Part A – Introducing the Law Commission's review

Chapter 1 – Context, scope and approach

Introduction

1.1 Dividing property when relationships end is often a challenging task, and one which 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 recovery of partners and any children they might have. Different issues arise when a relationship ends on the death of one partner. The interests of the surviving partner may have to be balanced against competing interests, for example any children of the deceased.

1.2 The Property (Relationships) Act 1976 (PRA)[1] sets out special rules of property division that apply when relationships end. These rules apply when partners separate, unless they agree otherwise. The rules can also apply when one partner dies. People can use the rules in the PRA to work out their entitlements and come to an agreement about the division of their property, or they can ask a court to apply the rules and make a decision for them.

1.3 This Issues Paper asks whether the PRA rules are operating appropriately in contemporary New Zealand. Is the PRA achieving a just division of property at the end of relationships?

1.4 In this chapter we explain the context of this review, its scope and our process so far. The rest of Part A is arranged as follows:

(a) In Chapter 2 we explore why we have the PRA. We explain that the PRA is social legislation, and outline its history.

(b) In Chapter 3 we discuss what the PRA attempts to achieve. We describe the framework of the PRA and how it works in practice.

[1] For ease of reading, we will refer to the Property (Relationships) Act 1976 as the PRA in the remainder of this Issues Paper.

(c) In Chapter 4 we discuss the big questions we have identified so far, and some of the options for reform that might significantly change how the PRA works in practice.

Our terminology and approach to anonymisation of court decisions

1.5 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 Issues Paper takes place after a relationship ends, but for simplicity we will continue to refer to "partners" rather than "former partners."

1.6 In Chapter 4 we ask whether the PRA should be amended to use relationship neutral terms, and invite submissions on this issue.

1.7 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.[2] To address this, we have replaced the names of parties with initials when our discussion of the facts of a case includes sensitive information which could identify individuals who may be vulnerable.[3]

Social context of this review

1.8 The PRA was enacted over 40 years ago. Since then New Zealand has undergone a period of significant change. We discuss these changes in detail in our Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) (Study Paper).

1.9 New Zealand is more ethnically diverse. The Māori, Pacific and Asian populations have more than doubled since 1976.[4] In 2013,

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

3 For a copy of our anonymisation policy please contact the Law Commission.

4 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction citing Ian Pool "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.

one in seven people identified as Māori.[5] Children today are also ten times more likely to identify with more than one ethnic group compared to older New Zealanders.[6] The population is ageing, and at significantly different rates across ethnic groups, which will continue to drive ethnic diversity in the future.[7] Religious identity is also changing. Fewer people identify as Christian, while almost half of the population report that they have no religion.[8]

1.10 These population shifts have coincided with changing patterns of partnering, family formation, separation and re-partnering.[9] 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 was accumulated over time. Now, fewer people are marrying and more people are living in de facto relationships.[10] In 2016, 46 per cent of all births were to parents who were not married (or in a civil union).[11] There is also greater recognition and acceptance of relationships that sit outside the 1970s paradigm, including same-sex relationships.[12] More relationships end in separation,[13] and increasing rates of separation are driving

5 Statistics New Zealand 2013 Quickstats about Māori (December 2013) at 5.

6 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: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction citing Statistics New Zealand 2013 QuickStats about culture and identity (April 2014) at 7.

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

8 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction citing Statistics New Zealand 2013 QuickStats about culture and identity (April 2014) at 27–30.

9 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 re-partner 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 nāianei* (NZLC SP22, 2017) at Introduction.

10 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 nāianei* (NZLC SP22, 2017) at Chapter 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>.

11 In 1976, only 17 per cent of children were born out of marriage: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 2 citing Statistics New Zealand "Live births by nuptiality (Maori and total population) (annual-Dec)" (May 2017) <www.stats.govt.nz>.

12 In 2013, 8,328 people recorded that they lived with a same-sex partner, up from 5,067 in 2001: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand 2013 Census QuickStats about families and households – tables (November 2014).

13 For example in 2016 the divorce rate was 8.7 (per 1,000 existing marriages and civil unions), compared to 7.4 in 1976: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i*

a rise in re-partnering,[14] 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.[15]

1.11 These social changes have significant implications for our review. They will have undoubtedly influenced public values and attitudes, and increasing diversity in relationships and families may affect what a "just" property division looks like today. The policy implications of increasing diversity in relationships and families are well recognised:[16]

> *Increasingly diverse and flexible family forms mean there are no longer clear universally held assumptions to be made about family circumstances; the increasing pragmatism of family law reform, aiming to offer management of family matters rather than abstract justice based on moral or religious principles, means that it becomes ever more important for the policy maker to understand what individuals expect and value…*

Scope of this review and our approach so far

1.12 In December 2015, the Minister responsible for the Law Commission, Hon Amy Adams, asked the Law Commission to review the PRA. The Terms of Reference are set out in Appendix A and are wide-ranging. They require consideration of the PRA rules and how property matters are resolved in practice.

1.13 Since then we have extensively researched the history of the PRA and reviewed case law, commentary and court data to understand how the PRA is operating in practice. We have looked at international experiences to inform our understanding of possible

Aotearoa o nāianei (NZLC SP22, 2017) at Chapter 3 citing 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.

14 In 2016, remarriages accounted for 29 per cent of all marriages, compared to 16 per cent in 1971: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 4 citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

15 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 nāianei* (NZLC SP22, 2017) at Chapter 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 Dharmalingam and others *A Demographic History of the New Zealand Family from 1840: Tables* (Auckland University Press, 2007) at 17.

16 Mavis MacLean and John Eekelaar "The Perils of Reforming Family Law and the Increasing Need for Empirical Research, 1980-2008" in Joanna Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets An Interdisciplinary Study* (Hart Publishing, Oxford, 2009) 25 at 31.

reform options. We have also researched the social context and published our findings in the accompanying Study Paper. We established an Expert Advisory Group to assist us in this review, and sought guidance from the Law Commission's Māori Liaison Group on those matters that may be of particular concern to Māori.

1.14 We have also undertaken targeted, preliminary consultation with a range of interested parties (see Appendix B). This preliminary consultation identified a number of issues and options for reform that are reflected in this Issues Paper. We know there will be other perspectives, and the submissions we receive in response to this Issues Paper will help us to develop our views on whether changes to the PRA are needed and if so what form they should take.

1.15 The Terms of Reference for this review 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. We cannot, however, consider the PRA in isolation from these regimes, as they each play an important role in supporting partners and children at the end of a relationship. In Part F we consider options for reform that have implications for the maintenance regime, and our discussion of the application of the PRA on the death of one partner in Part M has also required us to consider aspects of succession law which are not part of our Terms of Reference. It is possible that our final recommendations may have implications for these regimes. In Part L of this Issues Paper we also address the rules of private international law, the full extent of which is beyond the scope of this review. We discuss the role of the PRA as social legislation, and its relationship with other areas of family and social policy, in Chapter 2.

1.16 Our final report to the Minister Responsible for the Law Commission is due in November 2018.

Structure of this Issues Paper

1.17 This Issues Paper is divided into parts. Following on from Part A (Introducing the Law Commission's review) the parts are as follows:

- **Part B – What relationships should the PRA cover?**

We look at the types of relationships to which the PRA's main rules of division apply. We examine whether the PRA focuses on the right kinds of relationships.

- **Part C – What property should the PRA cover?**

The PRA requires partners to divide their relationship property. We look at the types of property that the PRA defines as relationship property and separate property.

- **Part D – How should the PRA divide property?**

The general rule at the heart of the PRA is that, on division, each partner is entitled to an equal share of relationship property. We discuss whether this general rule remains appropriate. We also look at the exceptions to equal sharing and whether they apply in the right circumstances.

- **Part E – How should the PRA treat short-term relationships?**

If a relationship has lasted for less than three years, the general rule of equal sharing does not apply. The PRA provides special rules for short-term relationships, and de facto partners have different rights to married and civil union partners. We ask whether the special rules should continue to apply to short-term relationships and if the different rights based on relationship type are justified.

- **Part F – What should happen when equal sharing does not lead to equality?**

Sometimes the partners will take different roles in a relationship. If one partner has been freed up for paid work, that partner may leave the relationship with a developed career. Conversely, a partner who has sacrificed paid work to perform unpaid roles in the relationship might not have the same income-earning opportunities after the relationship. Equal sharing may not fairly apportion the economic advantages and disadvantages each partner takes from the relationship. We look at how the PRA deals with these scenarios and whether it is effective.

- **Part G – What should happen to property held on trust?**

Many families use trusts to hold property. Trusts can cause difficulties if a relationship ends because trust property generally stands outside the PRA. There are, however, many legal remedies through which a partner can claim a share of the trust property, but they are not all found within the PRA. We examine this law and consider whether reform is needed.

- **Part H – Resolving property matters in and out of court.**

We look at how the PRA facilitates the resolution of property matters at the end of a relationship. We look at whether the law and processes meet people's reasonable expectations, and whether they are as inexpensive, simple and speedy as is consistent with justice.

- **Part I – How should the PRA recognise children's interests?**

Children have an important interest in the way their parents divide property at the end of a relationship. We focus on whether the PRA does enough to recognise the interests of children and we look at what taking a more child-centred approach would look like in practice.

- **Part J – Can partners make their own agreement about property?**

The PRA does not require all people to divide their property according to its rules. Instead, partners can make their own agreements to determine the status, ownership and division of their property in the event they separate or one partner dies. Partners can also make their own agreement to settle any differences that have arisen between them with respect to their property. We look at how the PRA controls the way these agreements are made and how agreements are to apply.

- **Part K – Should the PRA affect the rights of creditors?**

The PRA has a general rule that creditors continue to have the same rights against the partners and their property as if the PRA had not been passed. There are however a few exceptions. We examine whether the general rule and the exceptions are working appropriately.

- **Part L – What should happen when people or property have a link to another country?**

Some relationships will have links with other countries, either because the partners have ties with those countries or because they hold property overseas. We look at when the PRA should apply to these relationships, when a New Zealand court will decide the matter, how and where remedies can be enforced, and whether reform is needed.

- **Part M – What should happen when one partner dies?**

When a partner dies, the surviving partner can choose to either take whatever provision is made for them under the deceased's will, or apply for a division of the couple's property under the PRA. There is also limited scope for the personal representative of the deceased to seek a division under the PRA. These rules are complex. They give rise to difficult questions about the surviving partner's interest in the couple's relationship property and the rights of other people who feel entitled to the deceased's property. We discuss these issues and consider whether the PRA is the best statute to address these questions.

