committee to develop these procedural rules and provide guidance on the imposition of costs and other consequences for non-compliance with procedural rules.¹¹⁶ We also proposed that the powers of inquiry under section 38 be clarified and broadened, a separate scale of costs for relationship property proceedings be established and consideration be given to reducing the filing and hearing fees for relationship property proceedings.¹¹⁷
- 16.93 NZLS agreed with our proposals. It considered that the Family Court Rules Committee should comprise members of the Family Court judiciary and senior family law practitioners who are experienced in relationship property matters. NZLS submitted that it is "essential that rules are brought into force at the same time as the new Act". A practitioner considered that the current Rules Committee for the District Court Rules should take over promulgation of the rules for relationship property matters in conjunction with some Family Court lawyers or judges. That practitioner was of the view that the Family Court Rules are incoherent and that the rules for relationship property matters should be brought within the umbrella of the District Court and High Court Rules and made consistent with them.
- 16.94 The Judges of the Family Court commented that the Family Court Rules Committee should be responsible for updating all Family Court Rules, not just those relating to relationship property matters, and that "the Family Court Rules 2002 in their entirety are long overdue for an update". The Judges of the Family Court did not support suggestions that an associate judge could deal with case management or interlocutory matters. The Judges considered that creating those new roles would be an expensive exercise. Their preference was for highly qualified registrars, such as a senior registrar or equivalent, to carry out this role. Several practitioners commented on the success so far of the docket system in the Family Court. Two practitioners submitted that the docket system was working well and had made a difference in progressing cases. However, another practitioner did not consider that there had been an impact on delays under the system.
- 16.95 NZLS and two practitioners commented on section 38 inquiries. NZLS observed that the court's inquiries must be limited to relevant and admissible matters under the Evidence Act 2006. NZLS agreed that part of the current reluctance to direct a section 38 inquiry relates to the costs falling on the court as well as the availability of other remedies, such as notices to admit facts or notices for further particulars. One practitioner acknowledged the courts' reluctance to order section 38 inquiries was due to costs falling on the court and considered that costs should be ordered from relationship

¹¹⁵ Law Commission Review of the Property (Relationships) Act 1976: Preferred Approach – *Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P62.

¹¹⁶ P58 and P64.

¹¹⁷ P63 and P65–P66.

property. Another practitioner observed that the most important inquiry that the court can make is an inquiry into property valuation and considered the appointment of an accounting expert or a property valuer is invaluable to the court. The practitioner saw no reason why the costs of the inquiry could not be borne by the parties or paid in advance.

- 16.96 In relation to costs, NZLS submitted that all parties, whether legally represented or self-represented, who have failed to comply with procedural directions should be liable for costs awards and that guidance will be particularly important where a party is not legally represented.¹¹⁸ NZLS also agreed that a separate scale of costs for PRA cases should be established. It said that the court's discretion to award costs should be maintained but that, generally, costs ought not to be imposed unless one party has taken an unreasonable approach. However, one practitioner submitted that, in their experience, the civil costs regime did not cause problems or injustice.
- 16.97 In relation to filing fees, NZLS submitted that the Ministry of Justice could alternatively provide for fees to be shared between the parties.
- 16.98 A number of practitioners and the Judges of the Family Court raised the resourcing of the Family Court. One practitioner advised that, as a result of severe constraints on judicial resourcing, "the economically powerful party, even more than usual, digs in, taking all the time they can as they try to financially starve out the other partner". That practitioner doubted that the proposals to address delay will be a sufficient response to the constraints on judicial resources. The Judges of the Family Court noted that resourcing of the Family Court and the District Court was a matter of policy for the executive to decide. The only comment the Judges considered appropriate was that "resourcing is very much an issue which needs to be considered".

Conclusions

RECOMMENDATIONS

R102

A Family Court Rules Committee should be established for the purpose of developing new procedural rules for relationship property matters to be included as a sub-part of the Family Court Rules 2002 and issuing guidance on the rules as required.

R103

The new procedural rules should include case management procedures tailored to the needs of relationship property proceedings.

¹¹⁸ The New Zealand Law Society (NZLS) considered there is some inequity due to the prohibition on an award of costs against a legally aided party except in exceptional circumstances under ss 45–46 of the Legal Services Act 2011. It is NZLS's view that, where there is property payable to a legally aided party on resolution of matters, the restriction on the court's jurisdiction to award costs is not necessarily appropriate. Removal of the restriction on awarding costs in such circumstances would ensure that both parties face the same consequences for non-compliance with timetabling and other directions and would incentivise resolution as inexpensively, simply and speedily as is consistent with justice.

- R104** The new Act and the new procedural rules should grant the Family Court broad powers to appoint a person to make an inquiry into any matter that would assist the Court to deal effectively with the matters before it.
- R105** The new Act should make express provision for the Family Court to impose costs and other consequences for non-compliance with procedural requirements.
- R106** The new procedural rules and guidance issued on the rules should address:
- the imposition of costs and other consequences of non-compliance with procedural requirements; and
 - the exercise of the Court's discretion to make costs orders that are not for the purpose of penalising non-compliance.
- R107** A separate scale of costs for relationship property proceedings should be established.
- R108** The Government should consider reducing the application and hearing fees for relationship property proceedings.
- R109** The Government should collect data on the progress and resolution of relationship property proceedings in the Family Court in order to monitor whether the Family Court is adequately resourced to deal appropriately with relationship property proceedings.

New procedural rules and guidance for relationship property proceedings

16.99 We recommend that new procedural rules for relationship property matters should be developed and included as a sub-part of the Family Court Rules.¹¹⁹ In our view, the distinctive characteristics of relationship property matters (see paragraph 16.70) 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 relationship property proceedings.

16.100 We recommend that a Family Court Rules Committee be established to develop and supervise these new procedural rules and to issue guidance on the rules as required. We note submitters' comments regarding the constitution of the committee. As we

¹¹⁹ We note that the Independent Panel recommended that the Ministry of Justice initiate and coordinate a review and rewrite of the Family Court Rules 2002 in consultation with the Principal Family Court Judge and the New Zealand Law Society: Rosilyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendation 65. The Panel observed that a "consistent, principled approach will ensure that the Rules reflect modern court practices, acknowledging the specialist nature of the Family Court": at [376].

observed in the Preferred Approach Paper, a Family Court Rules Committee could be convened as a sub-committee of the Rules Committee established by section 51B of the Judicature Act 1908 and continued by section 155 of the Senior Courts Act 2016.¹²⁰ We agree with NZLS that the rules for relationship property matters should be developed and promulgated at the time the new Act is enacted so that the package of reforms is coherent. It is equally important that the Family Court Rules Committee be resourced to keep the Rules under review on an ongoing basis to ensure they remain up to date.

New case management procedures for relationship property proceedings

- 16.101 We recommend that the new procedural rules for relationship property proceedings should include case management procedures tailored to the distinctive characteristics of relationship property proceedings. We consider that this would provide greater certainty for parties and more efficient resolution of relationship property proceedings, both in terms of reducing costs to the parties and freeing up court resources. Our recommendations will also allow sufficient flexibility for each court to respond to the individual needs and circumstances of relationship property proceedings on a case-by-case basis.
- 16.102 When developing new case management procedures, consideration should be given to experiences under the docket system introduced for relationship property proceedings in some of the larger courts, the extent to which the procedures in the District Court Rules 2014 provide an appropriate model for relationship property proceedings and the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms and the Government's response to those recommendations.
- 16.103 We do not recommend introducing formal pleadings for relationship property proceedings. We do not consider that this would be the most effective way to respond to delay in the Family Court given the distinctive characteristics of relationship property proceedings and the need for adequate disclosure before matters in issue can be fully identified. Rather, we recommend 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.¹²¹ The case management procedures should also include a non-exhaustive list of information to be included in the memorandum. This could include:¹²²
- (a) an agreed statement of facts;
 - (b) the discovery sought by each party;

¹²⁰ 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.

¹²¹ See, for example, the process set out in the High Court Rules 2016, r 7.3.

¹²² This list is based on the comments of the Judges of the Family Court on the Issues Paper. The Judges 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.

- (c) identification of the property that each party believes to be relationship property and separate property and why;¹²³
 - (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;¹²⁴ and
 - (g) the identity and control of information possessed by each party.
- 16.104 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.
- 16.105 Consideration should also be given to submitters' suggestions for improved case management procedures outlined at paragraph 16.85. We see particular merit in case management procedures that can facilitate early access to judicial settlement conferences in appropriate cases and the use of experienced judicial officers to progress case management processes. We acknowledge the concerns of the Judges of the Family Court regarding the resource implications of creating new roles in the Family Court and their preference for a senior registrar to deal with case management and interlocutory matters. We also note that the Independent Panel examining the 2014 family justice reforms recommended that the position of Senior Family Court Registrar be established, which will reduce the judicial administrative workload and allow more time for core judicial work.¹²⁵ We anticipate that, if this recommendation is adopted, the Senior Family Court Registrar could have responsibilities of the kind envisaged by the Judges of the Family Court.
- 16.106 We do not recommend developing a specific summary judgment procedure or establishing some form of emergency court to deal with urgent relationship property matters. While several submitters suggested a summary judgment or similar procedure, we do not think it would be suitable for most relationship property matters. Summary judgments are reserved for cases where there is no defence to a claim or when there is no cause of action that can succeed.¹²⁶ The court must be left without any real doubt or uncertainty that there is no real question to be tried, and, as such, the test is high.¹²⁷ While a summary judgment procedure has been used in relationship property matters before,¹²⁸ in the large majority of cases, it is most likely that there will be a dispute and a

¹²³ This requirement would need to be consistent with our recommendation in Chapter 3 that the burden of proof of establishing whether property is separate property should be on the owning partner.

¹²⁴ We agree with the comments of the Judges of the Family Court on the Issues Paper that specific provision should be made in the rules to allow the court to direct that expert evidence is given in a sequence the court thinks best suited to the circumstances of the proceedings as provided in r 9.46 of the High Court Rules 2016 and r 9.37 of the District Court Rules 2014. This will give the court flexibility to receive concurrent evidence on matters such as valuations.

¹²⁵ Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendations 42–43 and at [255].

¹²⁶ District Court Rules 2014, r 12.2; and High Court Rules 2016, r 12.2.

¹²⁷ *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

¹²⁸ See, for example, *Gould (aka Timm) v Timm* [2013] NZHC 92; and *Edwards v Edwards* [2012] NZHC 1630.

real question to be tried.¹²⁹ We do not recommend an emergency court for urgent relationship property matters as this would have significant resource implications for the Family Court and is unlikely to be efficient for the small number of relationship property cases that do proceed to court. We do, however, consider merit in the Family Court Rules Committee exploring within the case management procedures fast-track timetabling and processes for particular orders, such as occupation, tenancy and furniture orders and interim distributions.

Broader powers of inquiry for the Family Court

- 16.107 We recommend that the new Act and the new procedural rules grant the Family Court broad powers to appoint a person to make an inquiry into any matter that would assist the Court to deal effectively with the matters before it. This is broader than the current scope of section 38 of the PRA, which is limited to inquiries into "the matters of fact in issue". We consider a broader power of inquiry than currently provided in the PRA is consistent with the Family Court's semi-inquisitorial approach in relationship property proceedings.¹³⁰ It will clarify that the Court can undertake inquiries not only into questions of fact, such as property valuations, but also into matters such as tikanga Māori values and concepts. 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 the Family Court Rules Committee should issue guidance to assist the Court in this regard.
- 16.108 We also recommend clarifying the powers of a person appointed by the Family Court to make an inquiry. The powers of inquiry in Part 16 of the District Court Rules 2014 should be used as a guide.
- 16.109 We do not recommend changes in respect of who pays the cost of the inquiry. The Family Court should retain discretion under the new Act to direct either or both of the parties to make such payments into the Court as it considers appropriate, taking into account the reasons for the inquiry and the circumstances of the case.

Clearer guidance on the imposition of penalty costs and other consequences for non-compliance

- 16.110 The Family Court's power to impose penalty costs and other consequences for non-compliance with procedural requirements should continue to be discretionary. However, we recommend that the new Act expressly enable the Court to impose costs and other consequences for non-compliance with procedural requirements. We also recommend

¹²⁹ Sim's Court Practice notes that the summary judgment procedure is appropriate in relationship property law when there is no dispute and an order is essentially to achieve the parties' relationship property or estate planning purposes: Sim's Court Practice (online ed, LexisNexis) at [HCR12.2.7(e)]. In *Biskind v Eagles Nest Properties Ltd* HC Wellington CIV-2010-488-687, 1 September 2011, the plaintiff brought a summary judgment application relating to pieces of real estate, seeking orders that the properties were held on constructive trust and the plaintiff was entitled to a half share in the properties. The defendants consented to the orders sought.

¹³⁰ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.17]–[25.19]. We acknowledge and accept the New Zealand Law Society's submission that the court must limit its inquiries to relevant and admissible matters under ss 6–8 of the Evidence Act 2006.

that the new procedural rules and guidance issued on the rules address the imposition of costs and other consequences for non-compliance, such as the possibility of the Family Court ordering an inquiry at the non-compliant party's cost. This should ensure the sanctions are applied consistently and act as a meaningful deterrent. We make similar recommendations in relation to consequences for non-disclosure at paragraphs 16.147–16.149 below.

Clearer guidance and a separate scale of costs for relationship property proceedings

16.111 We recommend that the new procedural rules and guidance issued on the rules should address the imposition of non-penalty costs for relationship property matters. In our view, the general principle that costs should otherwise "lie where they fall" is appropriate for relationship property proceedings due to their distinctive characteristics. This approach reflects the semi-inquisitorial approach taken by the Family Court in relationship property proceedings. It also recognises that parties may succeed on different points and that what constitutes "success" is not always clear or relevant in relationship property proceedings. However, we recommend that the Court should retain the discretion to award non-penalty costs if it considers it appropriate in the circumstances to do so. We also agree with NZLS that the distinctive characteristics of relationship property 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 relationship property proceedings

16.112 We recommend that the Government consider reducing the application and hearing fees for relationship property proceedings in recognition of the fact that introducing application fees has resulted in a reduction of 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.¹³¹

Resourcing the Family Court

16.113 We recommend that the Government should collect data on the progress and resolution of relationship property proceedings in the Family Court in order to monitor whether the Family Court is adequately resourced to deal appropriately with relationship property matters. We agree with the Independent Panel examining the 2014 family justice reforms that monitoring and development are essential to building a collaborative evolving family justice service and to avoid a situation where unintended consequences and perverse outcomes emerge.¹³² The inexpensive, simple and speedy resolution of relationship property matters is a principle of the PRA, and in Chapter 2, we recommend that this continues as a principle of the new Act. While we acknowledge that resourcing the Family Court is a matter of policy for the Government, we consider it is essential that the Family Court is properly resourced in order to give effect to this

¹³¹ We note the then Chief Justice Sian Elias's 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 "Towards Justice: Reflections on the system and society" (2018 Sir John Graham Lecture, Auckland, 10 August 2018).

¹³² Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019), Recommendations 64, 67–69, and at [395].

principle. This should include resourcing to give effect to our recommendations in Chapter 17 that would grant the Family Court first instance jurisdiction to determine all matters related to relationship property proceedings. The threat of court action and court-imposed penalties must effectively deter partners from engaging in bad behaviour when resolving relationship property matters out of court, and court action must be a real and efficient option in those cases where resolution of PRA disputes is not possible any other way.

DISCLOSURE

16.114 Achieving a just and efficient resolution of relationship property matters in and out of court relies on both partners having sufficient information about their property and 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.

Background

- 16.115 There is no express duty of disclosure on partners in the PRA. However, the Court of Appeal has confirmed that, in the context of relationship property matters that go to court, the law requires "total disclosure and cooperation" between parties.¹³³ The Court of Appeal has 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.¹³⁴
- 16.116 The Family Court Rules provide for initial disclosure by requiring each party to file an affidavit of assets and liabilities in the prescribed P(R) 1 form.¹³⁵ 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.
- 16.117 If there has been inadequate disclosure of assets and liabilities by either party, there are several orders a court can make to require additional disclosure, including an order for discovery.¹³⁶ Discovery is the process through which each party identifies the documents that are relevant to the proceeding and discloses those documents to the other party.¹³⁷
- 16.118 There are several possible consequences for failing to comply with disclosure obligations:¹³⁸

¹³³ *M v B* [2006] 3 NZLR 660 (CA) at [49].

¹³⁴ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

¹³⁵ Family Court Rules 2002, r 398 and sch 8 form P(R) 1. See n 83 above.

¹³⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.9].

¹³⁷ At [25.11].

¹³⁸ 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.¹³⁹
 - (c) Non-disclosure can be taken into account in an award of costs under section 40 of the PRA.
- 16.119 There is limited provision for disclosure when resolving relationship property 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.¹⁴⁰ 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".¹⁴¹
- 16.120 Lawyers have professional responsibilities to the court and their client in relation to disclosure. A lawyer must advise their client of the scope of their disclosure obligations and ensure to the best of their ability that their client understands and fulfils those obligations.¹⁴² A lawyer's primary duty is to the court, and the lawyer must not continue to act for their client if, to their knowledge, there has been a breach of discovery obligations by a client and the client refuses to remedy that breach.¹⁴³ 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.¹⁴⁴

¹³⁹ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186]; and *J v J* [2005] NZFLR 301 (HC) at [42]. In extreme cases, non-disclosure may amount to fraud, justifying the setting aside of a contracting out agreement or a decision of the court. See, for example, *Sharland v Sharland* [2015] UKSC 60, [2016] AC 871 per Lady Hale. In that case, the husband failed to disclose vital information about the value of a company shareholding. That was a fraud that "unravelling all" and enabled the court to set aside the agreement. See also *Cunha v Cunha* (1994) 99 BCLR (2d) 93 (BCSC), where 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 not 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 disclosed assets. The court may then vest all disclosed assets in the other party on the basis of equal division between the parties: *Laxton v Coglon* 2008 BCSC 42, [2008] BCJ No 45.

¹⁴⁰ Family Court Rules 2002, r 140.

¹⁴¹ Property (Relationships) Act 1976, s 21J(4)(c).

¹⁴² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch 1 cl 13.9.

¹⁴³ Schedule 1 cl 13 and sch 1 cl 13.9. Lawyers must also act in a timely manner and not in a way that undermines the processes of the court so should not engage in unethical discovery practices for the purpose of delay: sch 1 cl 3 and sch 1 cl 13.2.

¹⁴⁴ See *Chen v Wang* [2015] NZFC 3330, [2015] NZFLR 1025. Sanctions imposed by disciplinary action include censure, fines, requiring the refund of legal fees, payment of compensation, suspension or being struck off the roll: Lawyers and Conveyancers Act 2006, ss 156, 211 and 242.

Issues

- 16.121 Relationship property matters have distinctive characteristics (see paragraph 16.70 above) that can make disclosure challenging. They commonly involve complex legal and factual issues, unlike some other Family Court matters, but relationship property matters also have an emotional component that is often absent from other civil cases. 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.
- 16.122 These characteristics emphasise the need for clear disclosure obligations and effective penalties for non-compliance. However, the current law and processes are inadequate.¹⁴⁵ Specific issues include:¹⁴⁶
- (a) There is no express disclosure obligation on partners resolving relationship property matters out of court and no prescribed process for making disclosure out of court, including when partners enter into contracting out agreements under section 21 or settlement agreements under section 21A.
 - (b) If disclosure obligations are not met in relationship property proceedings, the court process places the onus on the partner without the information to take further action, incurring additional cost and delay.¹⁴⁷ 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.¹⁴⁸
 - (c) The lack of a structured case management process for relationship property 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 on disclosure issues

- 16.123 A clear theme of submissions we received on the Issues Paper and Preferred Approach Paper was that the current disclosure obligations and penalties for non-compliance do

¹⁴⁵ In the Grant Thornton survey, 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), indicating that non-disclosure is the most problematic issue that relationship property lawyers face.

¹⁴⁶ See discussion in Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016); and Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive, October 2016) 151 at 156.

¹⁴⁷ However, we note a court is able to draw inferences that are adverse to the non-disclosing party's position if there has been non-disclosure, as noted at paragraph 16.118(b) above.

¹⁴⁸ 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 on 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".

not facilitate inexpensive, simple and speedy resolution as is consistent with justice. In its submission on the Issues Paper, 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.

16.124 NZLS also 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. 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.

Options for reform

16.125 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.¹⁴⁹ We thought that a prescribed process like the pre-action procedures in Australia would be a good model for New Zealand (see discussion at paragraphs 16.36–16.37 above).

16.126 We also identified a range of options for reform that could be implemented individually or together to improve disclosure when relationship property matters go to court:¹⁵⁰

- (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.
- (d) Introducing additional sanctions for lawyers in connection with client non-disclosure.

Results of consultation

16.127 There was broad support in submissions on the Issues Paper for clearer and stronger disclosure obligations applying both in and out of court, including from a number of organisations, members of the judiciary and practitioner and academic experts.

Improving disclosure obligations

16.128 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 of relationship property matters out of court as well as in court and

¹⁴⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.69]–[24.73].

¹⁵⁰ At [25.52]–[25.61].

should be expressly provided for in the principles of the PRA. The Judges of the Family Court supported codifying the common law obligation of disclosure in a statutory duty. The Judges also considered that the duty should be binding on third parties, including trustees. Divorce Partners also supported a partner having a statutory obligation to disclose financial information with the utmost good faith.

