



UPDATE
RELATIONSHIP PROPERTY

Law Commission recommends a new Act for dividing property when people separate

BY **NICHOLA LAMBIE** AND **JOHN-LUKE DAY**

from Wellington, may not always have helped. Reportedly, Mr Ardern, in his time as Administrator, has worked on repairing the sometimes fraught relationship between Tokelau and New Zealand. He has visited the islands several times, once with Mr Faafoi.

The first judgment from the High Court of Tokelau does not specifically address how Tokelau legal processes can deal with other “commercial/contract” matters. There are “contract rules”, some of which the court considered. Dealings with outsiders, including contractors putting in alternative energy generation sources and other infrastructure, raise the spectre of further litigation affected by the unique common law position in Tokelau and the difficulties in administering islands – and during her recent visit, the Prime Minister said she would support an airstrip for Tokelau. ■

Wellington practitioner, **Richard Fletcher** ✉ richard.fletcher@woods Fletcher.co.nz, filed the first proceedings in the High Court of Tokelau. He has maintained an interest in Tokelau administration since then.

THE LAW COMMISSION HAS CONCLUDED its review of the Property (Relationships) Act 1976 (PRA) by recommending an overhaul of the way couples should divide property when they separate. The Commission proposes Parliament repeal the PRA and replace it with a new Act. Although the new Act would contain some familiar elements, such as the equal sharing of relationship property, the Commission’s 140 recommendations would mean key changes in other areas.

The Law Commission's review

The Law Commission reviewed the PRA to ensure it is operating appropriately and effectively. In 2017, it published an Issues Paper and sought submissions. At the same time, the Commission published a Study Paper examining the changes in New Zealand’s social context since the PRA was enacted in 1976. In 2018, the Commission published a Preferred Approach Paper, setting out its draft recommendations on key issues and inviting feedback.

The Law Commission received

over 400 submissions from members of the public, organisations, community groups, academics, lawyers, Judges and other experts. It also relied on a survey of public attitudes and values on relationship property division conducted by the University of Otago with support from the Michael and Suzanne Borrin Foundation.

In June, the Law Commission submitted its report, *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976*, to the Minister responsible for the Law Commission, Hon Andrew Little. The report is available on the Commission’s website, at <https://lawcom.govt.nz/our-projects/review-property-relationships-act-1976>.

Some of the key recommendations in the report are summarised below.

Relationship property and the family home

A strong theme in the review was the unfairness many New Zealanders felt in having to divide property they acquired before a relationship, especially the family home. Currently, the family home is

always classified as relationship property and divided between the partners even if it was owned by one partner before the relationship. This rule was put in place in the 1970s, when the paradigm relationship was a marriage, entered into early in life, in which the spouses accumulated property and raised a family over time. The family home was therefore a product of the family joint venture, to which each partner was deemed to have contributed in equal, albeit different ways. However, increasing rates of separation and repartnering mean that more people are entering relationships later in life, often having already accumulated key assets such as their home. In these situations, the family home cannot be said to be a product of the family joint venture, and equal sharing can produce an unjust result.

To address this issue, the Law Commission recommends revising the definitions of relationship property and separate property so that property is only treated as relationship property if it was:

- a. acquired by either partner for the partners' common use or benefit; or
 - b. acquired or produced by either partner during the relationship (excluding third party gifts and inheritances).
- The family home should no longer be treated as relationship property just because it was used by the partners during the relationship. The Commission instead recommends that when the family home was acquired by a partner before the relationship was contemplated, or was received as a third party gift or inheritance, it should be classified as the owning partner's separate property. Only the increase in the property's value while being used as the family home should be relationship property.

Simplifying the eligibility criteria

The Law Commission is satisfied the law should continue to apply in the same way to marriages, civil unions and de facto relationships that last for three years or more. This will ensure equal treatment of relationships that are substantively the same and is consistent with social trends such as the increasing prevalence of de facto relationships. The Commission acknowledged, however, that some submitters were concerned that the definition of de facto relationship does not provide adequate guidance or certainty on when a relationship starts. To address this concern, the Commission recommends a new statutory presumption that two people are in a qualifying de facto relationship if they have maintained a common household for a period of at least three years. The presumption would be rebuttable by evidence that the partners did not live together as a couple, with reference to the existing section 2D(2) list of factors.

The Commission also recommends simplifying the eligibility criteria by removing the special rules for short-term relationships. Marriages and civil unions should always be subject to the ordinary rules of division. If a couple are in a de facto relationship but they have not shared a common household for three years, they should only be subject to the new Act if they meet additional

requirements, based on the existing section 14A requirements. That is, there must be a child of the relationship or one partner must have made substantial contributions to the relationship, and in either case a court should only be able to make an order for division if it considers it just. If these requirements are satisfied, the relationship should be subject to the ordinary rules of division.

Rethinking how economic advantages and disadvantages are shared

The Law Commission has concluded that section 15 has been unsuccessful in effectively addressing economic advantages and disadvantages arising from the relationship or its end. Section 15 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. The 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 may 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.

The problems with section 15 include the time and cost of making a successful claim and the inconsistent approaches adopted in the courts. The Supreme Court's recent decision in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 has not improved the accessibility of the remedy. All five Judges issued separate judgments providing different views on many matters, including the level of compensation to be awarded under section 15.