Chapter 2 – Why do we have the PRA?

2.1 In order to understand why we have the PRA, it is helpful to look to the past and explore how property practices when relationships end have changed throughout New Zealand's history. We look at property practices in traditional Māori society, those that were inherited from England and Wales and the series of law changes that ultimately resulted in the PRA. We then go on to explore the current social and legal context within which the PRA currently operates.

Marriage and property practices in traditional Māori society

2.2 Māori ascribe to a unique world view that governs their relationships with each other and the world around them. The roles of men and women in traditional Māori society can be understood only in the context of this world view.[17]

2.3 In traditional Māori society, men and women were considered essential parts of the collective whole, both formed part of the whakapapa that linked Māori people back to the beginning of the world, and women in particular played a key role in linking the past with the present and the future.[18] Women were nurturers and organisers, valued within their whānau, hapū and iwi.[19] Women of rank maintained powerful positions within the social and political organisations of their tribal nations, reflected in the fact that some women signed the Treaty of Waitangi on behalf of their

17 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 327 and Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 125.

18 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 330 and Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 125.

19 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.

hapū.[20] Women's mana could be inherited from male and female tupuna, as well as conferred on female and male descendants.[21]

2.4 Marriage was a relationship of importance not only to the spouses but also to their whānau, for it established links between the whānau and provided each with new generations.[22] According to Māori custom, public expression of whānau approval established a couple as "married".[23] A married woman remained a part of her own whānau even if she chose to live with her spouse's whānau: her marriage did not entail a transferral of "property from her father to her spouse".[24] Spousal differences were resolved between whānau,[25] and in cases where misconduct was shown, divorce was relatively simple so long as the correct procedures were followed.[26] Divorce carried no stigma, and child care arrangements and support were sorted out within the whānau context.[27]

2.5 While Māori valued marriage, it was not given absolute precedence over other relationships because of the emphasis placed on descent.[28] For Māori, descent and descent group membership are key elements in the organisation of both social

20 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 16.

21 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 14.

22 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 and Donna M Tai Tokerau Durie-Hall "Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 186-187 citing Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (1st ed, Oxford University Press, Auckland, 1992). Some marriages were arranged for the purpose of building relationships between iwi, in some cases for securing peace following hostilities: Hirini Moko Mead *Tikanga Māori* (Revised ed, Huia Publishers, Wellington, 2016) at 177–180.

23 Customary recognition of marriage took many different forms depending on iwi or hapū, or on the social status of the couple. Once approval was given by the whānau, the couple were considered married, even if cohabitation was delayed. The newly married couple did not set up a new household but joined an established one. See 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 19 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.

24 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 127, as cited in 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 [77].

25 ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) at 52.

26 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 127, as cited in 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 20.

27 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 127. However, the tikanga of muru was traditionally practised in circumstances that threatened the institution of marriage, including he tangata pūremu: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 161 and 255.

28 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.

life and personal identity.[29] Mana, land rights and the trusteeship of taonga all passed down descent lines.[30]

2.6 Māori place high value on land, or whenua.[31] Māori are "tangata whenua", or people of the land, and cultural practices or tikanga associated with birth and death emphasise links to the land.[32] Land was the foundation of the social system, and continuity of the group depended very much on a home base, called te wā kāinga, where people could live like an extended family.[33] The relationship Māori had with the land was not about owning the land or being master of it:[34]

> *In the beginning land was not something that could be owned or traded. Māoris did not seek to own or possess anything, but to belong. One belonged to a family, that belonged to a hapū, that belonged to a tribe. One did not own land. One belonged to the land.*

2.7 Both men and women had the capacity to hold property:[35]

> *The position of Māori women with regard to the ownership of property was in great contrast to that of their Pākehā contemporaries. In Māori society before and after contact, use-rights over land and resources were 'owned' or held by women as individuals as well as by men, subject only to the overriding right of the tribal community and the mana (authority) of chief over the land and people.*

2.8 Marriage "did not alter this reality."[36] A woman retained ownership of land that was hers prior to marriage, and decisions regarding it were hers to make, subject to her whānau and hapū interests.[37]

---

29 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.

30 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. One of the distinctive features of Māori social organisation is that descent is traced through links of both sexes. As a result individuals have not one but many descent lines.

31 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 285–286.

32 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 287.

33 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 288.

34 Eddie Durie "The Law and the Land" in Jock Phillips (ed) *Te Whenua Te Iwi, the Land and the People* (Allen & Unwin and Port Nicholson Press, Wellington, 1987) at 78. See also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 289.

35 Angela Ballara "Wahine 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.

36 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy 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.

37 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 330 and Angela Ballara "Wahine 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.

Women could hand land down to some or all of their children, male or female, and gifts of land were often made by parents to their daughters on their marriage.[38] If a woman's family gifted land to her husband in celebration of their marriage, his right of occupancy would terminate and the land would revert to her family if on the woman's death there were no children of the marriage and the husband had no blood link to the land.[39]

The impact of introduced law on the role of Māori women in society

2.9 At the time of the signing of the Treaty of Waitangi in 1840, Māori women were acknowledged as owners of Māori land in accordance with tikanga.[40] Māori women continued to play important and active leadership roles during the latter part of the nineteenth century, particularly in the Māori land movements and the land wars.[41]

2.10 However the role of Māori women in society was gradually undermined in the period of colonisation that followed the signing of the Treaty of Waitangi.[42] Māori collectivism was philosophically at odds with the colonial ethic of individualism.[43] The role of women as nurturers and organisers was challenged by the colonial view of men as heads of the family, while the role of women of rank as leaders was challenged by the colonial view of the subordinate role of women to men.[44] The relationship of women with the land was also challenged by the colonial concept of individual land ownership and the role of men as property owners.[45]

38 Angela Ballara "Wahine 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. See also Pat Hohepa and David Williams *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29 and 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.

39 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 330.

40 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 16.

41 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.

42 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 Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29.

43 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 127 at 133.

44 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.

45 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.

2.11 Most Māori married according to their own custom until the early twentieth century.[46] However, the English Laws Act 1858[47] and successive marriage laws required Māori to conform more closely to the legal requirements for establishing marriage inherited from England until, in the 1950s, customary marriages were no longer legally recognised.[48] To avoid their children being deemed illegitimate, and to access social services (such as the widow's benefit and housing assistance), Māori couples had to marry according to State law. This led some Māori to move away from customary marriage, although it remained common in the 1950s and 1960s.[49] The Status of Children Act 1969, which eliminated the discrimination of children based on their parents' marital status, and the growing prevalence of cohabitation among non-Māori, may have subsequently reduced pressure for Māori couples to officially register a marriage.[50] Today the general rule remains that Māori have to marry in accordance with State law in order for their marriage to be legally recognised.[51]

2.12 Customary Māori land tenure with regard to women was progressively undermined in the late nineteenth century.[52] The Native Land Act 1873 provided that husbands should be party to all deeds executed by married Māori women.[53] Husbands on the other hand were free to dispose of their Māori wives' land

46 Megan Cook "Marriage and partnering — Marriage in traditional Māori society" (4 May 2017) Te Ara — The Encyclopedia of New Zealand <www.teara.govt.nz>.

47 The English Laws Act 1858 declared that the laws of England had force in New Zealand. See 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.

48 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. The Māori Purposes Act 1951, s 8(1) and the Māori Affairs Act 1953, s 78, both provided that:

> *Every marriage to which a Māori is a party shall be celebrated in the same manner, and its validity shall be determined by the same law, as if each of the parties was a European; and all provisions of the Marriage Act 1908 shall apply accordingly.*
>
> *The Māori Affairs Act also invalidated all future Māori customary marriages and any marriages entered into in the past, except as expressly provided by that Act (s 79).*

49 Megan Cook "Marriage and partnering — Marriage in traditional Māori society" (4 May 2017) Te Ara — The Encyclopedia of New Zealand <www.teara.govt.nz>; Donna M Tai Tokerau Durie-Hall "Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 186; and Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Overview" (1998) 10 Social Policy Journal of New Zealand 122.

50 Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Overview" (1998) 10 Social Policy Journal of New Zealand 122.

51 Family law statutes enacted since 1950, including the Marriage Act 1955, largely ignore Māori customary marriages. The exception is Te Ture Whenua Māori Act 1993, which preserves the application of family maintenance in relation to marriages in accordance with tikanga Māori, but only those entered into before 1 April 1952 (s 106(4)). See Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 334.

52 Angela Ballara "Wahine 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.

53 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 which enabled married Māori women to deal with their land as if "feme sole" (an unmarried woman). See Angela Ballara "Wahine 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.

interests without their wife being a party to the deed.[54] Legislation enacted during this period also moved land ownership into individual (usually male) ownership rather than guardianship, again eroding Māori women's control.[55]

2.13 As the Law Commission has earlier observed:[56]

> *Land alienation had profound effects on Māori society, and in particular Māori women, as it destroyed the collective whānau/hapū unit. That the whānau/hapū unit was given less importance undermined the values that maintained its well-being. The erosion of those values – family and tribal history, language skills, mutual caring and support – eroded the importance of the roles and of the women who traditionally performed them.*

2.14 The imposition on Māori of colonial standards subordinated Māori women and contributed directly to the diminution of their value in Māori society.[57] The influence of introduced laws and culture eventually affected the core of Māori society. When the English common law was applied to Māori women, their status was the same as their English counterparts.[58]

Post-colonial history of relationship property law

The doctrine of matrimonial unity

2.15 Colonial New Zealand inherited its rules of marriage and divorce from England and Wales. In contrast to the role of women in traditional Māori culture, in English common law the husband was the authoritarian head of the family, with powers over both person and property of his wife and children. On marriage, the law deemed 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

54 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.

55 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.

56 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.

57 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 16.