- 16.129 NZLS supported a prescribed pre-action procedure. It submitted that this would promote consistent and uniform procedures and ensure that disclosure is provided. It would also assist to prevent 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.
- 16.130 The Judges of the Family Court agreed that improving disclosure obligations will simplify the court process and help reduce delay. However, the Judges considered that a general obligation to discover 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. The Judges supported a more tailored and sophisticated approach to disclosure and submitted that the Family Court Rules should establish a clear procedure for initial disclosure tailored to the needs of relationship property proceedings. One judge of the Family Court commented separately that the High Court rules relating to discovery should be incorporated into the Family Court Rules.
- 16.131 Some practitioners also thought that the disclosure requirements should be clearer and applicants should not be able to file the P(R) 1 form 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

- 16.132 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.
- 16.133 NZLS and several practitioners supported stricter consequences through costs awards, with some practitioners supporting the automatic imposition of costs. There were a range of views on the efficacy of current costs awards. One practitioner commented that cost 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.

- 16.134 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. The Judges of the Family Court considered that, if financial penalties are proposed, they should contain a discretionary element and be coupled with a requirement that a prior specific warning has been given before a penalty is imposed 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.
- 16.135 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. NZLS said this option has "considerable attraction".

Sanctions for lawyers

- 16.136 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.
- 16.137 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. The Judges commented 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 relationship property matters. One judge of the Family Court commented separately that additional sanctions for lawyers are unnecessary because a party soon becomes unhappy with their lawyer if a judge has coupled a costs award with the recommendation that the lawyer pays.
- 16.138 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".

Results of consultation on the Preferred Approach Paper

- 16.139 We received 12 submissions on the proposals in our Preferred Approach Paper to improve disclosure in relationship property matters.¹⁵¹ Our proposals included introducing an express statutory duty of disclosure and amending the Family Court

¹⁵¹ Law Commission Review of the Property (Relationships) Act 1976: Preferred Approach – *Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P57–P61.

Rules to include a prescribed process for making disclosure out of court through pre-action procedures, a clearer procedure for initial and subsequent disclosure and clearer and stricter consequences for non-disclosure.

16.140 All submitters commenting on our disclosure proposals agreed that there should be an express statutory duty of disclosure, that disclosure requirements should be clearly set out in the Family Court Rules and that there should be clear consequences for non-compliance. Professor Atkin considered that the main disclosure requirements and the consequences of non-compliance should be explicitly set out in the PRA while the details could be left to the Family Court Rules. The Judges of the Family Court and several practitioners preferred the tailored discovery rules in the High Court Rules over the District Court Rules.¹⁵²

Conclusions

RECOMMENDATIONS

R110

The new Act should include an express duty of disclosure on partners.

R111

The new procedural rules for relationship property matters (see R102) should include:

- a. a prescribed process for complying with the duty of disclosure prior to making an application to the Family Court as part of the new pre-action procedures; and
- b. the procedure for initial and subsequent disclosure in relationship property proceedings.

R112

The new Act should make express provision for the Family Court to impose costs and other consequences for non-compliance with disclosure obligations.

R113

The new procedural rules and guidance issued on the rules should address the imposition of costs and other consequences for non-disclosure.

16.141 Our recommendations are designed to better encourage a culture of compliance with disclosure obligations when resolving relationship property 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.

¹⁵²

See r 8.9 of the High Court Rules 2016 and r 8.9 of the District Court Rules 2014. The Judges of the Family Court commented that the monetary limit in r 8.9(e) and (f) should be reduced to \$1m for Property (Relationships) Act 1976 matters.

An express duty of disclosure

- 16.142 The new Act should provide that partners have a continuing duty to give timely, full and frank disclosure of all relevant information. Including the duty in the new Act rather than the Family Court Rules is more accessible and sends a clear message that the duty applies to the resolution of all relationship property matters.¹⁵³ It should also apply whenever partners enter into a contracting out agreement or resolve relationship property matters out of court by entering into a settlement agreement. The duty of disclosure should work in conjunction with and should expressly refer to the disclosure rules in the Family Court Rules (see discussion below).
- 16.143 We do not recommend extending the duty of disclosure to third parties, such as trustees. Currently, the Family Court can order disclosure in relation to any third party joined to proceedings following notice given under section 37 of the PRA.¹⁵⁴ Third parties who are joined to proceedings may be liable for costs, including penalty costs for non-compliance with an order for disclosure. The Court can also order particular discovery against a third party who is not joined to proceedings in accordance with the Family Court Rules.¹⁵⁵ While we received some feedback during consultation on problems encountered with third party disclosure, the extent of the problem is unclear and we are not satisfied that extending the continuing duty of disclosure to some or all third parties is necessary to prevent or resolve any problems.

New procedures for disclosure in the Family Court Rules

- 16.144 We recommend that the new procedural rules for relationship property matters (see R102) include a prescribed process for disclosure prior to making an application to the Family Court, as part of the new pre-action procedures (see R100). This process must be followed in order to comply with the general duty of disclosure in the new Act. When developing these disclosure requirements specific consideration should be given to:
- (a) whether the pre-action procedures should specify timeframes for completing disclosure requirements;¹⁵⁶ and

¹⁵³ We have considered but do not prefer the suggestion by the New Zealand Law Society in response to the Issues Paper that the duty of disclosure should be included as a principle in the Property (Relationships) Act 1976. In our view, a duty of disclosure operates at a subordinate level to the principles. It facilitates the principle that relationship property 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 recommended 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 *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019), Recommendation 25.

¹⁵⁴ In Chapter 11, we recommend that the new Relationship Property Act specify that trustees, beneficiaries and any other person with an interest in trust property should have a right to be heard in relationship property proceedings, expanding on the current s 37 of the Property (Relationships) Act 1976.

¹⁵⁵ Family Court Rules 2002, rr 143 and 147. Orders for non-party discovery have been sought in a number of cases under the Property (Relationships) Act 1976, including for information held by health professionals about alleged abuse in order to set aside a s 21 agreement: *S v O* [2015] NZFC 4458, [2016] NZFLR 409; by the respondent's father regarding company documents: *J v G* [2013] NZFC 9866; and by companies regarding company accounts where the shareholder of the companies was a trust of which the partners were discretionary beneficiaries: *M v M* [2012] NZHC 1636.

¹⁵⁶ 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 cl 3(5) and (6). This recognises that, in addition to disclosure requirements, those procedures provide a

- (b) how the pre-action procedures can facilitate easy access to a court in order to enforce disclosure requirements.
- 16.145 We also recommend that the new procedural rules include a clear procedure for initial and subsequent disclosure tailored to the needs of parties in relationship property proceedings. These rules should:
- (a) include initial disclosure requirements, such as a non-exhaustive list of the documents that must be disclosed initially, 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.
- 16.146 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 relationship property proceedings and the views on these Rules expressed in submissions discussed at paragraph 16.140 above.¹⁵⁷

Clearer and stricter consequences for party non-disclosure

- 16.147 We recommend that there should be clearer and stricter consequences for non-compliance with disclosure obligations.¹⁵⁸ In the Preferred Approach Paper, we proposed that these consequences should be clearly set out in the Family Court Rules. However, we agree with Professor Atkin that the potential severity of such consequences warrants explicit reference in the statute.¹⁵⁹ We therefore recommend that the new Act expressly enables the Family Court to impose costs and other consequences, including those outlined in paragraph 16.118 for non-compliance with disclosure obligations.
- 16.148 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

framework for out of court negotiation and resolution and strict timeframes are not appropriate in those circumstances.

¹⁵⁷ 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.

¹⁵⁸ 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.

¹⁵⁹ We note that many submitters to the Australian Law Reform Commission's review of the family law system also argued that disclosure obligations and the consequences of breach would be better placed in the primary statute: Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System – Final Report* (Report 135, March 2019) at [8.134].

necessary or desirable,¹⁶⁰ nor do we think it would be the most cost-efficient or effective mechanism to address non-disclosure.¹⁶¹ As costs orders provide financial relief to the other party, additional powers to penalise non-compliance directly from the relationship property pool are unnecessary.

16.149 We acknowledge the concerns of some submitters on the Issues Paper about the efficacy of costs orders as a consequence of non-compliance. We therefore recommend that the Family Court Rules be amended to provide guidance on when costs and other consequences for non-disclosure should be imposed to ensure they are a meaningful deterrent and are applied consistently (discussed at paragraph 16.118). We also recommend that the Family Court Rules provide a process for imposing costs and other consequences for non-disclosure. Consideration should be given to whether to provide a mechanism for the application for and imposition of costs for non-compliance with disclosure in the pre-action procedures and whether to provide for the escalation of costs as non-compliance continues.

No additional sanctions for lawyers

16.150 We do not recommend introducing additional sanctions for lawyers in connection with non-disclosure for the reasons outlined in the Issues Paper.¹⁶² We also agree with the Judges of the Family Court commenting on the Issues Paper 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 relationship property matters as is consistent with justice.

¹⁶⁰ 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.

¹⁶¹ Legislation Design and Advisory Committee *Legislation Guidelines: 2018 edition* at ch 22–27.

¹⁶² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.61].

CHAPTER 17

Jurisdiction of the courts

IN THIS CHAPTER, WE CONSIDER:

issues that arise in relation to the jurisdiction of the courts to hear and decide property disputes between partners and whether reform is required in relation to:

- the roles of the Family Court and High Court;
- the High Court's jurisdiction to hear and determine appeals on interlocutory decisions; and
- the Domestic Actions Act 1975.

THE ROLES OF THE FAMILY COURT AND HIGH COURT**Background**

- 17.1 Every application under the PRA must be heard and determined in the Family Court.¹ There is no limit on the financial value of claims the Family Court can hear. The Family Court can, however, transfer proceedings to the High Court if it decides that the High Court is the more appropriate venue to deal with those proceedings.²
- 17.2 Partners have a right of appeal to the High Court in respect of any decision of the Family Court to make or refuse to make an order, dismiss proceedings or otherwise finally determine proceedings under the PRA.³ We discuss below whether this right of appeal applies to interlocutory decisions, such as decisions on transferring proceedings to the High Court.

Issues

- 17.3 In the Issues Paper, we observed that there are several issues that affect the Family Court's ability to hear and determine property disputes that arise between partners at the end of a relationship.⁴ In particular:

¹ Property (Relationships) Act 1976, s 22.

² Section 38A.

³ Section 39. This right of appeal also applies in respect of decisions of the District Court.

⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.24]–[26.77].

- (a) it is unclear whether the Family Court can decide if a valid trust exists;
 - (b) it is unclear whether the Family Court has a general civil jurisdiction; and
 - (c) the Family Court does not have jurisdiction under the Trustee Act 1956 or the Companies Act 1993.
- 17.4 In light of these issues, we asked whether the High Court should have greater oversight of relationship property proceedings.⁵ We summarise these issues below.

The Family Court's jurisdiction to decide whether a valid trust exists is unclear

- 17.5 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. However, some beneficial interests in a trust can constitute "property" within the meaning of the PRA.⁶ So too can powers to control a trust if they allow unfettered control of trust property unconstrained by fiduciary duties.⁷
- 17.6 Given the prevalence of trusts in New Zealand, the Family Court sometimes has to determine whether property has been validly placed on trust and, if so, whether a partner's interests in the trust or powers to control the trust constitute property for the purposes of the PRA.⁸
- 17.7 For example, a partner might argue that the trust is a "sham" and is therefore invalid because the person who settled the property on the trust (the settlor) and the trustee intended to create different rights and obligations to those set out in the trust deed. If the trust is found to be invalid, the property reverts back to the settlor. If the settlor was a partner, the property would be subject to the PRA. Or a partner might argue that trust property is subject to an institutional constructive trust for the benefit of one or both of the partners.⁹ If a constructive trust exists, the partner's beneficial interest in that trust may constitute property within the meaning of the PRA.

⁵ At [26.79]–[26.91].

⁶ In Chapter 11, we explain that whether a beneficial interest under a trust constitutes property depends on the nature of that interest. A vested or contingent beneficial interest constitutes property, but a discretionary beneficial interest does not. 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].

⁷ *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551. Applied in *Da Silva v Da Silva* [2016] NZHC 2064 at [53]; *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529 at [73]; and *Darlow v Raymond* [2017] NZHC 269, [2017] 3 NZLR 353 at [127].

⁸ The High Court in *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) explained that this was part of the Family Court's inventory-taking function in proceedings under the Property (Relationships) Act 1976, which includes considering whether an item is property within the definition in s 2, whether one or both partners has a beneficial interest in that item and whether the interest is relationship property or separate property (at [33]). When identifying property beneficially owned by one or both of the partners, the Family Court applies the general rules of property law, including statute law, the common law and equity (at [35]). The High Court said that the Family Court's function at the inventory stage is declaratory only (at [36] and [38]).

⁹ An institutional constructive trust is one that arises by operation of the principles of equity and whose existence the court simply recognises in a declaratory way, as opposed to a remedial constructive trust, which is imposed by the court as an equitable remedy. See *Fortex Group Ltd (in rec, in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) discussed in *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [36]. The Court of Appeal has, in a series of recent decisions, confirmed that a constructive trust can be imposed over trust property: see *Murrell v Hamilton* [2014] NZCA 377 at [22]; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [71]–[72]; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397 at [43]–[47].

- 17.8 Some cases have cast doubt on the extent of the Family Court's jurisdiction to resolve matters involving the application of trust law in two key respects.
- 17.9 First, when the Family Court decides which property interests are relationship property, its decision binds only the partners and is not binding on third parties, including trustees.¹⁰ If one partner contends that there are assets that belong in the relationship property pool but those assets are in the apparent ownership of a third party, separate proceedings outside the PRA may be required in order to establish relevant beneficial ownership.¹¹
- 17.10 Second, case law is inconsistent on whether the Family Court can determine the validity of trusts and recognise constructive trusts. This includes whether the Family Court can declare a trust a sham¹² or decide whether property is held on constructive trust.¹³ In *Fisher v Fisher*, where the High Court had to consider whether the Family Court could deal with various challenges to the validity of a trust, the Court said that:¹⁴

Mr Knight suggested that the evidence before the Court provides a basis for allegations of equitable claims "by way of alter ego, sham and tracing". These are not causes of action. Rather, they are matters which the Court may have to consider in determining what property is owned by the parties personally, what dispositions may have occurred in relation to that property and how the ultimate value of that property should be brought into account between the parties on application of the PRA. The Family Court is well used to dealing with such issues. In that context, it is not unusual for the Family Court to have to determine whether property is truly held on an express trust or a constructive trust.

The extent of the Family Court's general civil jurisdiction is unclear

- 17.11 In the Issues Paper, we noted that the PRA operates as a partial code, so sometimes a partner may have a claim in common law or equity against a partner or against a third party (for example, where trust property is held by a third party trustee).¹⁵ The extent of the Family Court's civil jurisdiction, including its jurisdiction in equity, to decide claims related to relationship property proceedings is unclear and is subject to debate and inconsistent decisions.¹⁶

¹⁰ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39]. See also *Fisher v Fisher* [2015] NZHC 2693 at [102]–[103].

¹¹ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [40].

¹² The High Court in *F v W* (2009) 2 NZTR 19-024 (HC) considered that, in the absence of clear statutory direction, only the High Court could declare a trust a sham, exercising its inherent jurisdiction (at [29]–[31]). However, in *B v X* [2011] 2 NZLR 405 (HC), the High Court considered this within the Family Court's jurisdiction to detect fraud (at [72]–[75]).

¹³ The High Court in *F v W* (2009) 2 NZTR 19-024 (HC) considered that the Family Court did have jurisdiction to resolve constructive trust claims but not claims of a sham (at [40]–[42]). In *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534, the High Court stated it was necessary to obtain a declaration of constructive trust from the High Court (at [15]).

¹⁴ *Fisher v Fisher* [2015] NZHC 2693 at [45].

¹⁵ Section 4 provides that the Property (Relationships) Act 1976 applies to transactions between partners regarding property and, when expressly provided for, transactions between either or both partners and third parties. The Act will not therefore apply in all circumstances where property rights are in issue. There is still scope for the common law and equity to apply in limited circumstances. See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.15]–[26.22].

¹⁶ Bruce Corkill and Vanessa Bruton "Trustee Litigation in the Family Context: Tools in the Family Court, and Tools in the High Court" (paper presented to New Zealand Law Society Trusts Conference, Wellington, 2011) 103 at 103. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [1.36].

- 17.12 The Family Court is established by statute and, unlike the High Court, does not have inherent jurisdiction. Within its statutory jurisdiction, however, the Family Court has "the right to do what is necessary to enable [it] to exercise functions, powers and duties conferred on [it] by statute" (inherent powers).¹⁷
- 17.13 The Family Court is a division of the District Court,¹⁸ and a person cannot be appointed as a Family Court judge unless they are or are eligible to be a District Court judge.¹⁹ Section 16 of the Family Court Act 1980 provides that the District Court Act 2016 applies, with necessary modification, to the Family Court and Family Court judges "in the same manner and to the same extent as it applies to the District Court and District Court Judges".
- 17.14 The District Court Act provides that the District Court has a general civil jurisdiction to hear and determine any application for the exercise of civil jurisdiction where the amount claimed or the value of the property in dispute does not exceed the financial limit of \$350,000.²⁰ The District Court Act also provides that the District Court has the same equitable jurisdiction as the High Court up to the financial limit and except where an enactment expressly provides that the proceeding must be heard in another court.²¹ A District Court judge can also grant remedies, redress or relief in the same way as a Judge of the High Court in the same or similar proceeding.²² The parties to a proceeding can also consent to the extension of the District Court's jurisdiction beyond the financial limit.²³
- 17.15 There is, however, competing High Court authority on whether section 16 of the Family Court Act confers the District Court's civil and equitable jurisdiction on the Family Court.²⁴ On one line of authority, the Family Court has the same equitable jurisdiction as the District Court and the Family Court can exercise its District Court jurisdiction contemporaneously.²⁵ That would enable the Family Court to deal with any equitable claims that arise in the context of relationship property proceedings. Another line of authority, however, firmly states that the Family Court does not have the civil and equitable jurisdiction of the District Court, although it has jurisdiction to grant equitable relief.²⁶ On that line of authority, separate proceedings in the High Court would probably be necessary to resolve equitable claims arising in relationship property proceedings.

¹⁷ *F v W* (2009) 2 NZTR 19-024 (HC) at [33]; and *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [24], citing *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276. See also the discussion of inherent jurisdiction and implied powers of the courts in Law Commission *Reforming the Law of Contempt of Court: A Modern Statute – Ko te Whakahou i te Ture mā Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at [7.3]–[7.5].

¹⁸ Family Court Act 1980, s 4.

¹⁹ Section 5.

²⁰ District Court Act 2016, s 4 definition of "proceeding" and s 74.

²¹ Section 76.

²² Section 84.

²³ Section 81.

²⁴ We set out the competing lines of authority in detail in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.47]–[26.60].

²⁵ *Pedersen v Vaughan* [1990] NZFLR 203 (HC); *Singh v Kaur* [2000] 1 NZLR 755 (HC); *Perry v West* HC Auckland M1331-SD00, 8 September 2000; *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011; and *F v F* [2015] NZHC 2693.

²⁶ *Burt v Skelley* (1998) 17 FRNZ 152 (HC); *F v W* (2009) 2 NZTR 19-024 (HC); and *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC).

- 17.16 The lack of certainty in the Family Court Act and the resulting inconsistent decisions creates opportunity for delay and disputes on the proper forum for resolving issues related to relationship property proceedings. If the Family Court does not have substantive jurisdiction in equity, where trust property is in issue, it may not have jurisdiction to resolve all the claims before it in relationship property proceedings. This could require dual proceedings in the Family Court and High Court, which again has consequences in terms of cost and delay.

The Family Court lacks jurisdiction under the Trustee Act 1956 and Companies Act 1993

- 17.17 The Family Court does not have jurisdiction to make orders under the Trustee Act or the Companies Act.²⁷
- 17.18 However, the Trusts Bill currently before Parliament provides for an ancillary jurisdiction for the Family Court to exercise powers and make orders under the proposed new Trusts Act where a matter is already within its jurisdiction.²⁸ The Government states that this is intended to give the Family Court the tools necessary to deal with trust matters closely related to proceedings properly before it, reducing the need for parties to bring subsequent proceedings in the High Court to resolve disputes.²⁹ If the Trusts Bill is passed, the new Trusts Act will repeal and replace the Trustee Act.³⁰
- 17.19 Occasionally, property disputes between partners at the end of a relationship will involve companies, and one or both partners may seek to rely on remedies under the Companies Act. This could include interim remedies to prevent one partner from operating in a way not in the best interests of the company³¹ or for relief as a shareholder in that company.³²
- 17.20 In the Issues Paper, we said that it was unclear whether the Family Court's lack of jurisdiction under the Companies Act is an issue that interferes with the resolution of relationship property disputes as inexpensively, simply and speedily as is consistent with justice.³³ This was because company shares are property under the PRA and potentially divisible as relationship property and because issues about the control and management of the company under the Companies Act are generally distinct from issues under the PRA.³⁴

²⁷ Section 2 of the Trustee Act 1956 defines "court" to mean the High Court. The Court of Appeal in *Morris v Templeton* (2000) 14 PRNZ 397 (CA) confirmed at [9] that the equitable jurisdiction of the District Court under s 34 of the District Courts Act 1947 did not extend to granting relief under s 73 of the Trustee Act. Section 2 of the Companies Act 1993 defines "court" to mean the High Court of New Zealand.

²⁸ Trusts Bill 2017 (290-2), cl 136. The Trusts Bill received its second reading on 9 May 2019 and at the time of submitting this report to the Minister the Bill was awaiting the Committee of the whole House stage.