The Law Commission recommends the repeal of section 15. In

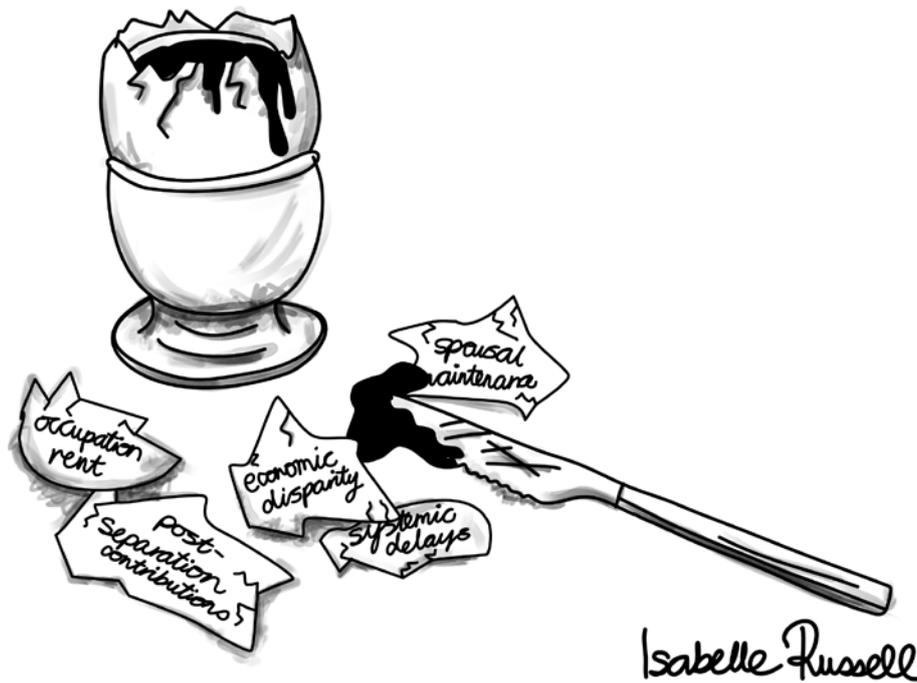
its place the Commission proposes the introduction of Family Income Sharing Arrangements (FISAs) as a simpler and more accessible remedy. Under a FISA, the partners would be required to share income for a limited period after separation. A partner would be entitled to a FISA when they have suffered economic disadvantages from the relationship 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.

If eligible, the amount payable under a FISA should be determined by a statutory formula that shares the partners' combined 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.

Partners should be able to apply to the court to adjust the formula when the amount payable would not accurately reflect the economic advantages and disadvantages each partner takes from the relationship.

If FISAs are implemented, the Commission also recommends the repeal of the maintenance regime under the Family Proceedings Act 1980. FISAs would be a more effective form of income sharing and the justification for providing income to a former partner through maintenance in situations when the partner is not otherwise entitled to a FISA is, the Commission considers, questionable.



A clean break?

Property (Relationships) Act 1976 & Family Proceedings Act 1980

Access to property held on trust

Many families in New Zealand use trusts as a means of holding key items of property. The PRA only applies to property of which the partners are the beneficial owners. Consequently, when placed on trust, there is usually no requirement that the property be divided at the end of the relationship. The Law Commission has concluded the use of trusts in this context often causes problems. After separation, a partner may be unfairly deprived of access to property that would otherwise be relationship property. In addition, several remedies against trusts have developed outside the PRA, such as claiming a constructive trust over an express trust and the court's broad powers under the Family Proceedings Act to vary trusts that are nuptial settlements.

The Law Commission recommends the new Act should provide the Family Court with broader powers in order to provide for a just division of property when a trust is involved. A new remedy should enable the court to respond to the various ways in which a trust might hold property that is produced, preserved or enhanced by the relationship. The Commission recommends 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.

Improving dispute resolution

A key issue that featured strongly in the Commission's review is that the PRA does not facilitate the inexpensive,

simple and speedy resolution of relationship property matters. Lengthy delays and unaffordable costs exacerbate what is already a time of anxiety, uncertainty and conflict for many. The Law Commission has made a range of recommendations designed to promote the just and efficient resolution of disputes including:

- developing "pre-action procedures" to encourage the resolution of issues out of court;
- improving Family Court processes through the creation of new procedural rules and the establishment of a Family Court Rules Committee for this purpose; and
- imposing a continuing duty to give timely, full and frank disclosure of all relevant information accompanied by stricter consequences for non-disclosure.

Division of property on death

Part 8 of the PRA sets out how property may be divided when one of the partners in a relationship dies. The Law Commission recommends that the new Act only apply to

relationships ending on separation. The context for dividing property on the death of a partner is different. It involves tensions between the rights of the surviving partner and other parties that might stand to benefit from the deceased's estate, such as children from a prior relationship. The Commission has recommended these competing interests should be considered and resolved as matters of policy within a broader review of succession law. The Minister responsible for the Law Commission, Hon Andrew Little, has requested that the Law Commission commence a review of succession law in the 2019/20 year. The terms of reference of this review are yet to be determined.

What next?

The Government will now give further consideration to the Commission's 140 recommendations for reform and the wider impact of its proposals. ■

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