58 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.

rights were acquired by the husband on marriage.[59] The property of the husband and wife could be used and, in most cases, disposed of as the husband pleased. It was also available to the husband's creditors to satisfy his debts. In contrast, the wife could not dispose of what had been her property without the consent of her husband.[60]

2.16 The husband, in return for the ownership and control of property his wife brought to the marriage, had an obligation to maintain his wife and children.[61] This maintenance obligation remained even if the husband and wife ceased to live together, and could be enforced by a court.[62]

2.17 The importance of the institution of marriage in post-colonial New Zealand meant that it was supported and protected by the State and the justice system: "Entry to and exit from marriage was firmly controlled, and the responsibilities of husband and wife were supported by the law and the fact that the welfare system was very limited."[63]

The separation of property system

2.18 In the nineteenth century, New Zealand lawmakers introduced legislation to remove many of the legal disabilities the doctrine of matrimonial unity placed on married women. In the first instance, changes were relatively modest, providing limited protections for "deserted wives."[64]

---

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

60 The courts did, however, develop a number of ways to mitigate the harshness of the doctrine. In particular, the courts of equity recognised that a settlement on trust solely for the wife's benefit was not captured by the doctrine, and thus a husband and his creditors could not access those funds. This led to the widespread practice of marriage settlements among the moneyed classes. See *Ulrich v Ulrich* [1968] 1 WLR 180 at 188 (CA); *W v W* [2009] NZSC 125; [2010] 2 NZLR 31 at [14]; Nicola Peart "Intervention to Prevent the Abuse of Trust Structures in New Zealand" [2010] NZ L Rev 567 at 592; John Rimmer "Nuptial Settlements: Part 1" (1998) 5 PCB 257 at 258.

61 A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 241–242. See also *Dewe v Dewe* [1928] P 113 at 119 per Lord Merivale as cited in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.5]: "A husband is obliged to maintain his wife, and may by law be compelled to find her necessaries, as meat, drink, clothes, physic, etcetera suitable to the husband's degree, estate or circumstances."

62 Matrimonial Causes Act 1857 (England & Wales) 20 & 21 Vict c 85, s 32. In New Zealand see the Divorce and Matrimonial Causes Act 1867, s 27.

63 Megan Cook "Marriage and Partnering - Marriage in the 19th century" (4 May 2017) Te Ara - the Encyclopedia of New Zealand <www.teara.govt.nz> at 2.

64 The Married Women's Property Protection Act 1860 granted a wife who had been deserted by her husband the right to apply to court for an order to protect from her husband and his creditors the property she had acquired since desertion. Those responsible for introducing the legislation explained that the previous law was unsatisfactory as the property of a wife who had been deserted by her husband could later be seized by the husband or even his creditors, leaving the deserted wife destitute: (16 August 1860) 2 NZPD 320. The circumstances in which an order could be sought were enlarged by the Married Women's Property Protection Act 1870. Section 2 granted the woman the right to seek an order when she and her husband had separated due to the husband's cruelty, adultery, habitual drunkenness or habitual failure to provide maintenance for the wife and children. Both the 1860 Act and the 1870 Act were consolidated in the Married Women's Property Protection Act 1880.

2.19 More significant reform came with the Married Women's Property Act 1884, which swept aside the doctrine of matrimonial unity and replaced it with a "separation of property" system. Parliament's primary concern was that the matrimonial unity doctrine had allowed husbands to squander the property that their wives brought to the marriage so that women were left without any means.[65] In response, the Act provided that a wife could independently acquire, hold and dispose of property as if she was a "feme sole."[66] In other words, she was an independent legal person. Wives could now acquire their own property, enter contracts in their own name, and sue and be sued.

2.20 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.[67] The Act looked at property as his or hers, rather than "theirs."[68] This, however, brought its own problems. The law now required a court to divide property according to each spouse's entitlements under general property law principles. More often than not, ownership was determined based on who held legal title and had paid for each item of property. The Act therefore did little for married women as most had remained homemakers, earned no income and accordingly had no means to contribute financially to the purchase of property.[69] In reality most of the matrimonial property was in the husband's sole name and had been paid for from his earnings. Likewise, the income on which the spouses relied was usually earned by the husband. As a result, on separation many women were left without any rights to the property used and acquired in the course of the marriage, unless they could show a direct interest in property that they had paid for in "cold hard cash."[70]

2.21 Despite the problems with the Married Women's Property Act, its substance was retained in later re-enactments of the same

65 (5 September 1884) 48 NZPD 155.

66 Married Women's Property Act 1884, s 3.

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

68 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 3.

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

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

law, and lingered well into the twentieth century.[71] Amendments in 1961 extended the principles to relationships that ended on death.[72] No provision was made for de facto relationships.[73]

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

2.22 In the second half of the twentieth century, concern was growing about the way in which the law disadvantaged women. There was increasing recognition that a wife may have supported her husband for many years by maintaining the home and looking after the children. These types of contributions undoubtedly helped the husband to work, earn income and acquire property.[74] However under the existing Married Women's Property Acts these types of contributions did not create any property interest in the matrimonial property.

2.23 The Matrimonial Property Act 1963 (1963 Act) was introduced in response to these concerns. It retained the separation of property system of the Married Women's Property Act, but with a "superimposed judicial discretion" that enabled a court to make orders overriding the spouses' strict legal and equitable[75] interests in the property.[76] 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,

71 Married Women's Property Act 1894, the Married Women's Property Act 1908, the Law Reform Act 1936, the Statutes Amendment Act 1939, the Married Women's Property Act 1952. The changes made by the series of Married Women's Property Acts did not, however, affect a wife's right to maintenance. A husband's maintenance obligations, even after separation or divorce, lived on under separate legislation. See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.8].

72 In 1961 the Married Women's Property Act 1952 was amended to define "husband" and "wife" to include their personal representatives, with the effect that the Act applied on the death of one spouse. See Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 6.

73 However, the purpose of the Married Women's Property Acts was to unwind the doctrine of unity that only applied on marriage. In effect, therefore, the position of women in de facto relationships may have been similar to that of married women under the Married Women's Property Acts. That is, women in either type of relationship could own property in their own right if she was a "feme sole", but would be required to establish property rights based on general property law principles.

74 The sentiment of law reformers in this era toward the dynamics of most families was famously summarised by English Judge, Lord Simon: "Men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it." (Lord Simon of Glaisdale "With All My Worldly Goods" (address to the Holdsworth Club, University of Birmingham, 20 March 1964) at 32).

75 A person may have an "equitable interest" in property even though they might not be the legal owner. The most common example of an equitable interest is where property is held on trust. The trustee, who is the legal owner of the property, is obliged to deal with the property for the beneficiaries. In that case, a beneficiary's interest is an equitable interest under the trust property.

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

services, prudent management, or otherwise."[77] For example, if the legal title to the matrimonial home was solely in the husband's name, a wife could claim an interest in that property by showing contributions that would not ordinarily result in a property interest under general property law principles. A 1968 amendment clarified that it did not matter that the spouse had not made a contribution in the form of money payments, nor did those contributions have to be of an "extraordinary character."[78]

2.24 The reforms brought about by the 1963 Act were very progressive for its time, although it applied only to marriages. It was at this point that New Zealand matrimonial property law broke away from England and Wales and took on its own distinctive character.[79] 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 focused in the home.[80] For the first time a wife's non-monetary efforts for her family, rather than direct financial contributions, could justify an interest in property when that marriage ended, on separation or death.[81] Despite the landmark shift, however, a number of problems with the 1963 Act's practical application emerged over the next decade.

The Matrimonial Property Act 1976 – "A new deal"[82]

2.25 Problems with the 1963 Act were identified in a report released in 1972 by a committee comprising members of the Ministry of

77 Matrimonial Property Act 1963, s 6(1).

78 Matrimonial Property Amendment Act 1968, s 6(1), which inserted a new s 6(1A) into the Matrimonial Property Act 1963.

79 In England and Wales the law was later amended through the Matrimonial Causes Act 1973 (UK). That legislation introduced a regime where the court had broad discretion to make orders regarding property at the end of a marriage. Although it remains in effect, it was amended in 1984 on the recommendation of the Law Commission of England and Wales to require the court to have regard to particular matters when making property adjustment orders. See Matrimonial and Family Proceedings Act 1984 (UK), s 3, which introduced s 25 to the Matrimonial Causes Act 1973 (UK). See also: Law Commission of England and Wales *Family Law: The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law* (LAW COM No 112, 1981).

80 For example, in the early 1960s over 90 per cent of all babies were born within marriage, and only 16 per cent of married women participated in the labour force. See P Hyman "Trends in Female labour force participation in New Zealand since 1945" (1978) 12 New Zealand Economic Papers 156 at 157; Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, 2007) at 225.

81 The Matrimonial Property Act 1963 applied on death as a result of a 1961 amendment to the predecessor legislation, the Married Women's Property Act 1952. That amendment defined "husband" and "wife" to include their personal representatives, and those definitions were carried into the 1963 Act. See Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 6.

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

Justice and the New Zealand Law Society.[83] In 1975 the Select Committee on Women's Rights also reported to Parliament on the way the 1963 Act was working.[84] Both committees complained that the 1963 Act's approach of requiring a spouse to show specific contributions to identified pieces of property still caused difficulties for married women. The committees said the law should instead assume that equal contributions have been made in respect of all assets of the marriage, especially the family home, and equal division should be automatic.[85] A "coherent and rational code" was needed to replace the 1963 Act.[86]

2.26 There was a general political consensus that progressive reform was needed.[87] The Matrimonial Property Bill 1975 (Bill) was introduced into Parliament and, despite an intervening general election and change in government, the Bill was enacted and became the Matrimonial Property Act 1976 (the 1976 Act). [88]

What problems did the Bill intend to remedy?

2.27 In a White Paper published on the introduction of the Bill to Parliament, the Minister of Justice explained:[89]

> *The law in New Zealand that now governs relations between husband and wife in property matters, despite the improvements made in the last 15 years, falls well short of achieving equal justice in practice between married people; nor does it accord with the way in which most married people in New Zealand look on their property and treat it.*

2.28 The Minister explained that the fundamental problems with the 1963 Act included:[90]

---

83 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972).

84 NV Douglas "Women's Rights Committee: June 1975" [1975] IV AJHR I13.

85 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 11. NV Douglas "Women's Rights Committee: June 1975" [1975] IV AJHR I13 at 75.

86 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 2.

87 Leading up to the 1975 general election, both Labour and National adopted the policy of legislating a presumption of equal sharing of matrimonial property. See New Zealand National Party *National Party 1975 General Election Policy* (National Party, Wellington, 1975) at 4; New Zealand Labour Party *The Labour Party Manifesto 1975* (Labour Party, Wellington, 1975) at 31.

88 The only major issue which divided the two parties in the process leading to the enactment of the Matrimonial Property Act 1976 was whether de facto partners should be included: see (7 December 1976) 408 NZPD 4564.

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

90 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5.

(a) An applicant had to prove specific contributions to identifiable items of property and have them quantified by a court.[91] In truth, the Minister said, a wife would be seeking an award from the husband's property, rather than a share of "their" property. In settlement negotiations, this placed married women in an inferior bargaining position.

(b) There was a considerable measure of uncertainty in every case. The cases decided under the 1963 Act showed that results could differ "significantly" on similar facts, and could depend "a good deal" on which judge heard the case.