²⁹ Ministry of Justice *Regulatory Impact Statement: A New Trusts Act – Agency Disclosure Statement* (August 2017) at 28.

³⁰ Trusts Bill 2017 (290-2), cl 155.

³¹ See, for example, *S v B* [2013] NZHC 497.

³² Section 174 of the Companies Act 1993 enables a shareholder to apply for relief where the acts of the company have been, are or are likely to be oppressive, unfairly discriminatory or unfairly prejudicial to him or her. See, for example, *B v F* [2012] NZHC 722.

³³ Consistent with s 1N(d) of the Property (Relationships) Act 1976.

³⁴ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.73]–[26.74].

The High Court's limited supervisory role in relationship property proceedings

- 17.21 The High Court has a limited supervisory role in relationship property proceedings. In addition to the right of appeal to the High Court under section 39, section 38A allows for the transfer of proceedings to the High Court. However, applications for transfer must be made in the Family Court,³⁵ and proceedings can only be transferred if the Family Court is satisfied the High Court is the more appropriate venue.³⁶
- 17.22 When the Matrimonial Property Act 1976 was first enacted, the High Court enjoyed concurrent jurisdiction with the District Court to hear and determine proceedings under that Act.³⁷ However, after the specialist Family Court was established, a policy decision was made to grant the Family Court exclusive jurisdiction to hear and determine relationship property matters, subject to a limited exception for particularly complex cases to be transferred to the High Court.³⁸ In 2001, amendments to what is now the PRA abolished concurrent jurisdiction, restricted the grounds for transferring proceedings from the Family Court and removed the High Court's power to hear and determine transfer applications itself.³⁹
- 17.23 The High Court's role in relationship property proceedings was revisited as part of a review of the Family Court in 2011.⁴⁰ This review resulted in changes to broaden the grounds for transferring proceedings under section 38A.⁴¹ Section 38A now provides that proceedings may be transferred if a Family Court judge is satisfied that the High Court is the more appropriate venue for dealing with proceedings, having regard to:
- (a) the complexity of the proceedings or of any question in issue in the proceedings;

³⁵ *Corbitt v Rowley* [2009] NZFLR 676 (HC).

³⁶ In the Issues Paper, we also noted that the High Court can make declarations affecting rights under the Property (Relationships) Act 1976 (PRA) either in exercising its inherent jurisdiction or its jurisdiction under the Declaratory Judgments Act 1908. It cannot, however, hear applications seeking orders for the division of relationship property under the PRA. See *Jew v Jew* [2003] 1 NZLR 708 (HC) at [41]. In that case, the High Court made a declaration that a family trust did not hold any property that constitutes relationship property under the PRA (at [38]). See also *Hayes v Parlane* [2014] NZHC 2416 at [67], where the High Court made a declaration that there was no qualifying de facto relationship for the purposes of the PRA. See Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.10]–[26.13].

³⁷ Matrimonial Property Act 1976, s 22.

³⁸ Other reasons for abolishing concurrent jurisdiction included that it addressed the risk that it was sometimes used for tactical advantage, often to disadvantage the poorer spouse, that it reflected the more general move to expand the jurisdiction of the District Courts (of which the Family Courts are a division) and that costs were likely to be lower for proceedings in the Family Court because its procedures were less formal than those of the High Court. See Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 30. See also Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 39, where it was noted that the great majority of cases under the Matrimonial Property Act 1976 were already being heard in the Family Court.

³⁹ Clause 23 of the Matrimonial Property Amendment Bill 1998 (109-1), enacted as s 23 of the Property (Relationships) Amendment Act 2001.

⁴⁰ The review considered whether Property (Relationships) Act 1976 disputes may be best dealt with in the District or High Courts given some of the issues involved, including issues about the Family Court's limited powers to deal with matters concerning trusts. See Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 26.

⁴¹ Property (Relationships) Amendment Act (No 2) 2013. Prior to 2014, a Family Court judge could transfer proceedings to the High Court only when satisfied that the High Court was the more appropriate venue for dealing with the proceedings "because of their complexity or the complexity of a question in issue in them": s 23 of the Property (Relationships) Amendment Act 2001, adding new s 22(3) (now repealed) to the Property (Relationships) Act 1976.

- (b) any proceedings before the High Court that are between the same parties and that involve related issues; and
- (c) any other matter that the judge considers relevant in the circumstances.

17.24 The amended test was expected to lower the barriers to transfer.⁴² However, while Family Court data demonstrates that there has been an increase in the number of cases transferred to the High Court, the numbers remain small as shown in the table below.⁴³ Two recent decisions under section 38A suggest that the threshold for transferring proceedings to the High Court will remain high,⁴⁴ and concerns remain that the test is "too difficult" to have complex relationship property proceedings transferred to the High Court.⁴⁵

NUMBER OF RELATIONSHIP PROPERTY CASES TRANSFERRED TO THE HIGH COURT

2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
3	5	4	12	5	9	11	9	8	6	17	15	15	20	16

Options for reform

17.25 In the Issues Paper, we identified several options for reforming the jurisdiction of the Family Court and High Court:⁴⁶

- (a) **Option 1: Extend the jurisdiction of the Family Court to address the current gaps.** This option is aimed at ensuring the Family Court has jurisdiction to hear and determine related matters in relationship property proceedings, including claims relating to trust property. This includes confirming that the Family Court has civil jurisdiction to hear claims in equity, extending jurisdiction under the PRA to make

⁴² Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note) at 3. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [19.17]; and Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [13.29].

⁴³ Data provided by email from the Ministry of Justice to the Law Commission (29 April 2019).

⁴⁴ In *H v H* [2015] NZFC 635, the Family Court refused an application to transfer proceedings to the High Court despite accepting these were complex proceedings (at [24]). In that case, Mrs H claimed that the relationship property comprised assets of up to \$100 million in value, while Mr H argued the relationship property was near \$10,000 in value (at [9]–[11]). The Court placed greater weight on the anticipated additional costs associated with the High Court hearing the proceedings and the impecunious position of Mrs H, particularly because of Mr H's unwillingness or inability to pay the "substantial" spousal maintenance awarded in Mrs H's favour (at [39] and [42]). In *Fisher v Fisher* [2015] NZHC 2693, the High Court upheld the Family Court's decision refusing to transfer proceedings to the High Court. The High Court observed that the claims in that case relating to the use of property to acquire trust property are claims that the Family Court regularly deals with as part of its specialist jurisdiction (at [44]) and that, for the potential for separate proceedings in the High Court to be considered, there should be "some real and substantial evidential basis for such a claim" (at [41]).

⁴⁵ Concerns were raised, for example, during the Law Commission's review of the law of trusts: see Ministry of Justice *Regulatory Impact Statement: A New Trusts Act – Agency Disclosure Statement* (August 2017) at 28.

⁴⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.97]–[26.115].

decisions binding on third parties in limited circumstances and granting the Family Court jurisdiction under the Trustee Act and Companies Act.

- (b) **Option 2: Return to concurrent jurisdiction.** This option would give the High Court concurrent jurisdiction to hear and determine relationship property proceedings as it had prior to 2001. This option would not resolve the issues with the Family Court's jurisdiction but would instead enable parties to avoid those issues by applying directly to the High Court.
- (c) **Option 3: Empower the High Court to transfer proceedings and/or reduce the threshold for transfer.** This option would change the balance between the Family Court's exclusive jurisdiction and the High Court's limited role in relationship property proceedings by allowing a High Court to order transfer under section 38A and/or reducing the threshold for transferring proceedings.

Results of consultation

- 17.26 We received 16 submissions that addressed jurisdiction issues. They included submissions from the New Zealand Law Society (NZLS), the Auckland District Law Society (ADLS), academics Professor Nicola Peart and Nikki Chamberlain, seven practitioners and three members of the public. We also received comments from the Judges of the Family Court. Jurisdiction issues were also discussed at eight public and practitioner meetings.
- 17.27 The Judges of the Family Court did not support a return to concurrent jurisdiction with the High Court and considered the power to transfer proceedings to the High Court operates sufficiently as it stands. They considered that the Family Court is the most appropriate forum for hearing relationship property proceedings and that it has developed expertise in dealing with applications under the PRA. The Judges noted the small number of successful appeals against Family Court decisions in comparison to the volume of defended applications filed in the Family Court.⁴⁷ They also noted that the recent Supreme Court decisions in *Scott v Williams* and *H v P* indicate Family Court judges have the necessary expertise to decide even the most complex PRA cases.⁴⁸
- 17.28 The Judges of the Family Court also acknowledged that concurrent jurisdiction can be used as a tactical advantage over the financially weaker party, which can raise access to justice issues. The Judges said that the Law Commission should be alert to the power dynamics in family relationships that can have a real impact on the outcome of separation if legislation is not robust enough to safeguard vulnerable parties. The Judges of the Family Court considered that, if the powers in the Trusts Bill were enacted, the Family Court would have the ability to determine trust issues in relationship property proceedings. The Judges of the Family Court also observed that the

⁴⁷ For example, in the 2017/18 year, there were 15 successful appeals from Family Court decisions (with an additional four appeals allowed in part) from a total of 78 appeals from 3,491 defended Family Court applications: District Court of New Zealand *Annual Report 2018* at 19. The Judges of the Family Court noted that six of those successful appeals were from decisions made under the Property (Relationships) Act 1976.

⁴⁸ In *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [268]–[269], the Supreme Court reinstated the Family Court's decision in relation to vesting and its approach to valuation, overturning both the decisions of the High Court and the Court of Appeal; and in *H v P* [2017] NZSC 196 at [94], the Supreme Court upheld the decision of the Court of Appeal that reinstated the Family Court's decision.

- appointment of specialist PRA judges does not acknowledge the existing expertise of Family Court judges and risks an increase in costs and a loss of flexibility in scheduling.
- 17.29 Another judge of the Family Court commenting separately also did not support a return to concurrent jurisdiction, noting that the amended power to transfer proceedings seemed to have been working well in practice and that transfer should not be necessary if the proposed amendments outlined in the Issues Paper relating to trusts were adopted.⁴⁹
- 17.30 NZLS submitted that the Family Court, as a specialist court with specialist judges and practitioners, is the proper court to determine all matters coming within the ambit of relationship property proceedings. It submitted that the Family Court should have jurisdiction under the Trustee Act in relation to all matters ancillary to its relationship property jurisdiction. It also identified examples of additional powers that the Family Court should have to deal with company matters.
- 17.31 ADLS noted the debate around the Family Court's equitable jurisdiction and considered that the Family Court's lack of jurisdiction to consider trusts was significant. It submitted that the current provisions in the District Court Act that allow parties to cede jurisdiction to a Family Court in matters of equity should be maintained and perhaps extended. ADLS also submitted that the Family Court's lack of jurisdiction to consider trusts calls into question whether the High Court should have greater oversight where relationship property matters include a family trust.
- 17.32 Views were mixed among practitioners. Some preferred the Family Court retaining originating jurisdiction even for cases involving trusts due to the lower filing and hearing fees in the Family Court. These practitioners thought that the Family Court should have jurisdiction to make all the necessary decisions so that matters could be resolved in one court and in front of one judge. Some practitioners commented specifically that this should include jurisdiction to make orders under the Trustee Act and Companies Act. Other practitioners, however, thought that High Court judges were better able to deal with complex cases. These practitioners favoured concurrent jurisdiction, particularly for high-value cases or cases involving trust property or cross-border issues.
- 17.33 Chamberlain and a number of practitioners supported specialist judges or a specialist court to deal with relationship property matters in order to address concerns regarding a lack of specialist skills in the Family Court and the low priority given to relationship property matters in the Family Court. Other practitioners, however, did not support specialist judges, arguing that the issue was more one of consistency in the Family Court.
- 17.34 Professor Peart was concerned about the expertise within the Family Court to determine issues under trust and company law. Peart also noted that trusts and companies invariably involve third parties whose rights are beyond the scope of the Family Court's specialist jurisdiction.
- 17.35 Members of the public who submitted on jurisdiction issues were generally critical of the Family Court. One submitter considered that removing concurrent jurisdiction was a "major error" and that the option of applying directly to the High Court should be

⁴⁹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.67]–[26.69].

restored. Some members of the public considered that relationship property proceedings should be heard in the District Court. Some did not consider Family Court judges had the necessary skills to deal with property and financial matters. Another member of the public cited the low priority for relationship property proceedings, delays and inadequate discovery rules in the Family Court. However, one member of the public submitted that the Family Court needed broader jurisdiction to remove trustees if they were abusing their powers.

Conclusions

RECOMMENDATIONS

- R114** When hearing and determining an application under the new Act, the Family Court should have jurisdiction to hear and determine any related matter within the general civil and equitable jurisdiction of the District Court pursuant to sections 74 and 76 of the District Court Act 2016. This should include jurisdiction to grant any remedy pursuant to section 84 of the District Court Act. However, the financial limit on the District Court's jurisdiction should not apply.
- R115** The new Act should retain the existing provisions for the transfer of proceedings and rights of appeal to the High Court to enable the High Court to continue to exercise a supervisory role in relationship property proceedings.
- R116** When hearing and determining an application under the new Act, the Family Court should have jurisdiction to make any order or give any direction available to it under the new Trusts Act (replacing the Trustee Act 1956) as proposed under clause 136 of the Trusts Bill 2017 (290-2).
- R117** The power to transfer proceedings to the High Court under clause 136(6) of the Trusts Bill 2017 (290-2) should be subject to the requirements relating to the transfer of proceedings in the new Act.
- R118** The Government should monitor the outcome of applications relating to the transfer of proceedings to the High Court and the outcome of appeals from Family Court decisions in order to ensure the High Court's supervisory role in relation to relationship property matters remains appropriate.

Extending the first instance jurisdiction of the Family Court

- 17.36 We recommend that the Family Court should have first instance jurisdiction under the Relationship Property Act (the new Act) to hear and determine all matters related to relationship property proceedings. In our view, all property disputes between partners

arising on separation should be decided by the same court at the same time.⁵⁰ This would promote the inexpensive, simple and speedy resolution of relationship property matters by avoiding the need to bring multiple proceedings to resolve related property disputes and the associated costs, delay and risk of inconsistent findings of fact.⁵¹ The High Court should continue to exercise a supervisory role in relationship property proceedings through the existing transfer provisions and rights of appeal. We discuss appeal rights in relation to interlocutory decisions below.

17.37 We consider that extending the first instance jurisdiction of the Family Court to address the current gaps is preferable to broadening the role of the High Court in relationship property proceedings (either by reintroducing concurrent jurisdiction or by amending the grounds for transferring proceedings under section 38A). This is for several reasons:

- (a) The Family Court has specialist jurisdiction in family and relationship property matters.⁵² This specialist jurisdiction has been reinforced by the progression of amendments to the PRA since 2001 (see paragraphs 17.22–17.23 above) and reflected more recently in the Trusts Bill, which proposes to grant the Family Court the necessary powers to deal with ancillary matters arising in the context of relationship property proceedings (see discussion below). In addition, as the Judges of the Family Court observed, the number of successful appeals against Family Court decisions is low in comparison to the volume of defended applications filed in the Family Court, and the recent Supreme Court decisions of *Scott v Williams* and *H v P* indicate that Family Court judges have the necessary expertise to decide even the most complex relationship property proceedings.⁵³
- (b) The Family Court already regularly applies principles of general law in relationship property proceedings. For example, in the recent case of *A v B*, the High Court, in dismissing an application for summary judgment under the Property Law Act 2007, observed that the Family Court is "perfectly well equipped" to assess the position at general law "and does so all the time".⁵⁴ In *J v J*, the High Court also observed that the Family Court is often called upon to rule on novel issues not previously determined by the High Court.⁵⁵ Extending the Family Court's first instance jurisdiction to consider related issues arising in civil law and equity allows the Court

⁵⁰ We note the Independent Panel examining the 2014 family justice reforms observed that having one judge manage a file ensures consistency and familiarity, is likely to promote better judicial decision making and, it was suggested to the Panel, is likely to promote better outcomes for children: Rosslyn Noonan, Chris Dellabarca and La-Verne King *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at [321].

⁵¹ These advantages were recognised by the High Court, in relation to the question of whether proceedings should be transferred to that Court, in *Fisher v Fisher* [2015] NZHC 2693 at [107].

⁵² See, for example, discussion in *J v J* [2012] NZHC 2292 at [21]; and *A v B* [2015] NZHC 1113, [2015] NZFLR 579 in relation to the Family Court's suitability to determine at first instance "the factual questions concerning the nature of the parties' relationship, from time to time, and the dates on which it was formed, transformed, and ended": at [22]. See also Vivienne Crawshaw "Jurisdiction Issues – Should I Stay or Should I go?" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 1–2.

⁵³ See n 48 above.

⁵⁴ *A v B* [2019] NZHC 371 at [17] and [28].

⁵⁵ *J v J* [2012] NZHC 2292 at [25].

to continue to develop expertise in dealing with all forms of relationship property matters.

- (c) The Family Court is generally more accessible than the High Court for separating partners as procedures are less formal,⁵⁶ costs are typically lower⁵⁷ and Family Courts are stationed in towns across New Zealand. While we note the view that the High Court procedures and case management system enable cases to be heard more efficiently in the High Court, we do not think this is a proper reason to enable the High Court to hear more relationship property cases.⁵⁸ Rather, it is a reason to improve the procedures in the Family Court. In Chapter 16, we recommend a range of measures to promote the just and efficient resolution of relationship property matters. These recommendations will enhance the Family Court's ability to deal with relationship property proceedings efficiently, effectively and inexpensively and will further cement its specialist jurisdiction to deal with relationship property matters.
- (d) Extending the first instance jurisdiction of the Family Court is consistent with recommendations made elsewhere in this report that will enhance the Family Court's ability to provide for a just division of property. In particular, in Chapter 11, we recommend broadening the scope of existing section 44C to provide a single comprehensive remedy that will enable a court to grant relief when a trust holds property that is produced, preserved or enhanced by the relationship. We recommend that a court should have wide remedial powers, including the power to order trustees to distribute capital from a trust, to vary the terms of a trust or to resettle some or all of the trust property on a new trust or trusts.
- (e) Extending the role of the High Court in relationship property proceedings would increase the risk of parties using the High Court for tactical advantage over the financially weaker party.⁵⁹ This concern was acknowledged by the Judges of the Family Court, who commented that litigation can be used by the party who has control over the family property and finances as a tactic to drain the financially weaker partner of their limited resources. The Judges considered that this issue would be exacerbated if concurrent jurisdiction were reintroduced and that applications may also be filed in the High Court as a delay tactic for the same reason to disadvantage the other party.
- (f) Finally, extending the first instance jurisdiction of the Family Court was supported by the Judges of the Family Court, NZLS and approximately half of the practitioners we heard from during consultation.⁶⁰

⁵⁶ Family Court Act 1980, s 10(1).

⁵⁷ This was noted as a significant factor in declining an application to transfer proceedings to the High Court in *H v H* [2015] NZFC 635 at [41]. It was also noted by the Judges of the Family Court commenting on the Issues Paper.

⁵⁸ A similar view was expressed by the High Court in *Fisher v Fisher* [2015] NZHC 2693 at [111].

⁵⁹ The Ministry of Justice advised the Justice and Electoral Committee of this concern during the progress of the 2001 amendments through Parliament in response to the former Chief Justice's submission noted at n 62 below: Ministry of Justice *Advice to Justice and Electoral Committee: SOP to Matrimonial Property Amendment Bill* (21 September 2000) at 5.

⁶⁰ We also note that, in the context of the 2013 review of the Family Court, Bill Atkin, Mark Henaghan and the Auckland District Law Society all submitted that the Family Court Proceedings Reform Bill 2012 should amend the Property

- 17.38 We acknowledge the concern raised by some submitters that the Family Court is not adequately resourced or best able to deal with cases involving complex issues of trust law.⁶¹ The Senior Courts have not supported extending the Family Court's jurisdiction to deal with disputes over trust property and governance.⁶² In 2018, the former Chief Justice Dame Sian Elias submitted on behalf of the Senior Courts to the select committee considering the Trusts Bill. The former Chief Justice's submission stated that development of law in the area of family trust issues will continue to occur substantially in case law and that this is not an area in which the Family Court has an established expertise.⁶³
- 17.39 We note, however, that the Family Court regularly deals with claims in relation to trust property as part of its specialist first instance jurisdiction under the PRA.⁶⁴ Not only does this mean that Family Court judges are likely to be increasingly familiar with trust law, but it is also more difficult to justify a carve-out of what is becoming a common aspect of relationship property proceedings.
- 17.40 We do not consider that it is appropriate for the resourcing of the Family Court to be relevant to a decision about the scope of the Court's jurisdiction when hearing relationship property matters. Rather than looking to another forum to deal with relationship property proceedings when they involve related matters under different areas of law, we think that the Family Court should be supported to exercise its function and powers under the new Act and to decide related matters. In Chapter 16, we recommend process changes to assist the Court to deal with proceedings more efficiently. We also recommend that the Government collect data on the progress and resolution of relationship property proceedings in the Family Court in order to monitor whether the Court is adequately resourced to deal appropriately with relationship property proceedings. It is critical that the Family Court has the time and resources to be effective in its role. This may include judicial education about the new Act.

The Family Court's civil and equitable jurisdiction

- 17.41 We recommend clarifying that the Family Court has the civil and equitable jurisdiction of the District Court where a claim is related to relationship property proceedings.⁶⁵ This would confirm the line of authority culminating in *Fisher v Fisher*⁶⁶ and, in our view, reflects the plain meaning of the relevant provisions of the Family Court Act, discussed at paragraph 17.13 above. This will ensure that the Family Court has first instance

(Relationships) Act 1976 and extend the jurisdiction of the Family Court in respect of trusts and company issues: Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at 85.