(c) The practice of the courts had been less than generous. There had been cases where wives had made significant contributions to their families over a number of years but, despite such loyalty and hard work, they were awarded a share of between one quarter and one third of the family home.[92]

(d) The task of showing specific contributions to identifiable items of property was often impossible in practice. The non-monetary contributions of wives and husbands were of a far more general character, although no less real.

What solution did the Bill seek to provide?

2.29 The Bill was said to embody the concept of "marriage as an equal partnership between two equal persons and as the basis on which our present society is built", and was "devised in the light of New Zealand needs and New Zealand values".[93] Spouses were no longer

91 The courts' approach of determining disputes by considering each item of property and making orders in respect of those items had been confirmed by the Court of Appeal in *E v E* [1971] NZLR 859 (CA). However the Privy Council later saw no justification or foundation for an "asset by asset" approach as taken by the Court of Appeal: *Haldane v Haldane* [1976] 2 NZLR 715 (PC) at 727.

92 An Auckland District Law Society Public Issues Committee said in 1975, "Differing judges have different ideas of what as a matter of social policy is fair, some markedly favouring wives and some husbands": Auckland District Law Society Public Issues Committee "Background Paper on the Law as to Matrimonial Property" (1975) at 2, as cited in 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). See also A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 248-249. The authors discuss the general approach to dividing property taken by the courts under the Matrimonial Property Act 1963:

> *Though judicial discretions are inherently unpredictable, the pattern that the courts appear to have adopted in exercising their discretion was to grant the wife an equal share in the matrimonial home, where she could show some financial or material contribution as well as domestic contributions, while in other cases she could normally have expected an entitlement of around about a third.*

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

to be treated as strangers in law but as partners in a common enterprise.[94] The primary shift in emphasis was from the concept of contribution to the property, to contributions to the marriage partnership, which were presumed to be equal.

2.30 The Bill was founded on the basis that a court should be permitted 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.[95] The Bill did this by introducing the concept of "matrimonial property."[96] Matrimonial property was the property that the husband and wife could regard as "theirs." Broadly speaking, the Bill defined matrimonial property as the family home, family chattels and all other property acquired by husband or wife after the marriage except by inheritance or gift.[97] It was this matrimonial property that would be subject to equal division between the husband and wife. Separate property, in contrast, would continue to belong solely to the husband or wife and would not be eligible for sharing. All property owned by either spouse that did not come within the definition of matrimonial property was separate property.

2.31 The concept of equal division of matrimonial property, the Minister explained, "has the great advantage of reintroducing certainty, putting husband and wife in an equal bargaining position should the marriage break up, and being consistent with broad social justice."[98]

2.32 The Bill expressly considered the role of Māori land, which had not been excluded under the 1963 Act. The Bill sought to protect the special status of Māori land and recognise the interests of other parties in that land by removing it from the ambit of the property sharing regime.[99] There was no discussion in Parliament of the change brought about by the Bill, but it seems to reflect the view that special rules for Māori land were necessary.[100] The

94 Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

95 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5-6.

96 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 6.

97 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 6.

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

99 Clause 6 of the Matrimonial Property Bill 1975 (125–1) excluded Māori land within the meaning of the Māori Affairs Act 1953.

100 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 464.

exclusion of Māori land meant that if one or both of the spouses had an interest in Māori land that land would not fall within the pool of matrimonial property available for sharing at the end of the marriage.

2.33 While the Bill dealt only with dividing property on separation, the Government also considered that the rights of a surviving spouse should not be inferior in any way to those of a separated spouse.[101] The Government observed, however, that reforming the law on the division of property on death presented "complex and stubborn problems", and elected to deal with this issue separately.[102]

2.34 The Government also questioned whether the new equal sharing regime should apply to de facto partners.[103] It observed that the same vulnerabilities married women suffered under the previous law could also affect women in long standing de facto relationships. The Minister said that for "practical and humanitarian grounds" there was a strong case for including de facto partners within the new regime. Following a change of Government, de facto relationships were removed from the Bill.[104] The incoming Minister of Justice said that removing de facto relationships meant that "…we believe that individuals should demonstrate to those they live with a responsibility to the other partner, and a responsibility at law to regularise that union."[105]

2.35 The resulting 1976 Act was recognised as:[106]

> *… social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other in respect of their "worldly goods" should the marriage come to an end.*

101 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 13.

102 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 13.

103 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 12-13.

104 Matrimonial Property Bill 1976 (125-2) as reported from the Statutes Revision Committee.

105 Hon David Thomson MP, Minister of Justice (9 December 1976) 408 NZPD 4727.

106 *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580 per Woodhouse J. Discussed in Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 5.

2.36 In the years that followed, the general rule of equal sharing of matrimonial property became accepted in New Zealand as the new norm.[107]

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

2.37 In 1988 a Working Group was established as part of the Government's social policy reform programme, to revise and update matrimonial property and family protection laws, including the 1976 Act.[108] There had been significant change in the social landscape since 1976, and the Working Group was required to consider whether equal division of matrimonial property provided a just and equitable result and whether the general approach of the 1976 Act was sound.[109]

2.38 The Working Group reported:

(a) It had looked at the "considerable topical concern" that equal division of matrimonial property had failed to secure an equitable result.[110] The heart of the debate about equality and equity, the Working Group said, was "the economic consequence of current sex roles in our society."[111] This could not, however, be laid at the door of the 1976 Act.[112] While the Working Group recommended improvements that would "go some way towards avoiding the discrepancies in the spouses' standard of living",[113] it considered it was unrealisistic to expect the 1976 Act to achieve social equity between the sexes.[114] Rather, the State must continue to have

107 See JM Krauskopf and CJ Krauskopf "Sharing in Practice: the effects of the Matrimonial Property Act 1976" (1988) 10 Fam Law Bull 140. The authors conducted a pilot study on, among other things, the extent to which the equal sharing norms had been accepted in New Zealand one decade after the introduction of the Matrimonial Property Act 1976. The authors concluded that a "minor social and legal revolution occurred in the acceptance of the major goals of the legislation."

108 The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to review the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships. The Working Group was convened to deal with the broad policy issues, rather than to produce a blueprint for new legislation: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

109 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 3.

110 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4–15.

111 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

112 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

113 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 14. These recommendations are discussed at paragraph 2.40 below.

114 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

a "significant role" in reducing disparities caused by "social factors."[115]

(b) It was still the case that the surviving partner in a marriage ended by death could be worse off than one whose marriage ended by separation. The Working Group observed that this had long been recognised as "unfair and untenable" and recommended that the 1976 Act should provide for the same rules of division of property on death.[116]

(c) Developments in other areas of law had given increasing recognition to de facto relationships. These were permanent and committed relationships in which the partners lived together as husband and wife despite not being legally married. The only way a person could claim an interest in his or her de facto partner's property was to commence court proceedings, which were often long and complex.[117] Although not unanimous on the exact changes required, the Working Group concluded that the 1976 Act should be reformed to extend its rules of property division to de facto relationships.[118]

2.39 The Working Group reported in 1988, but there was little advancement of its recommendations until 1998, when the Government introduced two reform bills into Parliament.[119] Their progress through the House was slow, in part due to a general election and change of government in 1999. This resulted in substantial changes to the proposed reforms, including changes that addressed "the issue of economic disadvantage suffered by a non-career partner when a relationship breaks down."[120] The amendments were finally enacted in 2001, and the 1976 Act was renamed the Property (Relationships) Act 1976 (PRA).

115 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

116 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40.

117 At this time, the de facto partner with legal title to the property retained it on separation unless their former partner could persuade a court that he or she had an equitable interest in the property, usually under a constructive trust (the leading cases being *Pasi v Kamana* (1986) 4 NZFLR 417 (CA) and, later, *Lankow v Rose* [1995] 1 NZLR 277; (1994) 12 FRNZ 682 (CA)). The Working Group noted that while the courts had tried to do justice between de facto partners, they had been "hampered by the fact that the law of trusts… is not really suited to achieving a just and predictable result in most cases." See Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 64–65.

118 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 70.

119 Matrimonial Property Amendment Bill 1998 (109-1), which proposed amendments to the Matrimonial Property Act 1976; and the De Facto Relationships (Property) Bill 1998 (108-1), which proposed a new property division regime for de facto relationships, similar to but distinct from the regime for marriages.

120 Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71 and 74-75.

2.40 The 2001 amendments extended the PRA to cover de facto relationships, both same-sex and opposite-sex, and added a new part to the PRA to provide for the division of relationship property if one partner died (either with or without a will).[121] The presumption of equal sharing was extended to apply to all matrimonial property (now renamed "relationship property"), following the Working Group's recommendation.[122] New sections 15 and 15A sought to achieve greater substantive equality, by permitting departure from equal sharing to compensate for economic disparity caused by the division of functions in the relationship. The "underlying notion" of the PRA as amended in 2001 was "one of equity; that it is sometimes fair to treat people differently in order to achieve a just outcome."[123]

2.41 Changes were also made to the PRA to recognise the particular significance of taonga and heirlooms, consistent with the Working Group's recommendations.[124] Both were explicitly excluded from the definition of family chattels and as such were no longer available for division.[125] The Working Group noted that part of the value of taonga and heirlooms is that they have passed down from earlier generations, and this is lost if they are passed outside the family group.[126]

2.42 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.[127]

The PRA as social legislation

2.43 The PRA is social legislation. 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:[128]

121 Property (Relationships) Act 1976, Part 8.

122 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 13-14. Under the 1976 Act the equal sharing presumption had applied only to the family home and chattels, with other matrimonial property being divided on a contributions basis.

123 Wendy Parker "Sameness and difference in the Property (Relationships) Act 1976" (2001) 3 NZFLJ 276 at 278.

124 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

125 Property (Relationships) Act 1976, s 2 definition of "family chattels."

126 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

127 Civil Union Act 2005; Property (Relationships) Amendment Act 2005.

128 Peter Boshier and others "The role of the state in Family Law" (2013) 51(2) Family Court Review 184 at 190.

> *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.*

2.44 The State's role in shaping the law to both encourage and reflect change in societal values is apparent in the history of the PRA. It has been significant particularly in challenging and redefining the role of women in society: "nowhere is the progressive emancipation of women reflected more strongly than in the field of matrimonial property rights of married people."[129] More recent developments have sought to ensure fair treatment of different relationship types, by applying the same rules of division to de facto relationships and same-sex relationships. There has also been a growing awareness that family law policy needs to be better attuned to recognising Māori, and this was reflected, for example, in the exclusion of taonga from the PRA in 2001.[130]

2.45 This history emphasises the need for our review to be supported by a clear understanding of the current values and attitudes of New Zealanders.

2.46 The discussion in this Issues Paper also takes place against the backdrop of New Zealand's domestic human rights law and its participation in a number of international conventions and declarations. The New Zealand Bill of Rights Act 1990 prohibits unjustified discrimination on a range of grounds including sex, marital status, family status and sexual orientation, with reference to the provisions of the Human Rights Act 1993.[131] This is particularly relevant to our discussion on what relationships should be covered under the PRA and how the PRA should treat short-term relationships.[132] New Zealand has ratified the International Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations

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

130 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 57.

131 The prohibition on discrimination is subject to "…such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": See New Zealand Bill of Rights Act 1990, ss 5 and 19; Human Rights Act 1993, s 21 for a list of the prohibited grounds of discrimination.

132 See Parts B and E of this Issues Paper.

Convention on the Rights of the Child.[133] New Zealand has also given its support to the non-binding Declaration of the Rights of Indigenous Peoples.[134] These commitments are relevant to our consideration of how the interests of women,[135] Māori[136] and children[137] should be taken into account in the PRA. Any recommendations we make in our final report will be reviewed for consistency with domestic human rights law and New Zealand's international obligations.

The pillars of financial support available when relationships end

2.47 While the PRA addresses how property is to be divided when relationships end, it is only one part of the broader picture of how former partners and their children are supported into the future. Ideally, future needs should be met without reliance on State support or intervention. Adults should be able to provide for their families from their own incomes. Parents have legal obligations to support their children and these are not extinguished on separation.[138]

133 New Zealand ratified the Convention on the Elimination of All Forms of Discrimination Against Women (1249 UN 13 (opened for signature 1 March 1980, entered into force 3 March 1981)) (CEDAW) on 10 January 1985 and the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) on 6 April 1993. To have effect in New Zealand, international obligations must be incorporated into New Zealand's domestic law: see Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at [8.2] and *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 280-281. Where possible New Zealand's domestic law should be interpreted in such a way as to accord with international treaties which New Zealand has ratified: see R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 30.

134 United Nations Declaration of the Rights of Indigenous Peoples (GA Res 61/295, 61st sess, 107th plen mtg, A/RES/295 (2007)). See also the New Zealand Government's expression of support at: "National Govt to support UN rights declaration" (20 April 2010) <beehive.govt.nz>.

135 The Convention on the Elimination of All Forms of Discrimination Against Women defines what constitutes discrimination against women (1249 UN 13 (opened for signature 1 March 1980, entered into force 3 March 1981), art 1). State parties undertake, among other things, to ensure the practical realisation of the principle of the equality of men and women through law and other means; and to establish legal protection of the rights of women on an equal basis with men (art 2).

136 The United Nations Declaration on the Rights of Indigenous Peoples provides, among other things, that indigenous peoples are free and equal to all other peoples and have the right to be free from any kind of discrimination in the exercise of their rights, in particular that based on their indigenous origin or identity: United Nations Declaration of the Rights of Indigenous Peoples (GA Res 61/295, 61st sess, 107th plen mtg, A/RES/295 (2007)) art 2. It is said to assist with the interpretation and application of the principles of Te Tiriti o Waitangi (the Treaty of Waitangi): Human Rights Commission *The Rights of Indigenous Peoples: What you need to know* (Human Rights Commission, Auckland, 2016) at 5.

137 The United Nations Convention on the Rights of the Child sets out the basic rights of children: Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). It provides, among other things, that the best interests of the child shall be a primary consideration in all actions concerning them (art 3.1); that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, and that those views should be given due weight in accordance with the age and maturity of the child (art 12.1); and recognition of the principle that both parents have common responsibilities for the upbringing and development of the child (art 18.1).

138 See Crimes Act 1961, s 152; Care of Children Act 2004, ss 4(1), 5(b) and 16. Parent's obligations to care for their children are discussed in Part I of this Issues Paper.

2.48 The principles of whanaungatanga and manaakitanga mean that in Māori culture, separating partners and their children may be supported by their whānau and indeed their hapū and iwi in some cases.[139] Support from extended family may also be available in other cultures, notably among Pacific people families.[140] All cultures have a vested interest in the functional relationships that determine the well-being and preservation of the family unit.[141]

2.49 Recognising that it will not always be possible for some partners to support themselves and their children when relationships end, the State ensures that there are other means of financial support available. These means of support have been described as "pillars."[142] Each pillar addresses a different issue and together with the PRA they establish a framework of financial support.

2.50 When partners separate, pillars providing for ongoing support include:

(a) **Maintenance**: A person may be entitled to maintenance from their former partner to the extent that it is necessary to meet their reasonable needs if they cannot meet those needs themselves.[143] Maintenance is intended to provide temporary relief to enable a partner to start constructing a new life post-separation.[144] Each partner should assume responsibility for meeting their own needs within a reasonable period.[145] Maintenance is usually a matter for a court to determine, although there is nothing preventing separating partners from making a private agreement as to the payment of maintenance. Maintenance is discussed in Part F.

(b) **Child support**: The costs of caring for any dependent children of the relationship are supported by payments

139 Donna M Tai Tokerau Durie-Hall "Maori Family" in Sandra Coney (ed) *Standing in the Sunshine: a history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

140 For example, one study has found that by age 4, 40 per cent of Pacific children growing up in New Zealand live in a household with other extended family members compared to 8 per cent of European children: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 5 citing Susan MB Morton and others *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now we are Four: Describing the preschool years* (University of Auckland, May 2017) at 39.

141 John Chadwick "Whanaungatanga and the Family Court" (2002) 4 BFLJ 91.

142 The law of many jurisdictions is based on a "pillar system" in which the package of financial remedies for a spouse on divorce is constructed on a number of pillars, each addressing a different issue. This happens in many civil law jurisdictions in Europe. See 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 141.

143 Family Proceedings Act 1980, s 64.

144 See for example: *Slater v Slater* [1983] NZLR 166 (CA) at 174 and *C v G* [2010] NZFLR 497 (CA) at [31] and [32].

145 Family Proceedings Act 1980, s 64A.

made by a parent who doesn't live with their children, or who shares the care of their children with another. The objects of the Child Support Act 1991 are set out in section 4, and the Act affirms the right of children to be maintained by their parents, the corresponding obligation on parents to maintain their children and the responsibility of parents to ensure that their obligations to birth and adopted children are not extinguished by obligations to step-children.[146] The amount of child support payable is calculated according to a formula set out in the legislation. The formula takes into account each parent's income, living needs, number of dependent children and care arrangements. The Commissioner of Inland Revenue is responsible for administering the scheme and any parent can apply to the Commissioner for a child support assessment. Court proceedings are not required. The formula does not take into account the special needs of a particular child or the special circumstances of the parents, but a parent can apply to the Commissioner for a departure from the standard formula. Child support is discussed in Part I.

(c) **State benefits**: The State has a role in supporting individuals under the Social Security Act 1964. This includes the financial support of single parents and jobseekers, the payment of supported living payments[147] and pensions, and the provision of Working for Families tax credits for low income households. While recourse to State benefits is generally seen as a last resort, it plays an important role in supporting families post-separation:[148]

> *There is little enthusiasm worldwide for the state to assume responsibility for the economic fallout of relationship breakdown. In reality, where private resources are limited, one party frequently becomes at least partially dependent on state support, but this is more often the product of inevitability than design.*

146 Child Support Act 1991, s 4.

147 Supported living payments are for people who have, or care for someone with, a health condition, injury or disability that severely limits their ability to work on a long-term basis.

148 Joanna Miles "Financial Provision and Property Division of Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 267 at 272.

2.51 Where a relationship ends on death, in addition to having the right to elect an entitlement under the PRA, the surviving partner may be able to access State benefits of the kind described above. They may also have a claim under the Family Protection Act 1955 against the deceased partner's estate which, like maintenance on separation, seeks to provide temporary relief to enable a surviving partner to start constructing a new life.[149] Claims under the Wills Act 2007,[150] the Administration Act 1969[151] or the Law Reform (Testamentary Promises) Act 1949[152] may also be available to a surviving partner or any children of the deceased. These statutes are discussed in Part M.

2.52 It is clear that the State has a vital interest in both the operation of the PRA and its interaction with the other pillars of financial support. When relationships end, this usually comes at a financial cost to each partner, and that cost is ultimately borne by the State through the provision of benefits when the other pillars fail. We have been mindful in preparing this Issues Paper that the division of property at the end of a relationship can affect the need for State support by one or both partners and any affected children.

Tikanga Māori and the PRA

2.53 In recent decades there has been a growing recognition of te ao Māori (the Māori dimension) and the need to acknowledge tikanga Māori and address how it might operate within or alongside New Zealand law.[153] In 2001 the Law Commission

149 The Family Protection Act 1955 allows surviving family members who have not been provided for by the deceased to bring claims against the estate under s 4 for "proper maintenance and support" where the deceased owed a "moral duty" under s 3 to provide for them.

150 The Wills Act 2007 states the requirements for the creation of effective wills and their administration. Wills can be challenged for non-compliance.

151 The Administration Act 1969 provides for how estates are to be administered when a person dies. It contains the rules for dividing property when a person dies without a will, including the entitlement of a surviving partner or child.

152 The Law Reform (Testamentary Promises) Act 1949 allows a person to bring a claim against an estate where the deceased made a promise to provide for the person in a will; that person provided a service which went beyond what would normally be expected of the relationship he or she had with the deceased; and the deceased failed to fulfil the promise.