⁶¹ See also Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.104].

⁶² Chief Justice Sian Elias "Submission to the Justice and Electoral Committee on the Trusts Bill 2017" at 1. The former Chief Justice had previously expressed concerns that the 2001 amendments to the Property (Relationships) Act 1976 risked undermining the right of litigants to bring cases in the High Court without systematic review: Chief Justice Sian Elias "Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000" at 1.

⁶³ Chief Justice Sian Elias "Submission to the Justice and Electoral Committee on the Trusts Bill 2017" at 1.

⁶⁴ As observed in *Fisher v Fisher* [2015] NZHC 2693 at [44].

⁶⁵ District Court Act 2016, ss 74, 76 and 84.

⁶⁶ *Fisher v Fisher* [2015] NZHC 2693.

jurisdiction to hear and determine related civil and equitable claims, including claims affecting the rights of third parties, such as trustees, provided they are joined as a party to proceedings.⁶⁷ In our view, there is a case for clarifying the Family Court's civil and equitable jurisdiction in respect of all matters properly before it,⁶⁸ similar to the Trusts Bill discussed below. However, because of our terms of reference, we only make this recommendation in relation to relationship property proceedings.

- 17.42 The new Act should clarify that claims heard and determined in the Family Court are not subject to the financial limit imposed on the District Court,⁶⁹ consistent with the approach taken under the Trusts Bill.⁷⁰ The limit is appropriate to demarcate the jurisdictions of the District Court and High Court in relation to general civil claims. However, relationship property claims often involve amounts greater than the current \$350,000 limit. Applying the financial limit to civil and equitable matters relating to relationship property proceedings would be inconsistent with our view that all property disputes between partners arising on separation should be decided by the same court and with the principle that all questions arising under the new Act should be resolved as inexpensively, simply and speedily as is consistent with justice.⁷¹

Granting the Family Court jurisdiction under the new Trusts Act

- 17.43 If the Trusts Bill is enacted in its current form,⁷² it will provide the Family Court with an ancillary jurisdiction to exercise powers and make orders under the new Trusts Act where a matter is already within its jurisdiction.⁷³ We endorse this approach subject to our recommendations relating to transferring proceedings to the High Court, discussed below. In Chapter 11, we recommend that some of the Family Court's ancillary powers in relation to trusts should be expressly contained in the new Act, specifically the power to remove, appoint or replace trustees.

No jurisdiction under the Companies Act

- 17.44 At this time, we do not recommend granting the Family Court jurisdiction under the Companies Act to exercise powers or make orders under that Act in the course of hearing and determining relationship property proceedings. As noted above, companies tend to raise different issues to trusts because company shares are property under the PRA and because issues about the control and management of a company under the Companies Act are generally distinct from issues under the PRA. We are not satisfied there is a compelling need for the Family Court to have ancillary jurisdiction under the

⁶⁷ See discussion in Chapter 11 regarding the rights of third parties related to a trust to be heard in Property (Relationships) Act 1976 proceedings. See also discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [19.12].

⁶⁸ In accordance with s 11 of the Family Court Act 1980.

⁶⁹ District Court Act 2016, ss 74 and 76.

⁷⁰ Clause 136(5) of the Trusts Bill 2017 (290-2) provides:

To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.

⁷¹ Property (Relationships) Act 1976, s 1N(d).

⁷² Trusts Bill 2017 (290-2), as reported from select committee.

⁷³ Clause 136.

Companies Act. Although the Judges of the Family Court and some submitters said that the Family Court should have all necessary powers to deal with relationship property matters, only NZLS and one practitioner specifically mentioned powers under the Companies Act. Professor Peart was concerned that the rights of third parties under company law are beyond the scope of the Family Court's specialist jurisdiction.

- 17.45 In Chapter 11, we said that, if the use of company structures to frustrate the operation of the new Act becomes an increasingly common issue in future, the remedies we recommend in relation to trusts could be adapted to apply to companies. Similarly, the Family Court could be granted ancillary jurisdiction under the Companies Act, similar to clause 136 of the Trusts Bill, should future reform be necessary. At present, however, we recommend no reform.

No broader test for transferring proceedings to the High Court

- 17.46 We do not recommend changing the test for transferring proceedings to the High Court. Section 38A has been the subject of several refinements over the years in order to achieve a proper balance between the Family Court's specialist jurisdiction and the High Court's supervisory role in relationship property proceedings. We consider the central question under section 38A – whether the High Court is the more appropriate venue for dealing with the proceedings – remains appropriate. Further, we are not aware of any concerns that the test for transfer is being inappropriately applied in the Family Court.⁷⁴
- 17.47 We note, however, that our recommendations above would give the Family Court wider first instance jurisdiction to hear and decide matters under a civil and equitable jurisdiction. We therefore recommend that the Government monitor the outcome of applications for transfer to the High Court and the outcome of appeals to the High Court in order to establish whether that court should have a greater supervisory role in relationship property proceedings in future.
- 17.48 We also note that section 38A is inconsistent with the proposed transfer mechanism in the Trusts Bill, which was inserted by the select committee in response to the concerns outlined at paragraph 17.38 above. Clause 136(6) provides that:

In any case to which this section applies, the High Court or Family Court may order on the application of a party to the proceedings, that the proceedings be transferred to the High Court.

- 17.49 This is inconsistent with section 38A in several respects. It permits applications to transfer proceedings to be made directly to the High Court. There is no test for transfer as there is in section 38A. It is also unclear whether clause 136(6) is designed to permit the transfer of the entire proceedings or only the matter that requires an exercise of jurisdiction under the new Trusts Act. On its face, it appears to permit transfer of the entire proceedings to the High Court for determination.⁷⁵

⁷⁴ We are aware of only one case where the High Court has heard an appeal of the Family Court's decision to refuse to transfer proceedings under s 38A of the Property (Relationships) Act 1976. In *Fisher v Fisher* [2015] NZHC 2693, the High Court declined to allow the appeal on the basis that the issues were not so complex as to make the High Court a more appropriate forum.

⁷⁵ This interpretation would be consistent with the select committee report (Trusts Bill 2017 (290-2) (select committee report)), which states at 10 that cl 136(6) of the Trusts Bill 2017 (290-2):

- 17.50 It is unclear how the two provisions would interact in relationship property proceedings where trust property is involved. As we note above, the Family Court regularly deals with claims in relation to trust property as part of its specialist jurisdiction under the PRA. We are concerned that clause 136(6) will be used strategically to circumvent the requirements of section 38A and seek a transfer of relationship property proceedings to the High Court, potentially to the detriment of the financially weaker party.⁷⁶ We recommend therefore that the Trusts Bill be amended to clarify that clause 136(6) is subject to the requirements relating to the transfer of proceedings in the new Act.

No specialist relationship property court or judges

- 17.51 We do not recommend provision for a specialist court or specialist judges in the Family Court to deal with relationship property matters. We agree with the Judges of the Family Court that this does not acknowledge the existing expertise of Family Court judges and risks an increase in costs and a loss of flexibility in scheduling. We expect Family Court judges will be appointed for their experience and expertise in family law, including the new Act, or a willingness to acquire or maintain specialist expertise in all relevant areas, including the new Act and trusts, and to undertake continuing education.

APPEALING INTERLOCUTORY DECISIONS

Background

- 17.52 Section 39 of the PRA grants partners a right of appeal to the High Court in respect of any decision to "make or refuse to make an order" under the PRA. However, the case law is not settled on whether this includes a right of appeal in respect of decisions made prior to the final determination of an application under the PRA (interlocutory decisions).⁷⁷
- 17.53 Interlocutory decisions can be procedural in nature and relate to case management or aspects of the conduct of trials. However, some interlocutory decisions can have a significant impact on the partners' rights and obligations, such as interim distributions of

... would provide that litigants in Family Court proceedings that raise trust law issues may apply to either the Family Court or the High Court to have the proceedings transferred to the High Court.

⁷⁶ We note that the Ministry of Justice's advice to the Justice Committee considering the Trusts Bill does not refer to the development of the Family Court's specialist jurisdiction nor the risk of tactical behaviour that is associated with reducing the barriers to transferring proceedings to the High Court. See Ministry of Justice *Departmental Report: Trusts Bill* at 363. We also note the Ministry's advice at 363 on including a clause like cl 136(6) was that this:

... would be similar to [s 38B] of the Property (Relationships) Act 1976. This way, it becomes a "push pull" provision (ie an application can be made to the Family Court or to the High Court for the transfer).

The reference to s 38B appears to be meant as a reference to s 38A, but s 38A is not similar to a "push pull" provision, as discussed earlier in this chapter.

⁷⁷ Interlocutory decision is not defined in the Property (Relationships) Act 1976. Rule 8(1) of the Family Court Rules 2002 defines an "interlocutory application" to mean:

... an application in proceedings or intended proceedings for an order or a direction relating to a matter of procedure or for some relief ancillary to the orders or declarations sought in the proceedings or intended proceedings..

In *Waterhouse v Contractors Bonding Ltd [Interlocutory decision]* [2013] NZCA 151, [2013] 3 NZLR 361 at [16], the Court of Appeal held that an interlocutory decision (of the High Court) is ordinarily understood to be a decision made in the course of a proceeding leading to or facilitating the hearing of the claim and its ultimate disposition following the hearing.

property,⁷⁸ interim occupation or tenancy orders,⁷⁹ orders restraining the disposition of property⁸⁰ and decisions relating to the transfer of proceedings to the High Court.⁸¹

- 17.54 Some High Court decisions have interpreted the right of appeal under the PRA to be limited to orders that finally determine proceedings.⁸² A right of appeal against interlocutory decisions was, however, recognised under the District Court Act.⁸³ More recently, however, in *L v L*, the High Court held that a plain reading of section 39 did not limit the right of appeal to final orders.⁸⁴ The Court said that, if section 39 was intended to limit appeals to final decisions, the Court "would expect it to say so".⁸⁵ The Court also rejected the view that the High Court could hear an appeal against an interlocutory decision under the District Court Act.⁸⁶
- 17.55 In other cases, the High Court has proceeded to hear an appeal of an interlocutory decision without any discussion of whether it has jurisdiction to do so under section 39 of the PRA or under the District Court Act. This has included hearing appeals on decisions to refuse to transfer proceedings to the High Court,⁸⁷ to refuse to order an inquiry under section 38 of the PRA⁸⁸ and to make orders restraining the disposition of property.⁸⁹

Issues

- 17.56 In the Issues Paper, we said that the lack of clarity regarding the scope of section 39 requires reform.⁹⁰ There is a range of decisions and orders that may be made under the PRA prior to the final determination of the proceedings. Sometimes, an interlocutory decision may be of such importance that a right of appeal is appropriate before the proceedings are finally determined. It is desirable for the purposes of transparency and access to justice that appeal rights are clear and are self-contained within the same statute.
- 17.57 An important question is what appeal rights should be available for interlocutory decisions under the PRA and whether there should be a right to appeal all interlocutory decisions or only some interlocutory decisions, such as those decisions that affect the

⁷⁸ Under s 25(3) of the Property (Relationships) Act 1976.

⁷⁹ Sections 27–28.

⁸⁰ Section 43.

⁸¹ Section 38A. Transfer of proceedings to the High Court is addressed above.

⁸² *Dunsford v Shanly* [2012] NZHC 257 at [7]–[8], applying *E v E* [2005] NZFLR 806 (HC) and *Crick v McIlraith* HC Dunedin CIV 2004-412-37, 1 June 2004. See also *Smith v Smith* [2016] NZHC 1197.

⁸³ District Court Act 2016, s 124. See *E v E* [2005] NZFLR 806 (HC); *G v G* [2007] NZFLR 27 (HC); *Dunsford v Shanly* [2012] NZHC 257; and *J v P* [2013] NZHC 557.

⁸⁴ *L v L* [2017] NZHC 2529 at [18]–[19].

⁸⁵ At [22]. See also *Smith v Smith* [2013] NZHC 2536 at [35] in relation to the similarly worded provisions of s 174 of the Family Proceedings Act 1980.

⁸⁶ *L v L* [2017] NZHC 2529 at [20].

⁸⁷ *Fisher v Fisher* [2015] NZHC 2693 at [3].

⁸⁸ *Brainich-Felth-Eillander v Ward* [2016] NZHC 2481 at [88].

⁸⁹ *Patterson v Davison* [2012] NZHC 2757; and *Shearer v Shearer* [2008] NZFLR 227.

⁹⁰ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.92]–[26.96].

partners' rights or liabilities under the PRA.⁹¹ This is particularly important given that we recommend in Chapter 16 a number of significant procedural changes to enhance disclosure, case management and trial aspects of proceedings, including introducing strict penalties for non-compliance with directions of the Court.

Results of consultation

17.58 NZLS was the only submitter to comment on rights of appeal in respect of interlocutory decisions. NZLS submitted that section 39 of the PRA should be amended so that it is clear that interlocutory decisions may be appealed with leave of the court. It said that interlocutory decisions, such as decisions regarding evidence or interim distributions, can have far-reaching consequences that may affect the substantive result.

Conclusions

RECOMMENDATIONS

R119 Parties to relationship property proceedings should have a right of appeal to the High Court in respect of any interlocutory decision made under the new Act that relates to interim distributions of property, occupation, tenancy and furniture orders, transfers of proceedings to the High Court, notices of claim, restraining dispositions of property or orders for disclosure made in relation to dispositions to a trust or company. Parties should also have a right of appeal in respect of a decision relating to disclosure under the Family Court Rules 2002.

R120 Parties to relationship property proceedings should be able to appeal any other interlocutory decision to the High Court with the leave of the Family Court or District Court.

R121 The Family Court Rules Committee (see R102) should issue guidance on how applications for leave to appeal are determined.

17.59 We recommend that some interlocutory decisions made under the new Act should be appealable as of right, and this should be expressly provided for in the new Act. The right of appeal should apply to decisions to make or refuse to make an order in relation to interim distributions of relationship property, occupation, tenancy and furniture orders, transfer of proceedings, notices of claim and restraining a disposition of

⁹¹ In *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309, the Supreme Court held at [31] that all interlocutory decisions were appealable under s 66 of the Judicature Act 1908 (now repealed) because the statutory language did not support any other interpretation. This overturned a previous line of authority that not all interlocutory rulings were susceptible to appeal: *Winstone Pulp International Ltd v Attorney-General* (1999) 13 PRNZ 593 (CA) at [18]–[19]. However, despite the Supreme Court's decision in *Siemer v Heron*, the High Court has continued to refer to the categories of interlocutory rulings and whether rights and liabilities are affected in accordance with the previous line of authority, although this has not been determinative of the cases: *Dunsford v Shanly* [2012] NZHC 257; *Y v B* [2012] NZHC 2287; and *Smith v Smith* [2016] NZHC 1197. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [19.43].

property.⁹² Decisions under these provisions may not finally determine relationship property proceedings and so would be interlocutory in nature. Such decisions may nonetheless have a significant impact on a party's rights and liabilities under the new Act. We also recommend that orders for disclosure under the new Act in relation to dispositions of property to a trust or company (currently provided for under sections 44C and 44E) or under the Family Court Rules should have an automatic right of appeal. While this may be a source of delay in relationship property proceedings, a decision relating to disclosure can have a serious impact on a party's case.

- 17.60 We do not recommend granting a right of appeal in respect of all interlocutory decisions made under the new Act. Many interlocutory decisions relate to case management or trial conduct and are more procedural in nature. This includes a decision to order an inquiry into any relevant matter and an interim award of costs, both of which are discussed in Chapter 16. An automatic right of appeal in respect of all interlocutory decisions risks unduly protracting relationship property proceedings with appeals⁹³ and may incentivise tactical behaviour by parties seeking to delay and increase the costs of a final resolution of relationship property proceedings. We note that our recommendations in Chapter 16 relating to pre-action, case management and disclosure requirements for relationship property matters have the potential to widen the scope of interlocutory decisions that could be challenged. In our view, extending automatic appeal rights to all interlocutory decisions would be inconsistent with the principle that relationship property matters should be resolved as inexpensively, simply and speedily as is consistent with justice.
- 17.61 We therefore recommend requiring leave of the Family Court to appeal any other interlocutory decision. This recognises that, in exceptional cases, an interlocutory decision of a procedural nature may also affect parties' substantive rights and liabilities.⁹⁴ Consideration should be given to whether a definition of "interlocutory decision" is desirable to clarify which decisions have an automatic right of appeal and which decisions require leave to appeal.
- 17.62 The effect of these recommendations would be to displace the general right of appeal under section 124 of the District Court Act.⁹⁵
- 17.63 In Chapter 16, we recommend that a Family Court Rules Committee should be established for the purpose of developing new procedural rules for relationship property matters and issuing guidance on the rules as required. We recommend that

⁹² These orders are currently provided for under ss 25(3), 27, 28, 28B, 28C, 38A, 42 and 43 of the Property (Relationships) Act 1976 (PRA). Other decisions may be made under the PRA before a final division of relationship property but are not interlocutory in nature because they are sought and made independent of an order for division. This would include orders relating to our proposed Family Income Sharing Arrangements, which are the focus of recommendations in Chapter 10. Such orders would be appealable as of right under s 39 of the PRA.

⁹³ See, for example, *T v E* FC Auckland FAM-2007-004-2481, 2 July 2008 at [4]; and *E v E* [2005] NZFLR 806 (HC) at [41].

⁹⁴ For example, in *Dunsford v Shanly* [2012] NZHC 257, the High Court determined at [11] that a decision of the Family Court to hear all Property (Relationships) Act 1976 applications before the Court together was appealable as although the decision was in the form of a case management direction, it involved important points of law and principle that took it out of the routine case management category.

⁹⁵ Section 124 of the District Court Act 2016 does not apply to a decision of a kind in respect of which another enactment "expressly confers a right of appeal".

this Committee should issue guidance on how leave to appeal applications are determined, addressing the types of interlocutory decisions where leave to appeal is likely to be granted, and the principles likely to be applied on an application for leave.

OVERLAP WITH THE DOMESTIC ACTIONS ACT 1975

Background

17.64 Part 2 of the Domestic Actions Act 1975 provides for the settlement of property disputes arising out of the termination of agreements to marry. It provides that, where the termination of an agreement to marry gives rise to a property dispute, a party may apply to the Family Court or the High Court for an order that will "restore each party... as closely as practicable to the position that party would have occupied if the agreement had never been made".⁹⁶

Issues

17.65 In the Issues Paper, we observed that the Domestic Actions Act is an uncomfortable fit with the PRA.⁹⁷ The two regimes partially overlap as the Domestic Actions Act can apply to de facto relationships where the partners were engaged.⁹⁸ The difficulty in applying the Domestic Actions Act to this category of relationships was recognised by the Court of Appeal even before the PRA was extended to de facto relationships in 2001.⁹⁹ In *Oliver v Bradley*, the Court of Appeal observed:¹⁰⁰

My reservation about applying [the Domestic Actions Act] to these circumstances arises from the pending words of subs (1) – "Where the termination of an agreement to marry gives rise to any question between the parties" etc. These parties not only agreed to get married, but they also agreed to live in a "de facto" domestic and sexual relationship, and it was their decision to embark on that which can be seen as leading to the acquisition of the house property and to its maintenance as their family home. Similarly, it was the termination of that relationship which led to the dispute about dividing their property. The concurrent agreement to marry appears to be no more than a facet of that more fundamental association. It seems quite artificial to regard this question about the property as being merely the result of their broken engagement. This is borne out by the difficulties experienced in trying to restore the parties to the position they would have been in if the agreement to marry had never been made, as enjoined by s 8(3).

Rather than introduce into the arena of domestic property disputes a new category of "engaged de factos", I would prefer to see s 8 confined to what I think is its real purpose – namely, the settlement of disputes about property acquired to mark the engagement (such as the ring in this case), or in contemplation of the marriage envisaged by it, rather than in furtherance of some other personal relationship. I do not think the legislation was

⁹⁶ Domestic Actions Act 1975, s 8(3).

⁹⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [26.138]–[26.141].

⁹⁸ The potential for overlapping claims was recognised by the High Court in *M v D* [2012] NZHC 1152 at [66].

⁹⁹ *Oliver v Bradley* [1987] 1 NZLR 586 (CA). In that case, the parties were engaged and purchased a home together where they lived until their separation four years later.

¹⁰⁰ At 591–592. These reservations have been shared by other courts, for example, in *Lee v Mahon* [2002] NZFLR 1136 (FC) at 1140; and *Nye v Reid* [1993] NZFLR 60 (DC) at 62–63.

ever intended to apply to the de facto situation in this case ... However, in the absence of any argument about the application of the Act, I content myself only with the expression of these reservations.

- 17.66 The Domestic Actions Act has not been updated to reflect the inclusion of de facto relationships into the PRA regime in 2001. It has been described by the High Court as legislation "from another age".¹⁰¹ However, applications under that Act, while uncommon, are still made.¹⁰² In *A v B*, a case from 2015, the partners were in a de facto relationship and had two children.¹⁰³ Following their separation, A commenced proceedings under the Domestic Actions Act for the return of items allegedly given to B throughout their relationship or damages of at least \$126,900. B applied to strike out the Domestic Actions Act application. The High Court, while "very much doubt[ing]" whether the Domestic Actions Act application would succeed, could not strike out the proceeding as, assuming the pleaded facts were true (as required for strike out applications), the claim was not "clearly untenable".¹⁰⁴
- 17.67 The existence of a separate regime for resolving property disputes under the Domestic Actions Act is problematic as it means a specific category of relationships are subject to two overlapping regimes, each with different aims (restoring the parties to their position but for the engagement under the Domestic Actions Act as opposed to achieving a just division of property under the PRA). Further, as the High Court has concurrent jurisdiction under the Domestic Actions Act, there is a risk of parallel proceedings in different courts and, as observed in *A v B*, the risk of contradictory findings.¹⁰⁵
- 17.68 The regime created under the Domestic Actions Act is also unnecessary. Parties in a qualifying de facto relationship under the PRA can apply to the Family Court for resolution of their property disputes under the PRA, while partners not subject to the PRA but who were engaged to be married may pursue a claim in equity based on constructive trust.¹⁰⁶

Results of consultation

- 17.69 In the Issues Paper, we asked whether Part 2 of the Domestic Actions Act should be repealed.¹⁰⁷ NZLS was the only submitter to comment on this issue. It observed that the Domestic Actions Act was passed at a time when de facto relationships were less common than is the case today. However, it noted that there are still cases brought

¹⁰¹ *M v D* [2012] NZHC 1152 at [66].

¹⁰² This is despite the courts having taken a narrow interpretation to its application. The Court of Appeal's observation in *Oliver v Bradley* [1987] 1 NZLR 586 (CA) that s 8 of the Domestic Actions Act 1975 should be confined to property acquired to mark the engagement or in contemplation of the marriage envisaged by it has been adopted by the High Court in *Zhao v Huang* [2014] NZHC 132, [2014] NZFLR 782 at [39]; and *Stopforth v Roddick* (1990) 6 FRNZ 392 (HC) at 396.

¹⁰³ *A v B* [2015] NZHC 487.

¹⁰⁴ At [29].

¹⁰⁵ At [32].

¹⁰⁶ In *Oliver v Bradley* [1987] 1 NZLR 586 (CA) at 592 per Henry J, the Court of Appeal considered that "an approximately identical result would be achieved whether the appellant's entitlement was assessed under the [Domestic Actions Act 1975] or on a constructive basis". See also the comments of Cooke P at 588–589.

¹⁰⁷ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 638.

under the 1975 Act, and some of those cases may pertain to litigants who have not cohabited but have been engaged to be married. NZLS considered that it remains appropriate to recognise actions resulting from the conscious decision involved in an agreement to marry. If Part 2 is repealed, that group who have not cohabited will have imprecise causes of action.

- 17.70 NZLS agreed that Part 2 of the Domestic Actions Act 1975 should be repealed so that those who have been in de facto relationships will be obliged to seek redress under the PRA. It submitted, however, that the PRA should be amended to preserve a principled avenue of redress for those who, although not in a de facto relationship, have committed or applied property in reliance on a promise to marry or to enter into a civil union (or perhaps even in reliance on a promise to enter into a de facto relationship). Examples would cover more than the return of engagement rings. An intending partner may pay a deposit for a house or a car in the name of the other intended partner or contribute substantially to an asset already owned by that person. Supportive family members may have been induced to do likewise. NZLS considered a simple principled avenue for redress remains desirable.
- 17.71 If Part 2 of the Domestic Actions Act is not repealed, NZLS submitted that the Family Court should have exclusive originating jurisdiction in these cases.

Conclusions

RECOMMENDATION

R122

Part 2 of the Domestic Actions Act 1975 should be repealed.

- 17.72 We recommend that Part 2 of the Domestic Actions Act, providing for the resolution of property disputes arising out of agreements to marry, should be repealed for the reasons identified above.
- 17.73 We acknowledge that repealing Part 2 of the Domestic Actions Act will potentially remove an avenue for redress in situations where two people have made a commitment to marry but are not in a de facto relationship as defined in the new Act. This might include couples who, for cultural or religious reasons, choose not to cohabit before marriage. We also acknowledge NZLS's view that people who make decisions affecting their property in contemplation of entering into a qualifying relationship should be able to access redress under the PRA. However, redress will continue to be available through a claim based on constructive trust. We think this is appropriate given the very small group of people who are likely to be affected by the repeal. We do not favour providing redress under the PRA for this group of people given this would be a significant extension of the scope of the PRA and given that the objects of redress under the Domestic Actions Act are vastly different to the objects of the PRA.

CHAPTER 18

Creditors' interests

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 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**Background**

18.1 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 before division occurs 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).¹ Generally speaking, the rights of secured creditors take priority over the rights of partners.²

18.2 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 and the provision for agreements that defeat the rights of creditors, discussed below. In Chapter 15 we also discuss the process for registering notices of claim on land under section 42.

¹ 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.

² Sections 20A and 46.

Issues

18.3 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.³ 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 property 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

18.4 We received submissions on the Issues Paper addressing the general policy of the PRA on creditors 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. There were no further submissions on our conclusion in the Preferred Approach Paper that the general policy of the PRA on creditors remains sound.

Conclusions

RECOMMENDATION

R123

Unless otherwise provided in the new Act, secured and unsecured creditors of a partner should have the same rights against that partner and that partner's property as if the new Act had not been passed.

18.5 We are satisfied that the general policy of the PRA on creditors remains sound for the reasons given in the Issues Paper.⁴ This is endorsed by the submissions received on this issue. We therefore recommend that the Relationship Property Act (the new Act) continue the general rule that creditors' rights are not affected by the new Act except where expressly provided.

18.6 Some submitters raised the problem where one partner improperly dissipates relationship property, for example, by incurring imprudent or purely personal obligations

³ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.34]–[31.39].

⁴ At [31.31]–[31.39].

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.⁵ We address the dissipation of property in Chapter 9.

- 18.7 Although we do not recommend any reform of the PRA's general approach to creditors, there are specific issues we have identified relating to the protected interest in the family home and the provisions for setting aside agreements that defeat creditors' rights 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

Background

- 18.8 Section 20B provides that each partner has a protected interest in the family home.⁶ It is protected in the sense that a partner's interest takes priority over the unsecured debts of the other partner unless the debt was incurred jointly by the partners or by a partner subsequently adjudicated bankrupt in order to purchase, improve or repair the family home.
- 18.9 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 \$103,000.⁷
- 18.10 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.⁸
- 18.11 There is considerable overlap between the PRA and the Joint Family Homes Act 1964 (JFHA).⁹ 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

⁵ We note, however, that s 44 of the Property (Relationships) Act 1976 (PRA) provides relief against a third party where a partner has disposed of property to the third party with the intention of defeating a partner's claim or rights under the PRA. However, it is a defence if the third party has received the property in good faith and has altered their position in reliance on having an indefeasible interest in the property (s 44(4)). We recommend in Chapter 11 that section 44 be retained in the new Act.

⁶ If no family home exists because it has been sold or because none existed or if the family home is 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: ss 11A–12.

⁷ Property (Relationships) Specified Sum Order 2002, cl 3.

⁸ *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 327; and *Johnson v Felton* [2006] 3 NZLR 475 (CA) at [133].

⁹ 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.

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.¹⁰ While this has not happened, the reasons for this recommendation remain valid.¹¹

- 18.12 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 their relatives and dependants. 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

- 18.13 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.¹² 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.¹³
- 18.14 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:¹⁴
- (a) The decreasing rate of home ownership means that the protected interest is not of practical benefit for an increasing number of New Zealand couples who do not own homes.¹⁵ 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 that would provide the equity required for a house of a reasonable minimum standard across New Zealand.¹⁶
 - (c) The family home may often be mortgaged and little or no equity may be available to provide a protected interest against unsecured creditors.

¹⁰ 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 Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.40]–[31.45].

¹² At [31.46].

¹³ At [31.12].

¹⁴ At [31.47]–[31.63].

¹⁵ 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 mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.48]–[31.50].

¹⁶ 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.

- 18.15 There are two further issues that were addressed in the Preferred Approach Paper.¹⁷ We address these issues below.

How should the protected interest work when equal sharing does not apply?

- 18.16 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 equal sharing occurs under sections 11–12. It is silent about how the protected interest applies if division occurs where extraordinary circumstances make equal sharing repugnant to justice under section 13 or in the case of relationships of short duration.¹⁸ Case law has established that the protected interest will apply to marriages of short duration, but a partner cannot claim a protected interest that is greater than what they could attain on the division of relationship property under the PRA.¹⁹ While we recommend repealing the provisions for short-term relationships in Chapter 6, the issue remains in situations where section 13 applies.

How should the protected interest work when the family home is not relationship property?

- 18.17 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,²⁰ nor will the family home be relationship property under our classification recommendations in Chapter 3 if it was owned by one partner before the relationship was contemplated, or was received by one partner as a gift or inheritance from a third party. 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. If our recommendations in Chapter 3 are implemented, 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

- 18.18 There was general support from submitters on the Issues Paper 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 proposals in respect of the classification of the family home 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.
- 18.19 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

¹⁷ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at [11.16]–[11.17].

¹⁸ Property (Relationships) Act 1976, ss 14–14A.

¹⁹ *Walsh and NZ Law Society v Powell* (1982) 1 NZFLR 103 (HC) at 109. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online 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.

²⁰ 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.

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. 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.

- 18.20 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 of the protected interest 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.
- 18.21 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.
- 18.22 The Insolvency and Trustee Service (Official Assignee)²¹ 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 or was held on trust or, due to the mortgage obligations, no equity was available.

Options for reform

- 18.23 We identified the options for reform in the Preferred Approach Paper as:²²
- (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

²¹ 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.

²² Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) at [11.23].

- (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.

18.24 Ultimately, we proposed that the Government should give further consideration to the options for amending or repealing the protected interest provisions.²³ NZLS, Professor Nicola Peart and the Official Assignee agreed with our proposal. Peart commented that a protected interest in the family home is not sustainable if the home is not invariably relationship property. Peart also questioned whether favouring couples over creditors and couples over non-partnered people was justifiable. NZLS advised caution in any amendments, however, to avoid unnecessarily eroding creditors' rights. The Auckland District Law Society (ADLS) favoured amending the operation of the protected interest regime by revisiting the amount of the specified sum and adjusting for inflation. ADLS also favoured extending the protected interest to other relationship property where there is no family home. While acknowledging the logic of the Law Commission's position on the JFHA, ADLS opposed repeal of that Act on the basis that both partners would lose the protected interest in the joint family home and there are existing rights under the Act that will be problematic to remove.

Conclusions

RECOMMENDATION

R124

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 new Act. 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 as recommended by the Law Commission in 2001.

18.25 Acknowledging the inadequacies of the protected interest provisions in the PRA, we recommend that the Government undertake further policy work.

18.26 We have reached this view having regard to the limited availability of the protected interest in practical terms (see paragraph 18.14 above), its failure to fulfil its original purpose²⁴ and the difficulties in addressing these issues through amendment of the protected interest provisions, as we explain below.

²³ P67.

²⁴ 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].

Problems with extending the scope of the protected interest

- 18.27 Extending the protected interest to all relationship property or to other specified items of relationship property presents a number of problems.
- 18.28 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.²⁵ However, under the current law, KiwiSaver entitlements are not available to the creditors of a KiwiSaver scheme member who is adjudicated bankrupt,²⁶ 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.²⁷ Until this review is complete, it is difficult to make any recommendations around extending the protected interest to retirement savings.
- 18.29 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 sits, would likely need to undertake the full process of classification, valuation and determination of the partners' respective shares in the relationship property.
- 18.30 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.
- 18.31 This approach could theoretically be enhanced if the partners had the ability to lodge a notice claiming an interest under the new Act in items of relationship property other than land, which is currently provided for under section 42 of the PRA. 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 new Act. It could be removed

²⁵ 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.

²⁶ *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224. See also KiwiSaver Act 2006, s 127.

²⁷ 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 and Employment *Discussion Document: Accessibility of retirement savings in bankruptcy for the repayment of creditors* (July 2016).

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 over personal property.²⁸ 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.²⁹ 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 adjusting the amount of the protected interest or how it is calculated

- 18.32 Regardless of what property the protected interest should apply to, the amount of the protected interest requires reform given the issues identified at paragraph 18.14(b) above.
- 18.33 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.
- 18.34 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.³⁰ The choice of percentage would be arbitrary. There is no apparent logic in choosing, for example, 25 per cent over 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.
- 18.35 While it would be possible to set an arbitrary specified sum that 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).
- 18.36 It would, however, be possible to specify a percentage proportion of some or all relationship property that 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.

²⁸ Matrimonial Property Act RSA 2000 c M-8, s 26; and Family Law Act SBC 2011 c 25, s 100.

²⁹ 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].

³⁰ Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [15], n 13.

- 18.37 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.
- 18.38 For the reasons given at paragraph 18.30 above, calculating the protected interest as a percentage of some or all of the relationship property would be easier when the partner was adjudicated bankrupt, although the Official Assignee would still need to identify, classify and value the relationship property and determine the partners' respective shares in order to apply the protected interest.

Further policy work is required

- 18.39 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 new Act. 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.³¹ However, 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.³² 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.
- 18.40 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 their relatives and dependants. 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.³³ This would provide priority over unsecured creditors for 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 their family and creditors is not within the terms of our review, so these questions would require separate investigation.

³¹ Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [15], n 13.

³² Given the relative illiquidity of retirement savings, there will not be the same opportunity for gaming as the Law Commission identified with a house.

³³ 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].

- 18.41 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.
- 18.42 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. There is a strong argument for removing the protected interest provisions from the PRA. However, we consider a final decision on repeal or reform needs to be considered within the broader context of the relationship between the insolvency regime and the interests of partners under the property sharing regime, which is beyond the scope of this review.
- 18.43 This broader policy work should also consider progressing the repeal 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.

CHALLENGING AGREEMENTS THAT HAVE THE EFFECT OF DEFEATING CREDITORS' RIGHTS

Background

- 18.44 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".
- 18.45 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.³⁴ Creditors must therefore challenge an agreement within a two year period of it being made if the agreement is to be void against affected creditors.

Issues

- 18.46 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.³⁵ 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 judgment against the partner or partners, which may take months if not years. The partners may also conceal their agreement.

³⁴ *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [21].

³⁵ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.67]–[37.72].

(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.

18.47 The Supreme Court in *Felton v Johnson* was uncertain how the limitation period would apply to the Official Assignee.³⁶ 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 that is the subject of the agreement.³⁷ The Court considered that the Official Assignee's position was a "matter of considerable difficulty".³⁸ 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).³⁹ It is also uncertain whether and to what extent a claim by the Official Assignee displaces the claims of individual creditors.⁴⁰

18.48 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

18.49 In the Issues Paper, we presented two options for reform:⁴¹

- (a) **Option 1:** Remove section 47 from the PRA and rely on the general law of insolvency.⁴² 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:
 - (i) making the meaning of the two year period explicit;

³⁶ *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [24]. See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.73]–[31.75].

³⁷ *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [21].

³⁸ At [24].

³⁹ At [24].

⁴⁰ At [24]. See also *Official Assignee of X (Bankrupt) v Y* [2017] NZHC 1117, [2017] NZFLR 320.

⁴¹ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.76]–[31.81].

⁴² Elizabeth Tobeck "Relationship property and creditors" [2006] NZLJ 413 at 414–416.

- (ii) setting out the steps the Official Assignee must take to challenge an agreement; and
- (iii) if the Official Assignee intervenes, making clear the effect that would have on the position of other creditors.

Results of consultation

- 18.50 Five submitters on the Issues Paper addressed this issue. NZLS submitted that partners should be able to achieve certainty in managing their relationship property 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 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. Professor Peart considered that it was a concern that creditors did not know "that or when" the transaction between the parties occurred.
- 18.51 Four submitters commented on our proposals in the Preferred Approach Paper to amend section 47(2) to confirm the two year period operates as a limitation period and to grant the Official Assignee powers to treat an agreement, disposition or other transaction between the partners as an insolvent transaction under the Insolvency Act, displacing any claims by other creditors.⁴³ NZLS supported our proposals.
- 18.52 ADLS emphasised the need for parties to an agreement and creditors to obtain certainty and suggested that this could be achieved by requiring that the parties disclose their agreement to any creditors and that creditors be entitled to a copy of any relationship property agreement affecting property offered as security to that creditor. ADLS supported our proposal in respect of clarifying the operation of the two year limitation period. It noted our proposal in respect of the effect of an application by the Official Assignee to set aside an insolvent transaction on the claims of other creditors but considered that the rights of the Official Assignee should not override the interests of a secured creditor. Professor Bill Atkin favoured a test in section 47(2) that focused on reasonable discoverability so the limitation period should start from the time it was reasonable for the creditor to have discovered the prejudicial agreement between the partners.

⁴³ Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018), P68–P70.

18.53 The Official Assignee agreed with the intent of the proposals. However, it submitted that, in a partner's bankruptcy, an agreement or transaction between the partners that defeats creditors' interests does not fit the description of an insolvent transaction under the Insolvency Act. That is because an insolvent transaction is defined under the Insolvency Act as a transaction that enables a creditor to receive more towards satisfaction of a debt by the bankrupt than that person would receive or is likely to receive in bankruptcy.⁴⁴

Conclusions

RECOMMENDATIONS

R125 The new Act 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.

R126 When a partner is adjudicated bankrupt, the Official Assignee should have powers under the new Act in respect of agreements, dispositions or other transactions between the partners that have the effect of defeating the rights of creditors. These powers should be consistent with the Official Assignee's powers under the insolvent transactions regime in the Insolvency Act 2006.

R127 An application by the Official Assignee to set aside an agreement, disposition or transaction should displace any claims by other creditors that the agreement, disposition or other transaction has the effect of defeating creditors' rights.

R128 An application by the Official Assignee to set aside an agreement, disposition or transaction should be made in the High Court.

18.54 We consider that creditors should continue to be able to challenge an agreement, disposition or transaction between partners under the new Act, where it has the effect of defeating creditors' interests. We recommend that the new Act adopts a two year limitation period, confirming the Supreme Court's approach in *Felton v Johnson*, and addresses how the limitation period applies to the Official Assignee.

18.55 We recognise there is some merit in Option 1 presented in the Issues Paper. Relying on the general law of insolvency might be seen as aligning with the general policy that creditors' rights should continue as if the new Act had not been passed (see R123). The current 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 in the property that is the subject of an agreement or transaction between the partners. As we concluded earlier in this chapter, further work on the intersection of the insolvency regime with the interests of partners

⁴⁴ Insolvency Act 2006, s 195(1).

- under the property sharing regime is required (see R124). Until that work is undertaken, we prefer Option 2 as it addresses current difficulties in the operation of section 47(2).
- 18.56 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 relationship property matters will not be overturned after a longer period given the likelihood they will have moved on with their lives. For this reason, we do not favour a reasonable discoverability test as submitted by Professor Atkin, nor do we consider that compelling disclosure of agreements by partners to creditors is necessary. The disclosure of such agreements should continue to be a matter for the creditor and partner to address through agreement, for example, as a condition of lending.
- 18.57 We also recommend that the Official Assignee be given powers under the new Act that are broadly in line with the regime for insolvent transactions under the Insolvency Act. The Official Assignee should be able to exercise these powers if an agreement, disposition or other transaction between the partners:
- (a) 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) was made within the two years immediately before the partner is adjudicated bankrupt.
- 18.58 We note the Official Assignee's submission that a partner does not stand in the same position as a creditor who has been enabled to receive more towards satisfaction of a debt than they would have received in bankruptcy. However, it is possible to determine whether a partner has been preferred through an agreement, disposition or transaction, having regard to a partner's protected interest in the family home.
- 18.59 If these requirements are satisfied, the Official Assignee should be able to apply to the court to cancel the transaction. Any application to set aside a 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.
- 18.60 We recommend that the Official Assignee should be required to make any application to cancel an agreement, disposition or 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 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

Background

18.61 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 PRA⁴⁵ is "deemed to have been made for valuable consideration".

Issues

18.62 In the Issues Paper, we said that the practical effect of section 47(3) was unclear and identified three particular uncertainties:⁴⁶

- (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) To succeed under section 47(2), creditors must 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.⁴⁷ 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.

18.63 In the Issues Paper, we discussed whether section 47(3) appropriately balances the rights of separated partners and the interests of unsecured creditors.⁴⁸ 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.

⁴⁵ 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 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 ed, Thomson Reuters) says at [PR21A.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 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.

⁴⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.84].

⁴⁷ This is because if, under the agreement, the partner has received the same value as consideration for the property they 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.

⁴⁸ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [31.85]–[31.89].

18.64 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; or
- (c) a partner may accept significant burdens, such as childcare responsibilities, in order to receive a greater share of the property. 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.

Options for reform

18.65 In the Issues Paper, we suggested several options for reform:⁴⁹

- (a) **Option 1:** Remove section 47(3) altogether. This reflects a policy position that a partner's rights under a 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:⁵⁰
 - (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 they 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.

⁴⁹ At [31.90]–[31.98].

⁵⁰ Insolvency Act 2006, s 208.

- (d) **Option 4:** Increase the amount of the protected interest (see discussion on the protected interest above).

Results of consultation

- 18.66 Five submitters on the Issues Paper and Preferred Approach Paper addressed section 47(3). 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 passed. 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). In its submission on the Preferred Approach Paper, NZLS supported our proposal to adopt Option 2, replacing section 47(3) with the defences available under general insolvency law.⁵¹
- 18.67 ADLS considered that a partner's rights under a settlement agreement should take priority over the rights of unsecured creditors to the extent of a reasonable protected interest. It noted that the test under section 208 of the Insolvency Act may set a higher threshold than the current threshold under the PRA and submitted that replacing section 47(3) with the defences available under general insolvency law is only appropriate if they are inserted into the PRA so that the PRA remains a comprehensive code.
- 18.68 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. It noted, however, in its submission on the Preferred Approach Paper that it was unsure what "value" a partner would provide in order to claim the defence.
- 18.69 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. Option 3 was also supported by one member of the public submitting on the Preferred Approach Paper. That submitter considered Option 3 was preferable over Option 2 as it would allow the court to take into account extraordinary circumstances, while Option 2, they considered, set a high standard.