153 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [117]. The Law Commission Act 1985 requires the Commission to take into account te ao Māori in making recommendations for the reform and development of the laws of New Zealand: s 5(2)(a). In a draft paper written for the purposes of the Commission's review of Māori custom and values, Whaimutu Dewes said there is "an increasing acceptance that Māori Custom Law should be recognised to ensure its survival and to provide Māori determined alternatives to a moncultural government legal system." See Whaimutu Dewes Māori Custom Law: He Kākano i Ruia Mai i Rangiātea, e Kore e Ngaro (unpublished draft paper written for the Law Commission) at 11 as cited in Law Commission *Māori Customs and Values in New Zealand Law* (NZLC SP9, 2001). See also Jacinta Ruru and Leo Watson "Should Indigenous Property Be Relationship Property" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

published a Study Paper, *Māori Custom and Values in New Zealand Law*, in which it concluded:[154]

> *If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.*

2.54 In 2016, Sir Hirini Mead wrote that:[155]

> *… it is time for New Zealand to establish its own common law that is relevant to our people and the realities we face in this country. In other words, Māori custom law has to be an essential part of our joint common law.*

2.55 David Williams has observed that a delicate balance is required of law-makers and decision makers:[156]

> *If tikanga Māori is ignored altogether, except when it needs to be obtained for the purpose of extinguishment, then the monoculturalism of the past will be perpetuated. On the other hand, if custom law is entirely removed from the community context whence it arose then it will rapidly lose its authenticity.*

2.56 New Zealand legislation has, for many years, recognised various Māori concepts.[157] The courts address Māori concepts in case law, taking account of tikanga Māori both through the provision of expert evidence and by taking judicial notice of it.[158]

2.57 Ruru identifies the challenge to the family law system and its practitioners, in "how to recognise, understand and accommodate tikanga Māori relating to the family."[159]

---

154 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [402], see also [403].

155 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at viii.

156 David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 5. See also Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [294].

157 For example, the Education Act 1989 defines a wananga by reference to tikanga Māori (s 162(4)(b)(iv)), the Resource Management Act 1991 defines kaitiakitanga and tikanga Māori (s 2) and Te Ture Whenua Māori Act 1993 provides for decisions of the Māori Appellate Court on matters of tikanga Māori to be binding on the High Court (s 61(4)). Mead observes that this may evidence the increasing acceptability and popularity of tikanga Māori in the wider community: see Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 26. See also Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, 1996) at 50. More recent examples of Māori concepts in New Zealand law (and proposed law) include the Oranga Tamariki Act 1989 and Te Ture Whenua Māori Bill 2016 (126-2).

158 See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [204]–[220] and [252]. See also the suggestion that a panel of experts (pukenga) could raise general levels of awareness of tikanga Māori and also be involved in court processes in David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 43–44. See also *B v P* [2017] NZHC 338, *Takamore v Clarke* [2014] NZLR 733 (SC).

159 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 58 where she also identifies the challenges of how to understand and mediate conflict in marriages between Māori and non-Māori, and how to formulate

2.58 In the context of the PRA, there are a number of specific issues of particular interest to Māori.[160] However, there is also a broader question about the recognition of tikanga Māori in the framework of the PRA as it is outlined in Chapter 3. To provide context to that discussion, we briefly describe tikanga Māori.[161]

What is tikanga Māori?

2.59 Tikanga Māori[162] refers to the body of rules and values developed by Māori to govern themselves – the "Māori way of doing things."[163] It is sometimes described as Māori custom law.[164] Importantly, tikanga Māori should not be seen as fixed from time immemorial, but is based on a continuing review of fundamental principles in a dialogue between the past and the present.[165] Mead observes that "[t]ikanga Māori is adaptable, flexible, transferable and capable of being applied to entirely new situations."[166]

2.60 In the Commission's Study Paper, *Māori Custom and Values in New Zealand Law*, it concluded that:[167]

---

and administer family law so that it guarantees all citizens equal consideration and respect for their cultural views and practices, given the special status of the Māori people as signatories of the Treaty of Waitangi on the one hand, and the imbalance in access of Māori and non-Māori to political power on the other.

160 See paragraph 4.48 for a discussion of Property (Relationships) Act 1976 matters where tikanga Māori is relevant.

161 This description is necessarily brief in this introductory Part of the Issues Paper. We have referred extensively to the Law Commission's *Study Paper Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) and note its own acknowledgment of work and commentaries provided by Justice (now Sir Edward) Durie, Dame Joan Metge, Dr Michael Belgrave, Dr Richard Mulgan, Chief Judge (now Justice) Joseph Williams, Whaimutu Dewes and Dr David Williams (Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at ix).

162 The fundamental values which inform tikanga Māori have been comprehensively examined by Sir Hirini Mead and are also discussed in the Law Commission's *Study Paper on Māori custom and values*. See Hirini Moko Mead *Tikanga Māori* (Revised ed, Huia Publishers, Wellington, 2016) and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [124]–[166].

163 Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 2, as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [71].

164 Tikanga is the closest Māori word equivalent to the concepts of law and custom. For a detailed discussion of Māori Custom Law see the Law Commission's previous reports including: Law Commission *Justice: The Experiences of Māori Women* (NZLC R53, 1999); Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) and Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003). It has been suggested that tikanga relies on a collective sharing of decision making, tied to the community, and differs from the law which exists today with its ties to a world of individualism: see Pat Hohepa and David Williams *The Taking into Account of Te Ao Maori in relation to Reform of the Law of Succession* (unpublished paper for the Law Commission, 1996) at 19.

165 Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) at 51 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [10].

166 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 355.

167 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [75]. In reaching this conclusion, the Law Commission drew extensively on the papers of all contributors to the Custom Law Project, which included Dame Joan Metge, Dr Michael Belgrave, Dr Richard Mulgan, Chief Judge Williams, Whaimutu Dewes and Dr David Williams. At [98] the Law Commission quoted Dr Michael Belgrave's statement that:

> *to achieve a modern Maori consensus on the nature of customary law that is workable in the present, it is necessary to appreciate the extent to which colonisation was more than simply a catalyst for the modification of customary law. That at different times Maori customary law was denied, acknowledged, defined modified and extinguished according to non-Maori agenda casts a long shadow that cannot be ignored.*

> *Tikanga Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. In tikanga Māori, the real challenge is to understand the values because it is the values which provide the primary guide to behaviour. Aspects of tikanga may be subject to a particular interpretation according to certain circumstances but then reinterpreted in the light of other circumstances. Thus tikanga Māori as a social system was traditionally pragmatic and open-ended and remains so today.*

2.61 While tikanga Māori was an essential part of traditional Māori society and was binding, today there are choices about how people conduct their lives, and tikanga is being revisited.[168]

2.62 Whanaungatanga is the underlying concept of Māori customary family law.[169] It signals that in traditional Māori thinking relationships are everything, and the individual identity is defined through that individual's relationships with others; the individual is important as a member of the collective.[170] Whakapapa, which identifies the nature of relationships between all things, is the glue that holds the Māori world together.[171] It follows that tikanga Māori emphasises the responsibility owed by the individual to the collective.[172] Mead characterises this as individuals expecting to be supported by their relatives near and distant, while the collective group also expects the support and help of its individuals.[173]

2.63 The basic social unit of Māori society is the whānau.[174] Each whānau belongs to one or more hapū and iwi, although Mead observes that today, these terms "are not firmly attached to one kind of kinship grouping", rather they are used more creatively.[175]

---

168 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 7. Richard Mulgan suggests that

> *…neither the modern whanau nor the modern iwi encompasses the individual's daily life to the extent achieved by the former hapu. Given that both the extent and the flexibility of the authority of tikanga over individuals depended on their involvement in the life of the hapu, the attenuation of hapu life must set limits to the extent to which Maori customary law is appropriate for modern urban Maori. By the same token, there may be grounds for allowing a more extensive application of tikanga Maori for those Maori who choose to live in closer, more intensely Maori communities which, like the traditional hapu, encompass their economic as well as their social life.*

169 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 IJLPF 327 at 329. See also Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 9, as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130].

170 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130].

171 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130] citing Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 9.

172 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, March 2001) at [130].

173 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 32.

174 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 224.

175 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 242.

Nuclear families are submerged in and dominated by the whānau, which also include grandparents, aunts and uncles.[176] Children are considered taonga. The child is viewed as not the child of the birth parents, but of the family, and the family is not a nuclear unit within space, but an integral part of a tribal whole.[177]

2.64 Alongside whanaungatanga there is manaakitanga, which Mead describes as "nurturing relationships, looking after people, and being very careful about how others are treated."[178] Mead stresses that manaakitanga is important no matter what the circumstances might be.[179] Durie observes that "[k]inship bonds [compel] support for whanau during crisis without reference to cause or blame."[180]

176 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 61 and Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 IJLPF 327 at 329.

177 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 IJLPF327 at 329 quoting Department of Social Welfare, 1996: 74-5.

178 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 33. Alternatively, Durie describes manaakitanga as "generosity, caring for others and compassion": ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) at 6, referred to in the Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, March 2001).

179 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 33.

180 ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) at 52 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, March 2001).

Chapter 3 – What does the PRA do?

3.1 The PRA sets out rules that govern how property owned by either or both partners is divided when a relationship ends. The rules that apply when partners separate sit within a framework. The framework, illustrated in the pyramid below, also includes policy, theory and principles.[181] It is important that we identify and articulate this framework before we discuss the rules of the PRA, because it explains why we have the rules, and guides the courts' interpretation of the rules.[182]

3.2 While the PRA also sets out rules that apply to relationships ending on death, in some respects these rules are at odds with the framework that applies on separation. We therefore discuss the PRA's application on death separately, at paragraphs 3.31-3.323 below.

The framework of the PRA

3.3 The framework of the PRA is complex because it has developed over time and involves a range of different, sometimes competing, concepts.[183] This problem is not unique to New Zealand. In England and Wales, where the rules of property division on separation have developed largely though case law, the courts recognise multiple objectives but there is no overriding

181 As discussed below, when we refer to principles we are talking about the principles listed in section 1N but also the implicit principles that can be discerned from the Property (Relationships) Act 1976's purpose, rules, history and supporting materials.

182 The Scottish Law Commission also recognised the importance of articulating the framework within which the rules operate in its 1981 review of financial provision on divorce: see Scottish Law Commission *Family Law: Report on Ailment and Financial Provision* (SCOT. LAW COM. No. 67, 1981) at [3.37]. The Commission noted that a lack of clear principles involved not only "an abdication of responsibility by Parliament in favour of the judiciary", but also an abdication of collective responsibility in favour of the conscience of a single judge:

> *… it does not seem satisfactory that questions of social policy, which have very important financial consequences for individuals, should turn on informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle…*

183 See Margaret Wilson "The New Zealand context – setting the legal and social scene" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 3, where she observes that the policy of the 2001 amendments to the Property (Relationships) Act 1976 was not necessarily informed by a detailed political discussion of competing theories on how to effect the reform. The lack of a single, coherent theory, Wilson explains at 3–4, is in part due to the fact that people do not live lives according to a theory, and are not always driven by rational decision-making: "it is not surprising that in an area such as family relationships where the issues causing the conflict are complex that the remedies can be pragmatic and lacking in coherence." Wilson goes on to say at 4: "The fundamental reason however for the lack of a coherent theoretical legislative approach in this area is the gendered nature of our relationships."

rationale.[184] In Scotland, when the Scottish Law Commission looked at what the objective of financial provision on divorce should be, it concluded that no one objective or principle was adequate standing by itself.[185] A combination of principles was appropriate, because it "corresponds to reality."[186]

Policy and theory of the PRA

3.4 The policy[187] of the PRA is the just division of property at the end of a relationship. By "just" we mean the broad statutory concept of justice outlined in PRA, including in the rules of division but also the rules that permit partners to enter into their own property arrangements, subject to safeguards.[188] This policy is reflected in the statutory purpose and principles set out in sections 1M and 1N of the PRA[189] as well as in the legislative history discussed in Chapter 2.