⁵¹

Law Commission Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai (NZLC IP44, 2018), P71.

Conclusions

RECOMMENDATION

R129

A court should not be able to order recovery for creditors from a partner who receives property under a settlement 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. altered their position in the reasonably held belief that the transfer of property was valid and would not be cancelled.

18.70 We broadly favour an approach under the new Act that 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. We agree with ADLS that these defences should be set out in the new Act itself rather than referring to the Insolvency Act. However, we do not recommend importing the requirement under insolvency law that the recipient partner show they "gave value" for the property. The concept of giving value does not sit comfortably with the general policy that creditors' rights should continue as if the new Act had not been passed (see R123). Further, when partners settle their property matters under a settlement agreement, they may place different weight and value on different factors. The recipient partner might give something that has high intrinsic value but low monetary value for the property in question. In our view, the alteration of position test alone should be sufficient.

CHAPTER 19

Cross-border issues

IN THIS CHAPTER, WE CONSIDER:

issues that arise when one or both partners live overseas, have a connection with another country or own property in another country (cross-border issues) and whether reform is required in relation to:

- when the PRA applies to property disputes between partners;
- giving effect to partners' foreign law agreements;
- when a New Zealand court has jurisdiction to hear and decide cross-border issues; and
- the enforcement of foreign judgments in New Zealand.

INTRODUCTION

- 19.1 In an increasingly globalised world, relationship property matters are more likely to be complicated by cross-border issues.¹
- 19.2 When cross-border issues arise, the PRA must interact with the principles and rules of private international law.² Private international law comprises a mix of general principles and rules arising from case law, specific laws set out in the domestic laws of a country and bilateral and multilateral treaties between countries.³ This means that private international law, as a body of law, is different in every country.
- 19.3 Sections 7 and 7A of the PRA determine whether the PRA or another country's law applies to a property dispute between partners. The jurisdiction of a New Zealand court to hear a property dispute between partners, and whether a foreign judgment is enforceable in New Zealand is addressed elsewhere in New Zealand law. Together,

¹ This is likely driven by increased international mobility, rising numbers of international couples (where the partners come from different countries) and globalisation (enabling the ownership of property in other countries). See Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [32.1] and [32.7]–[32.8].

² At [32.9]–[32.17].

³ See discussion in David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 1–14.

these rules form part of New Zealand private international law relating to property disputes between partners.

WHEN THE PRA APPLIES TO PROPERTY DISPUTES BETWEEN PARTNERS

Background

19.4 Section 7 of the PRA establishes when the PRA applies to property disputes between partners. It focuses primarily on the nature of the property concerned, distinguishing between movable property (such as money or shares in a company) and immovable property (such as land).⁴

19.5 Section 7 provides:

7 Application to movable or immovable property

- (1) This Act applies to immovable property that is situated in New Zealand.
- (2) This Act applies to movable property that is situated in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand—
 - (a) at the date of an application made under this Act; or
 - (b) at the date of any agreement between the spouses or partners relating to the division of their property; or
 - (c) at the date of his or her death.
- (3) Despite subsection (2), if any order under this Act is sought against a person who is neither domiciled nor resident in New Zealand, the court may decline to make an order in respect of any movable property that is situated outside New Zealand.

19.6 The effect of section 7 is that the PRA applies to immovable property situated in New Zealand regardless of where the partners live⁵ but does not apply to immovable property situated outside New Zealand.⁶ This means that a court cannot classify overseas immovable property as relationship property and divide it under the PRA or make any order affecting it, nor can a court take account of overseas immovable property when dividing the partners' other property under the PRA.⁷

⁴ Movable and immovable property is classified differently in different countries. In New Zealand, whether or not something is movable or immovable is determined with reference to where the property is located. If there is no evidence on whether the country where the property is located would classify the property as movable or immovable, in New Zealand, the position is assumed to be the same as New Zealand law: *M v B* FC North Shore FAM-2009-044-726, 30 April 2010. See discussion on movable and immovable property in Law Commission *Dividing relationship property – Time for change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [32.39]–[32.42].

⁵ For example, in *Howson v Howson* HC Hamilton CP52/01, 2 May 2002, the High Court held it had jurisdiction in relation to immovable property in New Zealand (a farm) even though both partners were domiciled in Australia.

⁶ *Walker v Walker* [1983] NZLR 560 (CA); and *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA). A New Zealand court may, however, be required to consider overseas immovable property in a claim made other than under the Property (Relationships) Act 1976, for example, if a constructive trust is claimed over property owned overseas. In the Issues Paper (Law Commission *Dividing relationship property – Time for change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017)), we discuss at [32.44]–[33.47] the general rule of private international law that a New Zealand court cannot make a judgment or order relating to foreign immovable property and the decision of *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL).

⁷ In *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA), the Court of Appeal held at 488–489 that claims in respect of foreign property should not be the basis of compensating adjustments to New Zealand assets to ensure

19.7 In relation to movable property, the PRA applies regardless of where the movable property is situated if at least one of the partners is domiciled in New Zealand at the relevant time.⁸ The term "domicile" is generally understood as relating to where a person intends to live permanently.⁹ It may not be where a person physically resides at a certain point. A person may therefore reside in New Zealand for many years without it being their domicile. Where neither partner is domiciled in New Zealand at the relevant time, the PRA will not apply to movable property.¹⁰

Issues

19.8 Three issues arise with section 7. These issues relate to:

- (a) the distinction between movable and immovable property;
- (b) the status of section 7 as a "unilateral choice of law rule"; and
- (c) the domicile test used in relation to movable property.

The distinction between movable and immovable property

19.9 The distinction section 7 makes between movable and immovable property prevents the resolution of property disputes under a single legal regime.¹¹ The PRA might apply to some of the partners' property but will not apply to any immovable property the partners own outside New Zealand. This frustrates the PRA's policy of a just division of property when relationships end and is inconsistent with the principle that questions arising under the PRA be resolved as inexpensively, simply and speedily as is consistent with justice.¹² The increasingly globalised nature of relationships means that property disputes are more likely to involve cross-border issues, and the PRA should be able to respond to such issues as they arise.

that the final division of the total assets reflects a New Zealand approach. This decision was followed in *Shandil v Shandil* [2011] NZFLR 554 (HC).

⁸ For example, in *Johnson v Johnson* [2017] NZCA 147, [2017] 3 NZLR 435 the Court of Appeal said at [31] that it was "beyond doubt" that as between the parties the High Court had jurisdiction over movable property in the United States.

⁹ Under s 9 of the Domicile Act 1976, a person acquires a new domicile if they are living in a country where they are not already domiciled, intend to live in that country indefinitely and are capable of having an independent domicile. In *Johnson v Johnson* [2016] NZHC 890, [2016] 3 NZLR 227, the partners separated six months after moving to New Zealand from the United States. The wife filed proceedings under the Property (Relationships) Act 1976 in New Zealand. The husband disputed whether there had been an intention to domicile in New Zealand. Asher J, applying s 9 of the Domicile Act, held at [17] that the wife, having chosen to move to New Zealand and intending to live here permanently, "ha[d] acquired a new domicile in New Zealand". Asher J's conclusion about the wife's domicile was not disputed on appeal in *Johnson v Johnson* [2017] NZCA 147, [2017] 3 NZLR 435.

¹⁰ Unless the partners have agreed otherwise under s 7A(1) of the Property (Relationships) Act 1976. We note, however, that a court may, under s 7(3), decline to make an order in respect of any movable property situated outside New Zealand. This may happen, for example, if a court concludes that an order would not be capable of being enforced in an overseas jurisdiction.

¹¹ Contrary to s 4 under which the Property (Relationships) Act 1976 is intended to be the principal source of law that governs property matters when a relationship ends. In the Issues Paper, we also observed that it might be difficult to determine whether property is movable or immovable in some situations, such as where the property has an intangible quality to it: Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [32.41].

¹² Section 1N(d).

- 19.10 For example, if before their separation the partners lived in New Zealand but owned a holiday home overseas, they would be unable to divide all of their property under a single legal regime because the PRA would not apply to their holiday home. Instead, they would have to rely on the law of the country in which the holiday home was situated. Depending on the law of that country, the holiday home may be divided in a way that is inconsistent with the policy of the PRA and contrary to the partners' reasonable expectations.
- 19.11 Issues also arise in relation to movable property. If, for example, the partners lived and owned a home in New Zealand during their relationship but shortly before separation moved overseas permanently, taking some movable property with them but retaining some savings and their house in New Zealand, the PRA might only apply to their house in New Zealand if a court determines they had acquired a new domicile overseas. The partners may have to rely on the law of their new home country in respect of their movable property, including their savings still situated in New Zealand.
- 19.12 Parliament revisited section 7 and its jurisdictional distinction between movable and immovable property when considering the Matrimonial Property Amendment Bill in 1999.¹³ The Government Administration Select Committee noted that the underlying rationale for section 7 was the reality that a court in one country is not in a position to make an enforceable judgment in respect of land in another country.¹⁴ Three submitters to the Committee considered the situation of overseas immovable property needed to be addressed,¹⁵ and the Family Law Section of the New Zealand Law Society submitted that not including overseas immovable property could:¹⁶
- ... cause hardship and injustice. Obviously it presents the New Zealand party with the prospect of being obliged to litigate over immovable property overseas. ... The result is that parties are faced with two sets of proceedings, or more likely, one set of proceedings and substantial concessions being given in relation to the property overseas. Basically, it becomes uneconomic to pursue it. Clearly this can be extremely unfair.
- 19.13 However, the Committee noted there were a number of difficulties with requiring a court to take into account overseas immovable property for the purposes of division under what was then the Matrimonial Property Act 1976 (now the PRA).¹⁷ Even if it is done indirectly by entitling one spouse to a greater share of New Zealand matrimonial property, the Committee observed it still involves an implicit classification of that property, and resulting problems include the risk of conflicting judgments over rights to the same property and third party interests and claims not being adequately taken into account.¹⁸ The majority of the Committee did not recommend amendment to the

¹³ Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xv–xvi. See also Ministry of Justice *Matrimonial Property Amendment Bill – Foreign Immovables and Māori Land* (29 April 1999).

¹⁴ Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xv–xvi.

¹⁵ At xvi.

¹⁶ Mary O'Dwyer *Comments on the Matrimonial Property Act 1976 from the Family Law Section of the New Zealand Law Society* (5 May 1999) at 2. However, while sharing the concerns about problems presented to spouses when cross-border issues arise, the Family Law Section did not advocate fundamental change to the legislation at that time.

¹⁷ Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi.

¹⁸ At xvi.

immovable property rule in section 7, considering that such amendments were beyond the scope of the Matrimonial Property Amendment Bill and should not be considered in isolation.¹⁹

- 19.14 In our view, the key consideration about whether the PRA should apply to overseas immovable property is a practical one. That is how an order under the PRA, in relation to overseas immovable property, can be given effect without impinging on the sovereignty of the state where the property is located. In the Issues Paper, we suggested a possible option for reform could be to make provision for a court to make orders against the partners themselves (*in personam* orders) rather than against the property directly (*in rem* orders). For example, a court could order that one partner pay the other compensation if, had the overseas immovable property been situated in New Zealand, it would have been classified as relationship property under the PRA.²⁰

Section 7 as a unilateral choice of law rule

- 19.15 Section 7 is a unilateral choice of law rule. This means it only sets out when the PRA applies. It is silent on which country's law applies when the PRA does not apply, namely, in relation to overseas immovable property or movable property where neither partner is domiciled in New Zealand at the relevant time. This creates uncertainty and risks leaving gaps in the law if no other country's law applies. This is in contrast to the approach taken in many comparable jurisdictions, which adopt a "universal" (or multilateral) choice of law rule in relation to property disputes between partners. A universal choice of law rule determines what country's law will be applied to a dispute, with the objective being to implement the reasonable and legitimate expectations of the parties.²¹ In the Issues Paper, our proposals involved moving away from the unilateral choice of law rule in section 7 to a universal choice of law rule whereby the law of the country to which the relationship had its closest connection is applied.²²

The domicile test

- 19.16 Finally, the domicile test in section 7(2) is problematic. The PRA will apply to movable property whenever one or both of the partners are domiciled in New Zealand at the relevant time. However, New Zealand might not be the country most closely connected to the relationship. For example, it might not be where most of the partners' property is

¹⁹ The Government Administration Committee also noted that initiatives were under way with Australian officials on developing a scheme to address a number of private international issues in the trans-Tasman context, including the possibility of harmonised choice of law rules. The Committee considered that the outcome of that work was "likely to provide a model for dealing with these concerns" (at xvi). No amendments to s 7, however, have eventuated. It remains substantially the same as when it was first introduced as s 7 of the Matrimonial Property Act 1976.

²⁰ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [32.52]–[32.55]. See also [33.59]–[33.64], where we discussed giving a court the power to classify all overseas immovable and movable property under the Property (Relationships) Act 1976 and expanding the range of remedial measures available to the court to acknowledge the overseas property without making orders specifically relating to that property.

²¹ Lord Collins and Jonathan Harris (eds) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [1.005], cited with approval in *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [79].

²² Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [33.30]–[33.37].

located.²³ Similarly, the PRA would not apply under section 7(2) if most of the partners' property was situated in New Zealand but neither partner was domiciled in New Zealand at the relevant time. The domicile test also fails to recognise the increasing reality that two partners can be domiciled in different countries, particularly at the relevant time. A test based only on the domicile of one partner can be unfair to the other partner, especially if that domicile was acquired after the relationship ended.²⁴

- 19.17 These problems mean that the domicile test may fail to reflect partners' reasonable expectations as to what law will apply to their property. The subjective nature of the domicile test is also problematic. It is open to manipulation by one partner as it simply requires an intention to live indefinitely in New Zealand.²⁵ As noted above, in the Issues Paper, we proposed replacing the domicile test with a test that focuses on the country to which the relationship has the closest connection.²⁶

Approach in comparable jurisdictions

- 19.18 Our review of comparable jurisdictions identifies that New Zealand departs from the generally accepted approach in comparable jurisdictions in two key respects.
- 19.19 First, New Zealand is unusual for a rules-based jurisdiction in adopting a unilateral choice of law rule. In Canada, nearly all provinces adopt a universal choice of law rule, which determines which law applies rather than simply stating when the law of that jurisdiction does or does not apply.²⁷ These jurisdictions identify the law to be applied by reference to the jurisdiction that had its closest connection with the relationship, often by identifying where the partners last resided together.²⁸ The variation amongst these

²³ For example, in *Johnson v Johnson* [2016] NZHC 890, [2016] 3 NZLR 227, the partners were United States citizens, were married there in 1998, and moved to New Zealand in 2010. They separated six months later, and the husband returned to the United States. Most of the partners' property was located in the United States. Asher J held at [17] that the Property (Relationships) Act 1976 applied because it was sufficient that the wife, having chosen to move to New Zealand and intending to live here permanently, "ha[d] acquired a new domicile in New Zealand". Asher J's conclusion about the wife's domicile was not disputed on appeal in *Johnson v Johnson* [2017] NZCA 147, [2017] 3 NZLR 435.

²⁴ The power of the New Zealand courts to stay proceedings in favour of an overseas venue may assist in situations where the relationship is more closely connected to another country. However, reliance on staying proceedings makes the law less accessible and less certain for applicants.

²⁵ The courts have defined the requisite intention for domicile as "the intention to reside permanently or for an unlimited time in a country": *Doucet v Geoghegan* (1878) 9 Ch D 441 (CA) at 130, as cited in *Humphries v Humphries* [1992] NZFLR 18 (FC) at 26. See also s 9 of the Domicile Act 1976.

²⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [33.30]–[33.37].

²⁷ Many Canadian provinces adopt the provisions set out in the Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act, which is uniform legislation that has been drafted to be added to the statute in the enacting province or territory that deals with the division of property owned by one or both spouses on the breakup or termination of their relationship. The only Canadian provinces we found that appear to have codified a unilateral choice of law rule are Alberta and Manitoba: see Matrimonial Property Act RSA 2000 c M-8, s 3; and The Family Property Act CCSM 2017 c F25, s 2(1).

²⁸ In all Canadian provinces except Saskatchewan and Quebec, the applicable law is identified by reference to the partners' last common residence: see, for example, Family Law Act RSO 1990 c F.3, s 15; The Family Property Act CCSM 2017 c F25, s 2; Family Law Act SBC 2011 c 25, s 106(3); Matrimonial Property Act RSA 2000 c M-8, s 3(1); Matrimonial Property Act RSNS 1989 c 275, s 22(1); Marital Property Act RSNB 2012 c 107, s 46; Family Law Act RSNL 1990 c F-2, s 32(1); Family Law Act RSPEI 1988 c F-2.1, s 16; Family Law Act SNWT (Nu) 1997 c 18, s 47; and Family

jurisdictions is largely due to which factors are given preference in determining the applicable law (for example, ranking common nationality above common residency or ranking the common residency immediately before separation above the common residency following marriage).

- 19.20 This universal approach contrasts with the unilateral approach in jurisdictions that New Zealand often compares itself with (Australia, England and Wales, Scotland and Ireland), which tend to focus simply on when the law of that country will apply.²⁹ However, these jurisdictions adopt a discretionary regime under which a court has discretion to adjust the partners' property interests on separation, and are therefore less comparable to New Zealand's rules-based regime.
- 19.21 Second, many comparable jurisdictions allow for overseas immovable property to be taken into account in some way. In some jurisdictions, courts have the power to make *in personam* orders in relation to overseas immovable property rather than making orders relating directly to the property itself (*in rem* orders).³⁰ Other jurisdictions simply do not draw a distinction between movable and immovable property in the context of property disputes between partners.³¹
- 19.22 Recent developments in the European Union are of particular interest. In January 2019, European Union Regulations 2016/1103 and 2016/1104 (the EU Regulations)³² came into force, governing the choice of law for property disputes between partners in most European Union countries.³³ The EU Regulations aim to clarify which law will apply to a

Property and Support Act RSY 2002 c.83, s 17(1). For Quebec, it is the first common residence: see Quebec Civil Code Book Two c V, art 3123.

²⁹ In Australia, proceedings may only be brought under the Family Law Act 1975 (Cth) if either partner is an Australian citizen, is ordinarily resident in Australia or is present in Australia at the date of proceedings: s 39(4). The choice of law rules concerning matrimonial property in the United Kingdom and Ireland are also limited to providing when domestic law applies. However, different rules are applied for marriages that are legally ended domestically if a party to the proceedings is an EU-national: see Domicile and Matrimonial Proceedings Act 1973 (UK); Family Law (Divorce) Act 1996 (Ireland), s 39(1); and Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1. Different rules are also applied if a marriage is legally ended in another country: see the Matrimonial and Family Proceedings Act 1984 (UK), s 15 (England and Wales) and s 28 (Scotland); and Family Law Act 1995 (Ireland), s 27.

³⁰ For example, the provincial courts in Canada (including British Columbia, Saskatchewan, Alberta, Brunswick, Newfoundland and Labrador, Nova Scotia, Yukon, Ontario and Prince Edward Island) have the power to take into account property located elsewhere without being able to make orders in relation to the property itself. In England and Wales, if there is property situated overseas, this can be taken into account when granting financial relief under either the Matrimonial and Family Proceedings Act 1984 (UK) or the Matrimonial Causes Act 1973 (UK). In Australia, the position was summed up in *Chen v Tan* [2012] FamCA 225 where the Family Court stated:

As authorities in family law make plain ... once a matter within the definition of "matrimonial cause" enlivens the jurisdiction of the Australian court, it is Australian law which the court applies, and it may adjust the property rights of the parties in property located overseas, regardless of any rights acquired or vested in the parties under foreign law.

³¹ See, for example, ch 3 of the Swiss Federal Code on Private International Law; and ch 2 of the Hague Convention on the Law Applicable to Matrimonial Property Regimes (opened for signature 14 March 1978, entered into force 1 November 1992) (ratified by France, Luxembourg and the Netherlands).