3.5 But why do the PRA's rules divide property in the way they do, and why can this division be described as just? The answers to these questions are found in the theory of the PRA. The theory ties together the policy of a just division of property and the rules that implement that policy. The theory provides the reason for *why* the division of property under the PRA is a just division.[190]

---

184 Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [3.62]. The Commission observed at [3.7] that this meant the courts have extraordinarily wide discretion, resulting in a lack of transparency and the potential for judicial inconsistency.

185 Scottish Law Commission *Family Law: Report on Ailment and Financial Provision* (SCOT. LAW COM. No. 67, 1981) at [3.59].

186 Scottish Law Commission *Family Law: Report on Ailment and Financial Provision* (SCOT. LAW COM. No. 67, 1981) at [3.60]:

> *We have seen that no single objective which is precise enough to be useful is wide enough to cover all the situations in which an award of financial provision may be called for. The reason is that an award of financial provision on divorce may be justified by one or more principles. It leads to clarity in the law to recognise this. A subsidiary advantage is that a system based on a combination of several principles can be discriminating as well as realistic. It may be, for example, that matrimonial misconduct will be relevant in relation to some principles but not others; or that an order for periodical payments for an indefinite period will be justified by some principles but not by others.*

The Commission recommended the adoption of five principles, and these remain the foundation of financial provision on divorce in Scotland today. See Family Law (Scotland) Act 1985, s 9, discussed in Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (Project Report, University of Glasgow, 2016) at 54.

187 Or purpose. We have used the term policy here so that we do not confuse purpose with the statutory purpose of the Property (Relationships) Act 1976, in s 1M.

188 See *Martin v Martin* [1979] 1 NZLR 97, where the Court of Appeal considered what was meant by the term "serious injustice" under s 13 of the Property (Relationships) Act 1976. Woodhouse J said, at 102, "in that context the reference to justice is clearly to the broad statutory concept of justice outlined in the Act and not to the varying standards that might appeal to individuals." Richardson J similarly said, at 108, that "the justice with which the statute is concerned at so many points is justice weighed in terms of the policy and scheme of the legislation itself rather than according to an abstract ideal."

189 Section 1M(c) explains that one purpose of the Property (Relationships) Act 1976 (PRA) is to provide for a just division of relationship property, and section 1N(c) also refers to a just division of relationship property. We consider however that the overarching policy of the PRA is broader than the just division of *relationship* property. In effect, the statutory purpose in section 1M(c) explains how the PRA achieves its policy of a just division of property at the end of relationships, by limiting the rules of division to relationship property only.

190 For a discussion of the theoretical analysis of property division frameworks see Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR

3.6 The primary theory of the PRA is based on the *entitlement of the two partners*. The PRA treats a qualifying relationship as an equal partnership or joint venture. The partners contribute equally, although perhaps in different ways, to the relationship. Each partner is therefore entitled to an equal share in the property of the relationship.[191]

3.7 Two secondary theories sit alongside the primary entitlement theory:

(a) The *compensation* theory recognises that in certain circumstances one partner should receive a share of the other's resources in order to compensate them for economic disadvantages a partner suffers from the relationship. Section 15, which allows a partner to claim compensation when the partners' division of functions during the relationship has led to a disparity in income and living standards after separation, reflects a theory of compensation.[192]

(b) The needs theory recognises that certain resources could help meet the *needs* of a partner or children of the relationship. Key needs-based provisions of the PRA are those dealing with occupation of the family home and postponement of the vesting of the partner's property entitlements.

3.8 We discuss these theories in greater depth where relevant in this Issues Paper.

Principles of the PRA

3.9 The principles form the basis for the PRA's rules.[193] Primarily, they are set out in the PRA itself: including in section 1N, which explicitly identifies four principles to guide the achievement of the purpose of the PRA, as set out in section 1M. We do

268.

191 See Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 275 and 292–293.

192 Some other provisions allow a partner to claim compensation when his or her rights under the Property Relationships Act 1976 have been unjustly lost or defeated (see for example ss 44 and 44C which provide compensation when a disposition of property has defeated a partner's claim or rights under the Act) or where the partner's conduct merits greater entitlements (see for example ss 18B and 18C which deal with a partner's contributions, both positive and negative, after the relationship has ended).

193 See the discussion on what is meant by a principle in William Dale "Principles, Purposes, and Rules" (1988) 10 Stat LR 15 at 18 and 22. Dale suggests that a principle is a first idea which is the starting point or basis for legal reasoning. A rule in a statute answers the question "what", whereas a principle answers the question "why."

not, however, see the list in section 1N as exhaustive. It was inserted by the Parliamentary select committee considering the amendments to the PRA in 2001, and in our view its effect was to add to, rather than replace, the implicit principles of the legislation as originally enacted.[194] A fuller expression of the PRA's principles can be discerned from its purpose, rules, history and the materials accompanying its enactment and subsequent amendment.[195]

3.10 We start with the four explicit principles set out in section 1N of the PRA:

(a) **Men and women have equal status, and their equality should be maintained and enhanced**.[196] Promoting the equal status of women and men has been a principle of the PRA since it was introduced in 1976. The principle of gender equality is enshrined in New Zealand law, and the Government remains committed to the protection and promotion of women's rights.[197]

(b) **All forms of contribution to the relationship are treated as equal**.[198] The notion that unpaid domestic and childcare responsibilities are of equal value to financial contributions further promotes the equal status of men and women. An entitlement based on non-financial contributions to the relationship was "not to be regarded as a matter of grace or favour, or as a reward for good behaviour, but as plain justice."[199]

194 In particular, the effect of s 1N of the Property (Relationships) Act 1976 was to add to the principles of the legislation as originally enacted the principle regarding functional equivalence of different types of relationships (s 1N(b)) and the principle that a just division of property takes into account the economic disadvantages partners suffer arising from the relationship (s 1N(c)).

195 The White Paper to the Matrimonial Property Bill 1975 identified a series of principles on which that Bill was based. We note however that some of these principles no longer apply as a result of amendments to the Bill as it progressed through Parliament, and subsequent amendments to the Matrimonial Property Act 1976. See AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10. The 1988 Working Group similarly identified certain principles that underpinned New Zealand's family law. See Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 3.

196 Property (Relationships) Act 1976, s 1N(a).

197 Consistent with the New Zealand Bill of Rights Act 1990, ss 5 and 19 and Human Rights Act 1993, s 21, as well as the Convention to Eliminate All Forms of Discrimination against Women. See *Women in New Zealand: United Nations Convention on the Elimination of All Forms of Discrimination against Women: Eighth Periodic Report by the Government of New Zealand 2016* (CEDAW/C/NZL/8, 15 July 201) at [1].

198 Property (Relationships) Act 1976 (PRA), s 1N(b). See also s 18(2), that confirms there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature. The PRA does not easily address what might be called negative contributions to a relationship such as the existence of family violence and we discuss this further in Chapter 12.

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

(c) **A just division of relationship property has regard to the economic advantages or disadvantages to the partners arising from their relationship or from the ending of the relationship**.[200] This principle was introduced in 2001 amid concerns that an equal division of relationship property does not always produce substantive economic equality between the partners.[201] For example, when a partner takes time out of the paid workforce to care for the children of the relationship, or leaves their job in order to move with their partner to a different geographic location with fewer career prospects, this can negatively affect how much that partner is likely to earn in the future.

(d) **Questions arising under the PRA should be resolved as inexpensively, simply and speedily as is consistent with justice**.[202] Inherent in this principle is a preference for people to resolve property matters out of court where that is consistent with justice.[203] 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.[204] However situations will inevitably arise which were not contemplated by the legislation. The question is how to balance the need for some measure of discretion to enable a just result in the exceptional cases, but not at the expense of certainty and predictability for the majority.[205] 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

200 Property (Relationships) Act 1976, s 1N(c).

201 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.

202 Property (Relationships) Act 1976, s 1N(d). Similar objectives are stated in the Family Court Rules 2002, r 3 and the High Court Rules 2016, r 1.2.

203 Self-resolution of property matters out of court may not be consistent with justice where, for example, there is a significant imbalance of power between the partners or information asymmetries.

204 Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

205 Currently, the Property (Relationships) Act 1976 balances need for certainty and discretion by permitting departure from the equal sharing rule in very limited circumstances, which we discuss at [3.27] below.

to be efficient and easy to follow. Another important aspect of ensuring property matters are resolved "consistent with justice" is the need for full disclosure between the partners, both in and out of court.

3.11 Although not stated in section 1N, the following are also implicit principles of the PRA:

(a) **The law should apply equally to all relationships that are substantively the same**. This principle is inherent in the core rules of the PRA which apply in the same way to marriages, civil unions and de facto relationships of three or more years' duration.[206] The principle is driven by the idea of equality as expressed in anti-discrimination laws and is reflective of a shift in family law policy towards greater recognition of a wide range of family relationships.[207]

(b) **A just division of property when a relationship ends should reflect the assumed equal contributions made by both partners**. This principle embodies the concept of equal sharing or the "50:50 split". The idea of equal sharing was introduced having regard to 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."[208]

(c) **Only property that has a connection to the relationship should be divided when the relationship ends**. Just as important as "how" property is shared, is "what" property should be shared. The principle of the PRA is that only property which is central to family life (commonly owned or used property, such as the family home and chattels, whenever acquired) and property attributable to the relationship is subject to equal sharing. Property of one partner that is kept separate

206 The de facto relationships we are referring to are the relationships that are of some permanence, so that they are comparable in substance to marriage and civil unions which are not affected by the rules about a marriage or civil union of short duration. Questions remain about how to assess whether relationships are substantively the same, and we discuss this further in Part B.

207 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 the New Zealand Bill of Rights Act 1990, s 19 and Human Rights Act 1993, s 21.

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

from the relationship is not subject to equal sharing. It can be a difficult task to define the property pool to which equal sharing should apply.