³² Regulation 1103/2016 [2016] OJ L183/1 implements enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and Regulation 1104/2016 [2016] OJ L183/30 implements enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

³³ The rules are universal in scope (art 21 of both EU Regulations), which means that the law of any other state (including non-EU States) may be found to be applicable irrespective of where the assets are located. The principle of mutual recognition means that a decision in one Member State will be recognised in another without any special

partners' property dispute. They do not distinguish between movable and immovable property and use a hierarchy of connecting factors to identify the relevant law: first, the partners' initial common habitual residence after marriage; second, the partners' common nationality at that time; or failing that, third, the law of the country that has the closest connection with the couple, taking into account all the circumstances at the time the relationship started.³⁴

Results of consultation

- 19.23 We received 27 submissions on the Issues Paper and the Preferred Approach Paper that addressed cross-border issues. These included comments from the Judges of the Family Court and submissions from the New Zealand Law Society (NZLS), the New Zealand Federation of Business and Professional Women (BPWNZ), eight academic and practitioner experts and 15 members of the public.
- 19.24 There was strong support among members of the public for a court having the ability to take into account the partners' worldwide assets when classifying and dividing relationship property under the PRA when the relationship had a connection to New Zealand. Several members of the public told us of personal experiences where property was owned overseas and the frustrations encountered in trying to access entitlements to that property. Problems included the cost and time of using lawyers overseas, issues with arranging payment of overseas lawyers, difficulties enforcing agreements in another country, problems in identifying the scope of the property (for example, failure of one partner to disclose the property or rental income from the property) and a lack of measures to ensure access to overseas property.
- 19.25 Most academic and practitioner experts supported reform of section 7. Dr Maria Hook and barrister Jack Wass jointly submitted that section 7 should be replaced with a universal choice of law rule, which would be more consistent with an internationalist approach to the conflict of laws. They submitted that a universal choice of law rule would recognise the multifaceted nature of relationships and should also enable a unitary determination of the claim based on one applicable law. They submitted that the court should identify the law with the closest and most real connection to the relationship by reference to a non-exhaustive list of factors that could include places of common residence, extent of social integration, whether parties organised their affairs on the basis of a particular law and whether the principles of the PRA favour connection with one country over another (for example, if one country did not recognise same-sex marriage).
- 19.26 Dr Hook and Wass also submitted that the PRA should adopt a more flexible approach to subject matter jurisdiction that has as its primary goal the effective coordination of

procedure: art 36 of both EU Regulations. Article 37 of both EU Regulations lists the grounds of permissible non-recognition, such as where the decision is contrary to public order.

³⁴ Article 26(1) of Regulation 1103/2016 [2016] OJ L183/1. For partners in a registered partnership without a valid property sharing agreement, the relevant law under art 26(1) of Regulation 1104/2016 [2016] OJ L183/30 is first the law of the state under whose law the registered partnership was created. By way of exception and upon application by either partner, a court may conclude under art 26(2) that the law of another state is applicable:

if the applicant demonstrates that: (a) the partners had their last common habitual residence in that other State for a significantly long period of time; and (b) both partners had relied on the law of that other State in arranging or planning their property relations.

relationship property claims across borders. To that end, they submitted that courts should have discretion to decline the exercise of jurisdiction over the claim as a whole or in relation to particular property. Where the relief granted over foreign property is unlikely to be effective or where there is a risk of irreconcilable decisions or where another court has already assumed jurisdiction, they submitted that the court should consider its role in the management and liquidation of the personal property relationship and be prepared to adjust the form of relief or, exceptionally, to decline judgment. Finally, they submitted that the court's jurisdiction should not extend to orders vesting title in foreign property, especially if title depends on registration. It should instead be limited to *in personam* relief, for example, in the form of an order that the defendant pass title or compensation orders that simply take into account the value of the property.

- 19.27 Academic Jan Jakob Bornheim also supported reform. Bornheim noted that the unilateral nature of section 7 is problematic for several reasons. It provides no principled basis for determining the applicable law when the PRA does not apply. It could also constitute a problem for foreign courts seeking to apply New Zealand law under a unilateral choice of law rule because section 7 only describes the territorial scope of application of the PRA. This could mean that foreign laws would render New Zealand law applicable but New Zealand law itself would exclude the PRA's application. As a result, the foreign system would be faced with a reference to New Zealand law but New Zealand law would be "empty" and contain no rules that can resolve the issue at hand. Bornheim supported adopting a universal choice of law rule, absent an agreement between the partners. Such a rule, Bornheim submitted, should apply to any issues that are characterised as being one of relationship property law to be determined as a matter of New Zealand law. Bornheim also submitted that the subject matter limitation regarding overseas immovables be abolished and that choice of law rules should not distinguish between movable and immovable relationship property.
- 19.28 As to when the PRA should apply, Bornheim submitted that the focus should be on common habitual residence rather than a broader inquiry into the "proper law of the relationship property", which would allow a court to take into account a wider variety of factors without any foreseeability or predictability. Bornheim submitted that, at the very least, the presumption should be that the law is determined according to clear guidelines unless a manifestly closer connection to a different jurisdiction can be established. Bornheim also submitted that a change in applicable relationship property law should have retroactive effect to the beginning of the relationship but that this should not affect transactions already completed before the change in applicable law. Where foreign law contains property rights unknown to New Zealand law, Bornheim submitted that a court should be able to transpose such rights to the corresponding New Zealand equivalent.
- 19.29 NZLS agreed reform is necessary. It agreed with the logic of applying the PRA to a relationship that is most closely connected to New Zealand. It noted, however, that this may raise issues of enforceability. NZLS suggested that relevant factors in determining a relationship's closest connection should include the residency, citizenship or visa status of the partners, any children of the relationship and their nationality, the spread of assets in the various jurisdictions and whether the family home is in the New Zealand jurisdiction. Where the PRA applied, NZLS supported a provision allowing a court to order compensation to take into account overseas immovable property where there is

clear evidence that the property exists and evidence of its value. It suggested clear statutory guidance on considerations a court should take into account when ordering compensation, such as whether the majority of the parties' relationship property is in New Zealand.

- 19.30 The Judges of the Family Court also supported reform, commenting that, despite the risk of interfering with the jurisdiction of another country, the inability of a court to compensate for an interest in overseas immovable property is a gap in the legislation that can give rise to injustice. The Judges considered that an amendment to section 7(1) allowing the Family Court to "compensate a party for an interest in overseas immovable property by taking it into account in the final property division" would be "a desirable reform". They noted, however, that compensation might have the effect of interfering with the jurisdiction of a foreign court over the same property, particularly if the compensation is coupled with a declaration or documentation that purports to limit a party's right to pursue a claim over the same property in a foreign court. The lack of such an express limitation, however, could potentially allow dual claims in two jurisdictions.

Conclusions

RECOMMENDATIONS

- R130** Section 7 of the PRA should be repealed, and the new Act should provide that, in the absence of a valid foreign law agreement, the law to be applied to property disputes between partners shall be the law of the country to which the relationship had its closest connection.
- R131** The new Act should provide a presumption that the country to which a relationship had its closest connection is the country where the partners last shared a common residence unless either partner satisfies a court that the relationship had its closest connection with another country.
- R132** Where the new Act applies under R130, all of the partners' property, including movable and immovable property situated outside New Zealand, should be subject to the new Act's rules of classification and division.
- R133** The court's broad ancillary powers to give effect to a division of relationship property under R86 should expressly include the power, in relation to property situated outside New Zealand, to order a partner to transfer the property or pay a sum of money to the other partner.

19.31 We recommend repealing section 7 and adopting a universal choice of law rule under which the domestic law of the country to which the relationship had its closest connection is applied.³⁵ We refer to this as the "closest connection test". This will ensure that, when a relationship had its closest connection with New Zealand, the Relationship Property Act (the new Act) will operate as a comprehensive regime. A universal rule is also more compatible with the approach taken in comparable rules-based jurisdictions and will give better effect to the reasonable expectations of partners whose relationship had its closest connection with New Zealand.

The closest connection test

19.32 In order to promote greater predictability and certainty, we consider that the new Act should provide a presumption that a relationship had its closest connection with the country where the partners last shared a common residence. The objective nature of such a presumption should allow partners to easily identify the law that applies to their property dispute and would also enable the courts to determine which law to apply without requiring a detailed examination of the partners' relationship and property affairs. Such a presumption should be rebuttable, however, if a partner can establish that the country where the partners last shared a common residence is not the country with which the relationship had its closest connection. For example, if the partners separated while living abroad due to one partner's temporary relocation for work but most of their property remained in their home country, the presumption would not apply. The presumption would also not apply if the partners had never shared a common residence.

19.33 When the presumption is challenged or does not apply, it would be up to a court to decide, as a question of fact, the country to which the relationship had its closest connection.³⁶ Below is a non-exhaustive list of factors we suggest should be considered:

- (a) whether the proposed country was the domicile of one or both of the partners during the relationship;
- (b) other countries where the partners lived together (or apart) during the relationship;
- (c) the extent to which the partners continue to identify with (or have become alienated from) the proposed country;
- (d) the social and personal connections the partners have with the proposed country;

³⁵ Consideration should be given to whether a court may be required to apply the law of another country, under the doctrine of *renvoi*. See discussion in David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 129–130.

³⁶ See the recent New Zealand case of *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261, where the Court held at [36] that an inquiry into "ordinary residence" should logically address where the subject person's home had been up until the critical date, where that person was living at the critical date and that person's then intentions as to the future. Further, where a person is not living in New Zealand but has in the past lived in New Zealand, that person's intentions as to future residence will be material to whether they remain ordinarily resident in New Zealand (at [37]). The state of mind of the subject person, however, is only one consideration and must be assessed alongside the domestic realities of that person's life, including the length of time the person has lived out of New Zealand, the age of the subject person and family connections with New Zealand and the other country (at [37]). For a discussion of the Court of Appeal decision, see also Douglas White "A Personal Perspective on Legislation: *Northern Milk* Revisited – Soured or Still Fresh?" (2016) 47 VUWLR 699 at 705–707.

- (e) the location of the family home during the relationship;
- (f) if there are dependent children of the relationship, where they lived during the relationship;
- (g) where the partners' immovable property was located during the relationship;
- (h) whether the partners organised their property affairs during the relationship on the basis that the law of a particular country applied; and
- (i) whether the connection with the proposed country had been sustained over a long period.

19.34 The closest connection test is focused on the connection between a country and the *relationship* rather than the partners individually. A relationship may have a connection to more than one country, but the closest connection test embodies the idea that the partners would reasonably have expected that the applicable law would be that of the country to which the relationship was closest. To apply the law of another country would frustrate the partners' expectations.

When the new Act applies under the closest connection test

19.35 When the new Act applies under the closest connection test, all of the partners' property, including movable and immovable property situated outside New Zealand, should be subject to the new Act's rules of classification and division. This means that a court should be able to take into account all of the partners' property irrespective of where it is located and classify that property as relationship property or separate property. The net value of relationship property available for division between the partners should include the value of any items of relationship property that are situated overseas.

19.36 Where relationship property is situated overseas, a court should be able to use its full range of ancillary powers, currently available under section 33 of the PRA, to implement a division in a way that best addresses the partners' circumstances and the location of the property. If relationship property comprises overseas immovable property, a court should be able to make *in personam* orders by way of relief, such as an order that one partner transfer property or pay a sum of money to the other partner.³⁷ We recommend that the new Act expressly provide that a court has such a power.³⁸

19.37 When considering how to implement a division of relationship property that includes property situated overseas, a court should take into account the ability to enforce its orders effectively. Where orders made in respect of foreign property are unlikely to be effective or where there is a risk of irreconcilable decisions between two or more countries, the court should be prepared to adjust the form of relief. However, we expect

³⁷ We see this as being consistent with the general rule of private international law that a New Zealand court cannot make a judgment or order relating to foreign immovable property and the established application and exceptions to the decision of *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL). See discussion in Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [32.44]–[33.47]. Orders will need to be in a form that does not raise concerns under the Trans-Tasman Proceedings Act 2010.

³⁸ Similar to s 33(3)(n) of the Property (Relationships) Act 1976, which grants a court the power to make orders against a partner in respect of their separate property rather than orders against the separate property itself.

such situations to be rare because a court must first be satisfied that the relationship had its closest connection with New Zealand if the new Act is to apply.

- 19.38 This will enable the new Act to operate as a comprehensive regime and achieve a just division of all of the partners' property. Granting a court powers to take account of all property is consistent with the approach taken in many comparable jurisdictions, responds to the risk of power imbalances where one partner controls overseas property and encourages full disclosure.³⁹ If partners are able to deal with all their property under a single, comprehensive regime, this will promote the inexpensive, simple and speedy resolution of property matters.

GIVING EFFECT TO PARTNERS' FOREIGN LAW AGREEMENTS

Background

- 19.39 Section 7A applies where the partners have made an agreement on what law should be applied to their property. Such agreements are called choice of law agreements.

- 19.40 Section 7A provides:

7A Application where spouses or partners agree

- (1) This Act applies in any case where the spouses or partners agree in writing that it is to apply.
- (2) Subject to subsections (1) and (3), this Act does not apply to any relationship property if—
 - (a) the spouses or partners have agreed, before or at the time their marriage, civil union, or de facto relationship began, that the property law of a country other than New Zealand is to apply to that property; and
 - (b) the agreement is in writing or is otherwise valid according to the law of that country.
- (3) Subsection (2) does not apply if the court determines that the application of the law of the other country under an agreement to which that subsection applies would be contrary to justice or public policy.

- 19.41 The effect of section 7A(1) is that partners can expressly agree that the PRA will apply to their property even if neither partner is domiciled in New Zealand. If such an election is made, this would cover all immovable property in New Zealand and all movable property but would not cover overseas immovable property.

- 19.42 Partners may also expressly agree that the property law of another country should apply to their property under section 7A(2).

- 19.43 Section 7A(3) allows a New Zealand court to disregard a choice of law agreement under section 7A(2) if it determines that applying the law of another country would be contrary to justice or public policy. This reflects the well-established principle of New Zealand private international law that New Zealand courts will not apply a foreign law if it is contrary to a fundamental policy of New Zealand law.⁴⁰ In *New Zealand Basing Ltd*

³⁹ A failure to fully disclose all foreign property interests would be subject to the same consequences of non-disclosure discussed in Chapter 16.

⁴⁰ Marcus Pawson *Laws of New Zealand Conflict of Laws: Choice of Law* (online ed) at [14].

v Brown, the Court of Appeal explained that the test was whether applying the foreign law in question would "shock the conscience of a reasonable New Zealander, be contrary to a New Zealander's view of basic morality or violate an essential principle of justice or moral interests".⁴¹ The policy infringement:⁴²

must be of a fundamental or universal value, not simply the result of a ranking within a spectrum of relative values which are recognised in one legal system but not the other.

19.44 Few cases, however, provide an indication of how this principle is to be applied under section 7A(3) of the PRA.⁴³

Issues

19.45 Several issues arise with section 7A.

19.46 First, section 7A(2) only applies to agreements made "before or at the time [the partners'] marriage, civil union or de facto relationship began". It does not apply to agreements entered into during a relationship, including while the partners are in a de facto relationship but before they marry.⁴⁴ This is inconsistent with the priority given to the partners' autonomy in section 21 of the PRA, which gives partners the freedom to contract out of the PRA at any point during their relationship. It is also out of step with the increasing number of couples who enter into de facto relationships prior to marriage, and who may want to enter into a choice of law agreement at that stage of their relationship.

19.47 Second, a choice of law agreement may fail to satisfy the technical requirements in section 7A(2) if it does not expressly state which country's law is to apply.⁴⁵ An implicit choice of law is insufficient, even if the principles of contractual interpretation otherwise indicate that the partners had intended the law of a specific country to apply.⁴⁶ A further issue with the technical requirements of section 7A(2) is that the agreement must refer to "the property law" of a country that is to apply to the partners' property,

⁴¹ *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [67]. Note that the decision was overturned by the Supreme Court, but the Court observed that the parties' choice of law provision was irrelevant to the appeal: *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245 at [90]. See also *Reeves v OneWorld Challenge LC* [2006] 2 NZLR 184 (CA).

⁴² *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [68].

⁴³ In *Bergner v Nelis* HC Auckland CIV-2004-404-149, 19 December 2005, the High Court noted at [25] that some earlier decisions in the Family Court (*Pretorius v Pretorius* [2000] NZFLR 72 (FC) at 77 and *H v H* [2004] NZFLR 1096 (FC) at 1102–1103) had suggested that a foreign agreement might not properly be enforced on public policy grounds if there were a material difference between the outcome under the Property (Relationships) Act 1976 and the chosen law. While leaving the question open for further consideration, the High Court observed at [27] that:

It is, at least, seriously arguable that Parliament intended agreements entered into in another jurisdiction to be given effect, irrespective of the result of the application of the chosen law, unless (for example) the parties had insufficient connection to the chosen law to justify its use. If that were not so, there would be little point in the parties choosing the law of another jurisdiction to govern their property arrangements.

⁴⁴ *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460 at [27].

⁴⁵ *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460. In that case, the Court held at [26] that s 7A(2) did not apply because the couple's agreement was:

... one which contracts out of the relevant South African matrimonial property legislation but does not explicitly state which country's property laws are to apply to any relationship property acquired in other jurisdictions.

⁴⁶ The High Court of Australia described explicit and implicit choice of law agreements as "but species of the one genus, that concerned with giving effect to the intention of the parties" in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 440.

when in fact the relevant law of a country may not be property law but something else, such as a matter of unjust enrichment or constructive trust.

- 19.48 Third, the relationship between section 7A and the contracting out provisions in Part 6 of the PRA is unclear. Section 7A does not contemplate partners making a choice of law agreement alongside (or as part of) an agreement with respect to the status, ownership and division of some or all of their property that is made under the law of another country. It is unclear whether a court can uphold such an agreement that fails to satisfy the technical requirements of section 7A(2) and/or section 21F under section 21H.⁴⁷ Partners immigrating to New Zealand might be required to enter into a new agreement under section 21 of the PRA that satisfies the procedural requirements under section 21F, which may be costly.
- 19.49 Fourth, it is unclear when section 7A(3) applies, given the absence of statutory guidance or settled case law.
- 19.50 The cumulative effect of these issues is that agreements, particularly those entered into outside New Zealand, may not be recognised under section 7A even where the partners have organised their affairs in reliance on an agreement. Failing to uphold an agreement on technical grounds or simply because the partners were already in a relationship would be inconsistent with the priority given to partners' autonomy to choose the property consequences of their relationship.

Results of consultation

- 19.51 Members of the public generally supported partners being able to rely on choice of law agreements entered into before or during the relationship. One member of the public, however, felt that the agreement should only be enforceable if it was entered into before the relationship began.
- 19.52 NZLS and academic and practitioner experts generally supported extending section 7A(2) to include agreements made during a relationship and clarifying that reference to the law of another country rather than the property law of another country should be sufficient for a valid agreement.
- 19.53 Submissions were mixed on whether choice of law agreements should include agreements where a choice of law is implied rather than expressly stated. Bornheim supported the enforcement of an implied choice of law where conventional rules of contractual interpretation lead to a conclusion that the parties intended the agreement to be governed by the laws of a specific jurisdiction. Dr Hook and Wass did not, however, consider that section 7A(2) should include an implied choice of law. They suggested a more principled approach would be to treat the parties' expectations as one factor to be taken into account in identifying the applicable law. NZLS made a similar submission, saying that it should be left to the court's discretion to decide whether the PRA should apply if the partners do not say in their agreement which

⁴⁷ In *Stark v Stark* [1996] NZFLR 36 (DC), the Court recognised the possibility that an agreement entered into overseas could be treated as a contracting out agreement under s 21 of the Matrimonial Property Act 1976 (now pt 6 of the Property (Relationships) Act 1976 (PRA)) and that a court may give effect to that agreement even though it did not satisfy the procedural requirements set out in what was s 21(6) of the Matrimonial Property Act (now s 21F of the PRA). The Court refused to do so, however, on the basis that it was not satisfied that the non-compliance did not materially prejudice the interests of the partners as required under what is now s 21H of the PRA.

country's law should apply. NZLS submitted, however, that there should be a rebuttable presumption that New Zealand law applies and that the onus should be on the person seeking to rely on foreign law to prove otherwise.

- 19.54 Submitters were generally in agreement that greater guidance is needed as to when a court can set aside an otherwise valid choice of law agreement. NZLS submitted that a court should have regard to the factors in section 21J(4). NZLS recommended, however, a lower threshold than "serious injustice" in order to set an agreement aside given that agreements entered into overseas may not be subject to the same procedural safeguards as an agreement entered into in New Zealand. The Judges of the Family Court commented that a court should retain a wide discretion to set aside agreements that are contrary to justice or public policy. They did not therefore support a "serious injustice" test similar to that in section 21J. Bornheim submitted that the current phrasing of the public policy exception in section 7A(3) would be too narrow for a universal choice of law rule absent a choice of law agreement as it would not encompass cases where the law designated by the default rule violates public policy. It would also be too wide because it suggests that the foreign law can be disregarded in favour of New Zealand law altogether. Bornheim instead proposed that the application of a rule of law of any country may be refused if such application is contrary to justice or public policy but that such an exception should be limited to remedying the specific public policy violation rather than disregarding the entire foreign law in question. Bornheim further argued that the public policy exception should be able to apply regardless of whether the applicable law is determined according to a choice of law agreement or a choice of law rule.

Conclusions

RECOMMENDATIONS

- R134** Section 7A of the PRA should be repealed, and the new Act should not apply to property that is subject to a valid foreign law agreement.
- R135** A foreign law agreement should include any agreement where:
- a. the partners expressly agree that the law of another country is to apply to some or all of their property;
 - b. it is apparent from the agreement that the partners intended the law of another country to apply to some or all of their property; or
 - c. the partners make an agreement in accordance with the law of another country with respect to the status, ownership and division of some or all of their property.
- R136** The partners should be able to make a foreign law agreement at any time.

- R137** A foreign law agreement will only be valid if it:
- a. is in writing;
 - b. is signed by both partners; and
 - c. meets the legal requirements of a valid agreement under the law of the country that is applied under the agreement (the nominated country) or under the law of the country with which the relationship had its closest connection, subject to R138.
- R138** If a relationship has no connection to the nominated country and New Zealand is the country with which the relationship had its closest connection, a foreign law agreement must meet the legal requirements of a valid agreement under New Zealand law.
- R139** Regardless of R130 or R134, the new Act should apply to the extent that a court is satisfied that applying the law of another country or giving effect to a foreign law agreement would be contrary to public policy, having regard to a number of specified considerations.

- 19.55 We recommend repeal of section 7A in order to give better effect to the reasonable expectations of partners who make agreements about how their property should be divided on separation.
- 19.56 The new Act should not apply to property that is subject to a foreign law agreement that satisfies the procedural requirements in R137. If the foreign law agreement is invalid or applies only to part of the partners' property, the law to be otherwise applied should be the law of the country to which the relationship had its closest connection under the closest connection test discussed above.

Foreign law agreements

- 19.57 Foreign law agreements should include the following:
- (a) The partners expressly agree that the law of a country other than New Zealand is to apply to some or all of their property. It should not be necessary for the agreement to expressly refer to "the property law" of another country. This overcomes issues that may arise if the relevant law of the other country is not a matter of property law but, for example, a matter of unjust enrichment or constructive trust.
 - (b) The partners make an implied choice of law in respect of some or all of their property. This addresses the risk that, in some cases, an agreement may fail to specify that the law of a particular country is to apply to the partners' property but it is apparent from the terms of the agreement that the partners intended that law to apply. In such cases, a court should be able to draw an inference that the

partners intended the law of a particular country to apply to their property.⁴⁸ We acknowledge that giving effect to an implied choice of law risks attributing an intention to the partners that was not there. In our view, however, the risk is low given that a court would need to be satisfied that it is readily apparent from the terms of the agreement that the partners intended that law to apply.

- (c) The partners make an agreement in accordance with the law of another country with respect to the status, ownership and division of some or all of their property (overseas property sharing agreement). Such agreements will be different to contracting out or settlement agreements entered into under the new Act as they are not negotiated under New Zealand law or under the new Act, in particular. They should not therefore be subject to the same procedural requirements as contracting out and settlement agreements under the new Act.

All foreign law agreements must satisfy procedural requirements

19.58 We recommend that a foreign law agreement should satisfy certain procedural requirements in order to be recognised and given effect under the new Act. The agreement must be in writing and signed by both partners. It must also meet the legal requirements of a valid agreement under the law of the country that is applied under the agreement (the nominated country) or under the law of the country with which the relationship had its closest connection.

19.59 Where a relationship had no connection with the nominated country and the relationship had its closest connection with New Zealand, the agreement should comply with the law of New Zealand. This will ensure that partners whose relationship is centred in New Zealand cannot simply avoid the legal requirements for contracting out and settlement agreements under the new Act by choosing to apply the law of another country with which they have no connection.

19.60 We recognise the risk that, by relying on the legal requirements of the nominated country or the country with which the relationship had its closest connection, an agreement might not have the procedural safeguards that would otherwise apply had the agreement been entered into in New Zealand. For example, partners entering into an overseas property sharing agreement might not need to obtain independent legal advice as they would be required to do under the new Act. However, imposing New Zealand's procedural requirements on agreements entered into outside New Zealand would impose a significant burden on the partners. It would also invalidate many agreements that had been made pursuant to the law of the nominated country, undermining the autonomy of partners who enter into an agreement in good faith.

19.61 In our view, this risk is appropriately addressed by granting a court discretion to refuse to recognise a foreign law agreement where that would be contrary to New Zealand public policy (discussed below).

⁴⁸ In *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, the majority of the High Court of Australia held at 441 that an inferred term was not so much a matter of implying a choice of law as a matter of construction that:

... requires consideration of the terms and nature of the contract and "the general circumstances of the case" ... What is involved in inquiring whether the parties have exercised their liberty to select a governing law is the ascertainment of that which, in truth, the parties are to be taken to have agreed ... [whether] the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law.

The New Zealand public policy exception

- 19.62 We recommend that a court should be able to apply the new Act regardless of the existence of a valid foreign law agreement to the extent that giving effect to that agreement would be contrary to public policy. In our view, it is appropriate that a court should retain a residual discretion not to give effect to a valid agreement (wholly or in part) in order to maintain the integrity of the New Zealand legal system and of New Zealand family law policy.
- 19.63 We also consider that a court should have the same discretion where the law of another country applies under the closest connection test.
- 19.64 In our view, the exception should continue to focus on public policy grounds. The concept of law being contrary to public policy is a well-established principle of private international law. In the words of the Court of Appeal, the policy infringement:⁴⁹
- ... must be of a fundamental or universal value, not simply the result of a ranking within a spectrum of relative values which are recognised in one legal system but not the other.
- 19.65 We do not recommend retaining a specific reference to "justice" in the new exception. As explained at paragraph 19.43, an element of the public policy test is whether an essential principle of justice is violated.⁵⁰ It is therefore unnecessary to refer to justice separately alongside public policy. It would also risk confusion and uncertainty as to the scope and purpose of the exception, particularly as our recommendations apply to overseas property sharing agreements. There may be a temptation to compare overseas property sharing agreements with contracting out and settlement agreements entered into under the new Act and the test for setting aside such agreements on the grounds of "serious injustice".⁵¹ As we explained at paragraph 19.57(c), overseas property sharing agreements are different to contracting out and settlement agreements and, accordingly, the test for setting aside such agreements involves different considerations.⁵²
- 19.66 We recommend that the new Act prescribe specific considerations that a court should take into account when determining whether giving effect to a foreign law agreement or applying the law of another country would be contrary to New Zealand public policy. Without limiting the scope of the test, these considerations are designed to guide a court's exercise of discretion with particular reference to New Zealand family law policy and the new Act. We do not recommend incorporating the existing considerations in section 21J(4) of the PRA, which apply where a court is considering whether to set aside a contracting out or settlement agreement on the grounds of serious injustice, for the same reasons given at paragraph 19.65. Rather, when the partners have entered into an overseas property sharing agreement in accordance with the law of another country, a New Zealand court should consider whether, under the law of that country, an agreement can be set aside on similar grounds to section 21J. If there is no discretion to set aside an agreement under the law of that country, a court might find that applying

⁴⁹ *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [68].

⁵⁰ At [67].

⁵¹ Property (Relationships) Act 1976, s 21J.

⁵² For example, s 21 and 21A agreements do not require a public policy test as they already operate within the context of the Property (Relationships) Act 1976 and its protections, which is New Zealand legislation.

the law of that country and giving effect to that agreement would be contrary to public policy.

- 19.67 The prescribed considerations should not be an exhaustive list and should only be indicative of the relevant considerations in any particular case. They should include:
- (a) the likely effect of applying the agreement or the law of another country on the partners;
 - (b) the extent to which the agreement or the law of another country is consistent with the purpose of the new Act and with New Zealand family law policy in general;
 - (c) in respect of an overseas property sharing agreement, the scope, if any, for that agreement to be set aside under the law of the country in accordance with which it was made; and
 - (d) in respect of any agreement, whether the partners received independent legal advice before signing the agreement.
- 19.68 Where only part of an agreement or a particular aspect of foreign law is contrary to public policy, the application of the new Act should be limited to remedying the specific public policy violation. In our view, this best promotes partners' autonomy to choose the property consequences of their separation. This is also consistent with our recommendation in Chapter 13 that a court should be able to set aside a contracting out or settlement agreement in part. As we note in Chapter 13, a court should not exercise this power if it would unfairly distort the partners' original bargain.

JURISDICTION OF NEW ZEALAND COURTS TO HEAR AND DECIDE PROPERTY DISPUTES

Background

- 19.69 The Family Court has jurisdiction to hear and determine all applications under the PRA.⁵³ This includes applications relating to immovable property situated in New Zealand and to movable property wherever situated if one of the partners is domiciled in New Zealand at the relevant time.⁵⁴ This is the extent of the Family Court's "subject matter jurisdiction" in relation to property disputes between partners.⁵⁵
- 19.70 The Family Court does not have subject matter jurisdiction to hear and determine disputes about property owned by either or both partners where the PRA does *not* apply. This includes where the partners have agreed that the law of another country applies to their property under section 7A(2), where the property in question is overseas immovable property⁵⁶ or where the property in question is movable property

⁵³ Section 22. This is subject to a power under s 38A to transfer proceedings to the High Court. We discuss the jurisdiction of the Family Court and High Court in Chapter 17.

⁵⁴ Pursuant to s 7. A partner must be domiciled in New Zealand at the date of an application made under the Act, at the date of any agreement between the partners relating to the division of their property or at the date of their death: s 7(2).

⁵⁵ See David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at [2.2].

⁵⁶ *Walker v Walker* [1983] NZLR 560 (CA); and *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA).

but neither partner is domiciled in New Zealand at the relevant time.⁵⁷ In these situations, an application would have to be made in the High Court or District Court,⁵⁸ although we note the view that no New Zealand court has jurisdiction to hear and decide property disputes between partners where the PRA does not apply by virtue of section 7.⁵⁹

- 19.71 To bring a matter before a New Zealand court, "personal jurisdiction" must also be established. Personal jurisdiction generally requires valid service of proceedings on the person against whom the claim is made (the respondent). A respondent can be served at any time when they are in New Zealand. When a respondent is overseas, service may require leave of the court.⁶⁰ When granting leave, the court must be satisfied that:⁶¹
- (a) the claim has a real and substantial connection with New Zealand;
 - (b) there is a serious issue to be tried on the merits;
 - (c) New Zealand is the appropriate forum for the trial; and
 - (d) any other relevant circumstances support an assumption of jurisdiction.
- 19.72 Where the respondent is served in New Zealand, they can ask the New Zealand court to stay or dismiss the proceeding on the basis that New Zealand is *forum non conveniens*, that is, the courts of another country are clearly the more appropriate forum for the matter to be heard and determined, rather than a New Zealand court.⁶²
- 19.73 A respondent served overseas can object to a New Zealand court's exercise of jurisdiction,⁶³ and a court can decline to exercise jurisdiction if the factors identified above are not satisfied.⁶⁴ They may also object to New Zealand as the venue for the proceeding on the basis that New Zealand is *forum non conveniens*.⁶⁵

Issues

- 19.74 In the Issues Paper, we observed that there do not seem to be any major issues in relation to the jurisdiction rules but we considered there was an issue relating to which

⁵⁷ The Property (Relationships) Act 1976 does not apply by virtue of s 7(2).

⁵⁸ In accordance with the High Court's inherent jurisdiction and the District Court's general civil jurisdiction under s 74 of the District Courts Act 2016 to hear claims of up to \$350,000 in value.

⁵⁹ Campbell McLachlan "Matrimonial Property and the Conflict of Laws" (1986) 12 NZULR 66 at 75–77.

⁶⁰ Rule 130 of the Family Court Rules 2002 states that rr 6.23, 6.24, 6.25, 6.27, 6.30 and 6.32 of the District Court Rules 2014 apply to service abroad of proceedings under the Property (Relationships) Act 1976. The equivalent High Court Rules are rr 6.27–6.32. Service outside New Zealand may require leave pursuant to r 6.24 of the District Court Rules or r 6.28 of the High Court Rules.

⁶¹ District Court Rules 2014, r 6.24(5); and High Court Rules 2016, r 6.28(5).

⁶² Goddard and McLachlan observe that the issues of jurisdiction and *forum conveniens* are conceptually distinct, although some factors are relevant to both: David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 15.

⁶³ District Court Rules 2014, r 5.51; and High Court Rules 2016, r 5.49.

⁶⁴ District Court Rules 2014, r 6.25; and High Court Rules 2016, r 6.29.

⁶⁵ Goddard and McLachlan note that where the defendant objects to jurisdiction under r 5.49 and is arguing that New Zealand is not *forum conveniens* in that context, it is unnecessary to make a separate application for a stay on the ground that New Zealand is *forum non conveniens*: David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 43.

New Zealand court should hear and determine a property dispute between partners when another country's law is to be applied.⁶⁶

- 19.75 As explained above, the Family Court cannot hear a claim in respect of property that the PRA does not apply to under section 7. For example, if partners are domiciled in New Zealand but own a holiday home in another country, the Family Court does not have jurisdiction to apply the law of that other country to the holiday home. An application to the High Court or District Court would be required, although the extent to which these courts have jurisdiction to hear and determine the matter is also uncertain, as noted above.⁶⁷

Results of consultation

- 19.76 The Judges of the Family Court commented that the Family Court should have sole jurisdiction to hear relationship property matters that involve cross-border disputes. They said the Family Court has developed expertise in dealing with applications under the PRA, as reflected in the very low number of successful appeals against Family Court decisions in the High Court. They did not consider there is any issue with the Family Court hearing and determining applications under sections 7 and 7A of the PRA.
- 19.77 NZLS submitted that there is capacity for the Family Court to exercise originating jurisdiction in relation to cross-border issues and that this should be retained. Just because the law of another country might apply does not, NZLS said, mean that a matter should automatically be transferred to the High Court. NZLS agreed, however, that any dispute involving the application of foreign law should be able to be transferred to the High Court from the Family Court. One practitioner who argued that the Family Court is able to deal with matters requiring the application of foreign law noted that this already occurs with matters under the Hague Convention on the Civil Aspects of International Child Abduction.⁶⁸
- 19.78 Few submitters commented on how the rules relating to jurisdiction are applied in practice. Those who did comment did not identify any serious issues with their operation. One lawyer noted it would be more efficient and cost-effective to file an originating application and seek directions as to service at the same time. They considered that a claimant would save money by bringing the issue of service to the court's attention early on.

⁶⁶ Law Commission *Dividing relationship property – Time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [33.55]–[33.58].

⁶⁷ Campbell McLachlan "Matrimonial Property and the Conflict of Laws" (1986) 12 NZULR 66 at 75–77.

⁶⁸ Hague Convention on the Civil Aspects of International Child Abduction 1343 UNTS 89 (opened for signature 25 October 1980, entered into force 1 December 1983).

Conclusions

RECOMMENDATION

R140 The first instance jurisdiction of the Family Court should be extended to include applications that involve the application of the law of another country under R130 or R134.

- 19.79 We recommend that the Family Court should have first instance subject matter jurisdiction in respect of all property disputes between partners, regardless of whether the new Act or the law of another country applies. This should include applications that involve the application of the law of another country under the closest connection test (see R130) or in accordance with a foreign law agreement (see R134). As we discuss in Chapter 17, the Family Court is generally more accessible and cost-effective for partners, and it has the expertise to deal with property disputes between partners. As cross-border issues become increasingly common, it is appropriate that the Family Court's first instance jurisdiction is expanded to include these issues. To the extent there are evidential issues with proving foreign law (with the result that New Zealand law is then applied by default), we are not satisfied that such issues necessarily need to be addressed in the High Court in the first instance.
- 19.80 The Family Court should continue to have the ability to transfer proceedings to the High Court (discussed in Chapter 17) where it is satisfied that the High Court is the more appropriate forum. This power need not, however, be exercised simply because there is a cross-border issue in the proceedings. This would increase the risk of tactical behaviour. We consider the existing criteria in section 38A, which we recommend be retained in the new Act (see R115), are adequate to guide the courts on when transfer to the High Court would be appropriate.
- 19.81 We are otherwise satisfied that the general rules relating to establishing jurisdiction, *forum conveniens* and *forum non conveniens* are appropriate for property disputes between partners and there is no compelling case to establish different rules for proceedings under the new Act or relating to the application of foreign law.

THE EFFECT OF FOREIGN JUDGMENTS

Background

- 19.82 Judgments and orders made by foreign courts (foreign judgments) have no direct operation in New Zealand. Foreign judgments may, however, be the subject of enforcement proceedings in New Zealand or may be recognised by a New Zealand court as determining an issue or claim.
- 19.83 The High Court is generally the court in which a party must seek enforcement of a foreign judgment. A person entitled to the benefit of a foreign judgment may be able to enforce that judgment in New Zealand by registering it under the Trans-Tasman Proceedings Act 2010 (TTPA), the Reciprocal Enforcement of Judgments Act 1934 or

the Senior Courts Act 2016.⁶⁹ Foreign judgments may also be enforced at common law by bringing an action in the High Court.⁷⁰ Various requirements must be established before a court will enforce a foreign judgment, depending on the common law or statutory process followed. At common law, the foreign court must have jurisdiction over the judgment debtor, the judgment must be for a definite sum of money (and not a sum payable based on revenue or penal law) and the judgment must be final and conclusive.⁷¹

- 19.84 Enforcement of foreign judgments at common law or under the Reciprocal Enforcement of Judgments Act or Senior Courts Act is generally limited to money orders. As a general rule, a non-monetary foreign judgment, such as an injunction or an order that purports to deal with immovable property, would not be enforceable in New Zealand.
- 19.85 This is not the case under the TTPA, which allows a range of Australian judgments to be enforced in New Zealand under the Reciprocal Enforcement of Judgments Act. Under the TTPA, "most final judgments of Australian courts and tribunals will be able to be recognised and enforced in New Zealand".⁷² The TTPA contemplates that an application to register an Australian judgment must be made to the Registrar of the High Court or "a New Zealand court that is not a superior New Zealand court but that has power to give the relief that is in the judgment".⁷³ While the TTPA applies to both money and non-money orders, a New Zealand court must set aside registration of a judgment under the Reciprocal Enforcement of Judgments Act if the judgment was given on a matter relating to immovable property or was about movable property that was not located in Australia at the time of the judgment.⁷⁴
- 19.86 A foreign judgment may give rise to a cause of action estoppel where the foreign court has already decided a cause of action. If a party has failed in their claim in the foreign court, they will not usually be able to relitigate the claim in a New Zealand court. A party may also be prevented from denying a matter of fact or law decided by a foreign court, as it gives rise to an issue estoppel. If the estoppel arises in favour of the party seeking to enforce the foreign judgment, this may provide the basis for a claim in the New Zealand courts.

⁶⁹ The Trans-Tasman Proceedings Act 2010 governs the enforcement of Australian judgments, the Senior Courts Act 2016 allows for enforcement of judgments obtained in any court of any Commonwealth country for the payment of money and the Reciprocal Enforcement of Judgments Act 1934 governs enforcement of a number of other countries (as identified and included by Order in Council).

⁷⁰ The only way to enforce a foreign judgment at common law is to bring an action on the judgment. Where the judgment debtor is not present in New Zealand, the plaintiff has to serve the proceeding out of the jurisdiction pursuant to r 6.27(m) of the High Court Rules 2016.

⁷¹ See ch 5 in David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012); and *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 (CA) at [36]. The judgment debtor may assert a defence if (a) the judgment was obtained by fraud; (b) enforcement of the judgment would be contrary to public policy; or (c) the proceedings in which the judgment was obtained were contrary to natural justice.

⁷² David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 84.

⁷³ Trans-Tasman Proceedings Act 2010, s 56.

⁷⁴ Section 61(2).

Issues

- 19.87 We did not identify any issues with the enforcement of foreign judgments in the Issues Paper. We have, however, subsequently considered two questions:
- (a) whether the Family Court should have jurisdiction to enforce foreign judgments relating to property disputes between partners, consistent with our recommendations above regarding the Family Court's jurisdiction to apply foreign law; and
 - (b) whether a New Zealand court should be able to enforce non-monetary foreign judgments where they relate to property disputes between partners, beyond the terms of the TTPA.

Conclusions

- 19.88 In our view, the normal rules relating to the enforcement of foreign judgments should continue to apply to property disputes between partners. We do not see any advantage in singling out property disputes between partners and extending the Family Court's jurisdiction to include enforcement of foreign judgments given the established procedures that exist in the High Court. The Family Court will, in any event, continue to recognise foreign judgments as is required in the course of its decision making.
- 19.89 We recognise the bar on enforcing non-monetary foreign judgments (other than as permitted under the TTPA) may add cost and delay to the resolution of property disputes between partners. However, in our view, any change in approach should be considered within a broader review of New Zealand private international law rather than in the specific context of property disputes between partners.
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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

Draft classification provisions

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; 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 acquired by the partner after the relationship ended;
- (c) was a gift to the partner from the other partner, not being property that is used for the benefit of both partners;
- (d) 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;
- (e) 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;
- (f) 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 is not 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) property acquired after the relationship ended that—
 - (i) is income or gains derived from relationship property; or
 - (ii) is proceeds from the sale or other disposition of relationship property; or

- (iii) the court considers just in the circumstances to treat as relationship property:

Example 4

After his relationship with Giles ends, Hau sells the family car. Using the sale proceeds, Hau buys another smaller car for himself. The smaller car, acquired from the sale proceeds of relationship property, is relationship property.

Example 5

During Ihaka's relationship with Jenny, he acquires a house that is subsequently used as the family home. The house is relationship property. When their relationship ends, Ihaka and Jenny move out of the family home. Ihaka rents out the property. The rent Ihaka receives is relationship property.

- (d) any increase in the value of separate property that is the family home:

Example 6

Before Ken enters into a relationship with Lulu, he owns a house valued at \$800,000. During their relationship, Ken keeps the house as his separate property but it is used by Ken and Lulu 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 Ken's separate property, but the increase in its value of \$400,000 is relationship property.

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

Example 7

Murray owns a classic car that is his separate property. He uses funds from a joint bank account that he has with his partner, Nerissa, to pay for restoration work undertaken on his car. The restoration work increases the value of his car by \$40,000. The car remains Murray'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 Murray's separate property.

Example 8

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

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- (f) any separate property of a partner used with the express or implied consent of the partner for—
- (i) improving, or increasing the value of any relationship property; or
 - (ii) increasing the amount of any interest of the partners in any relationship property:
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Example 9

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

Example 10

While in a relationship, Rawiri has a climbing accident and sustains spinal injuries that result in him subsequently needing to use a wheelchair. Rawiri 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, Stephanie, own. The modifications increase the value of the home, which is relationship property. When Rawiri's relationship with Stephanie ends, he 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.

Appendix 3

Draft amended section 44C

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 directly or indirectly 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.