(d) **Misconduct during the relationship is generally irrelevant to the division of property. This principle is long-standing.** Speaking in Parliament on an amendment to the predecessor to the PRA, the Matrimonial Property Act 1963, the then Minister of Justice confirmed that:[209]

> *The purpose of the Act is not to reward a wife for good behaviour or to punish her for bad behaviour… To introduce an element of fault in a substantial way would be to warp altogether the concept behind the Act – the concept of marriage as a partnership.*

This principle was carried into the PRA[210] and is consistent New Zealand's no-fault approach to marriage dissolution.[211] The PRA is generally not concerned with moral judgements about the partners' conduct.[212] Misconduct can only be considered in PRA proceedings in truly extraordinary cases, where the conduct was "gross and palpable" and it significantly affected the extent or value of the property to be divided.[213] Even then, misconduct is treated merely as a negative fact diminishing or detracting from other positive contributions to the relationship, rather than warranting a penalty in the division of property.[214]

(e) **A just division of relationship property should have regard to the interests of children of the relationship**. This principle is expressed in several places in the PRA, including section 1M (which sets out the purpose of the PRA) and section 26.[215] It recognises that the interests

209 (26 November 1968) 358 NZPD 3392.

210 Matrimonial Property Act 1976, s 18(3). See discussion in AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10.

211 Family Proceedings Act 1980, ss 37–43. The sole ground for dissolution of a marriage or civil union is that the relationship has broken down irreconcilably. This is established only if the parties have been living apart for the past two years, and no proof of any other matter shall be required: s 39.

212 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.40].

213 Property (Relationships) Act 1976, s 18A(3).

214 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.40]. This principle is also apparent in other provisions of the Property (Relationships) Act 1976, for example, in the way it treats simultaneous relationships. The partner that maintains two qualifying relationships is not penalised, for example, for any deception involved in maintaining the two relationships. See Property (Relationships) Act 1976, ss 52A–52B.

215 The need to have regard to the interests of children is also evident from the White Paper accompanying the Matrimonial Property Bill 1975 when it was introduced into Parliament. See AM Finlay "Matrimonial Property – Comparable Sharing:

of children of the relationship may be considered sufficiently important to warrant some degree of priority over their parent's property entitlements.[216] However as we discuss in Part I, in practice children's interests are seldom prioritised in this way.

(f) **Partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards**.[217] The rules of division in the PRA were intended to be "subordinate to the freedom of the husband and wife, subject to proper safeguards, to regulate their property relations in whatever way they think fit."[218] The Government at the time did not want to "force married people within the straitjacket of a fixed and unalterable regime."[219] This principle was therefore an "integral feature of [the PRA's] public legitimacy."[220] Importantly, the principle concerns relationship autonomy rather than individual autonomy. A person cannot unilaterally contract out of his or her obligations under the PRA; they must do so by way of agreement with their partner. Safeguards 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 the relationship must be made on the same basis if they are to be enforceable in a court.

(g) **A just division of property under the PRA should recognise tikanga Māori and in particular whanaungatanga.** This principle is reflected in the exclusion of Māori land and most taonga from the pool of relationship property to be divided under the PRA. Instead, dealings with Māori land are governed by Te Ture Whenua Māori Act 1993 and the kaitiakitanga of taonga is governed by tikanga.[221]

An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

216 See discussion in Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 290–291 and 302–303.

217 Property (Relationships) Act 1976, pt 6.

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

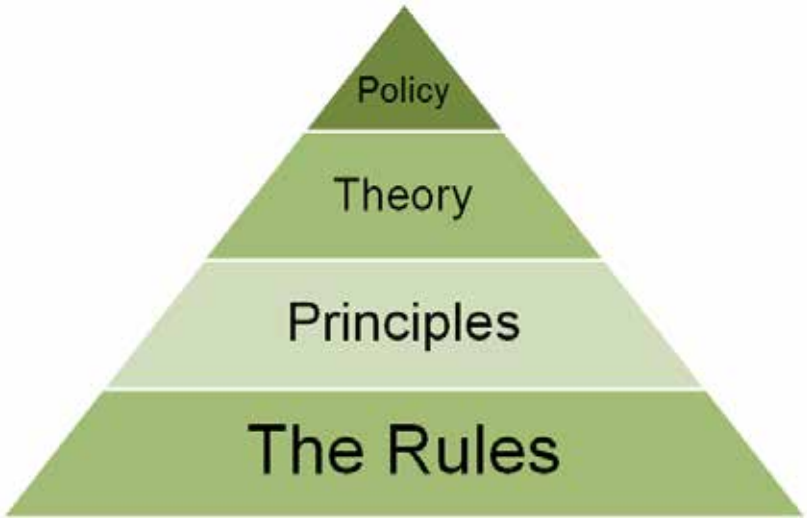
219 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

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

221 Although legal action under concepts such as constructive trusts may still be taken in relation to taonga. See for example *B v P* [2017] NZHC 338 at [150], [161]-[168].

(h) **A single, accessible and comprehensive statute should regulate the division of property when partners separate**. The PRA sought to provide a single, coherent, and rational code to replace the existing law on the division of property on separation.[222] This recognised the undesirability of requiring partners to rely instead on general remedies in property law or equity.[223] The situation is more complex for relationships ending by the death of one partner, as succession law also applies.

3.12 As highlighted throughout this Issues Paper, it is often necessary to prioritise and accommodate different theories and principles in particular situations.[224]



How it works – The PRA rules

3.13 The rules in the PRA set out how the policy, theory and principles (explicit and implicit) are achieved in practice. This discussion provides a high level summary of how the rules generally operate. Specific rules, and how well they work in practice, are considered in greater detail in other parts of this Issues Paper.

3.14 The PRA implements a deferred regime of property sharing. This is because the actual division of property only happens when a

222 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5. The operation of the Property (Relationships) Act 1976 as a code is enshrined in s 4.

223 Equity is a body of law New Zealand inherited from England and Wales. In previous centuries the courts would apply equity when established legal rules would achieve unfair outcomes. Over time, the courts' practice of applying equity evolved into distinct rules and principles. These rules and principles have become the law of equity which applies in New Zealand today.

224 See Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2008) 39 VUWLR 813; Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268.

court makes orders dividing the relationship property, or when the partners enter into a contracting out agreement under Part 6 of the PRA dividing the property between them. Prior to division, the partners may deal with or dispose of any property as if the PRA did not exist.[225]

3.15 It is important to note that many New Zealanders do not resolve their property affairs in accordance with the PRA rules. We know from anecdotal evidence that many partners divide their property in accordance with their own sense of fairness. Sometimes, the partners record their agreement in a way that meets the PRA's requirements for a binding contracting out agreement. Those agreements can be made before or during the relationship to specify how their property is to be divided if they separate in the future, or after separation to resolve their property matters.[226] Agreements can also provide for the division of property if one partner dies, and an agreement can be made between a surviving partner and the personal representative of the deceased's estate.[227] At other times, partners may resolve their property matters informally, with or without taking legal advice.[228] In all cases, the negotiated compromises may lead to different outcomes than might have resulted if the PRA was applied.

3.16 We also know that some rules of the PRA appear significant on a plain reading, but in reality are seldom relied on by a party or applied by a court. Section 26, which provides that a court may make property orders for the benefit of children, is a good example. This is an important power, however it is rarely used and when it is, the orders tend to relate to only a small proportion of the partners' property.[229]

225 Property (Relationships) Act 1976 (PRA), s 19. Only in limited circumstances may a partner restrain a disposition of property while the property remains undivided. 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. The notice has the effect of freezing the title as if the notice was a caveat lodged under the Land Transfer Act 1952 (s 42(3)). Section 43 allows a partner to apply to the court to restrain dispositions of property made in order to defeat the partner's rights and interests under the PRA.

226 Property (Relationships) Act 1976, ss 21–21A. When entering an agreement, the partners must comply with several requirements. These include that the agreement is in writing, each partner has independent legal advice before signing the agreement, and each partner's signature is witnessed by a lawyer who has explained the effect and the implications of the agreement to the partner (s 21F). A court retains an overriding power to set a contract aside if giving effect to the contract would cause a serious injustice (s 21J).

227 Property (Relationships) Act 1976, ss 21(2) and 21B.

228 We do not know how many people resolve property matters without the assistance of lawyers, but it is likely that this accounts for a significant proportion of separating partners. By way of example, research in England and Wales identified that 47 per cent of couples divorcing or separating between 1996 and 2011 did not seek legal advice: Rosemary Hunter and others "Mapping Paths to Family Justice: matching parties, cases and processes" [2014] Fam Law 1404 at 1405.

229 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR26.04(2)].

Who does the PRA apply to?

3.17 The PRA is concerned with three types of relationships: marriages, civil unions and de facto relationships. The general rule of equal sharing applies to all relationships of three years or longer, although special rules of division exist for shorter relationships.[230]

3.18 The PRA defines a de facto relationship as a relationship between two persons who are both aged 18 or older, who live together as a couple and who are not otherwise married or in a civil union with one another.[231] Sometimes it can be difficult to determine whether partners are in a de facto relationship for the purposes of the PRA and, if so, when that relationship began. No official records of de facto relationships are kept as is the case with marriages and civil unions. The PRA therefore lists a range of matters that indicate whether two people "live together as a couple", such as the duration of the relationship, the existence of a common residence and the degree of financial dependency between the partners.[232]

What property is covered by the PRA?

3.19 The first step in dividing property is to identify what is covered by the PRA. The PRA applies to all *property* the partners own, either individually or jointly. The definition of property in the PRA is broad, and it includes real property, personal property, estates or interests in such property, debts and other rights or interests.[233] The property *owner* is a person who is the "beneficial" owner.[234] A person can therefore have rights to property even if they are not the legal owner.

3.20 There are, however, several resources that can confer considerable financial benefits on a partner but they do not come within the PRA's definition of property. These resources include things like a partner's ability to earn income or a discretionary beneficial interest in a trust.

---

230 The Property (Relationships) Act 1976 provides special rules of division for marriages and civil unions of short duration at ss 14 and 14AA. However these special rules do not apply if partners were in a de facto relationship prior to their marriage or civil union, and the combined time living in a de facto relationship and marriage or civil union was more than three years. In respect of de facto relationships of short duration, the court can only make an order for the division of property if there is a child of the relationship or the applicant has made a substantial contribution to the relationship (s 14A).

231 Property (Relationships) Act 1976, s 2D(1).

232 Property (Relationships) Act 1976, s 2D(2).

233 Property (Relationships) Act 1976, s 2.

234 The Property (Relationships) Act 1976 defines "owner" to mean "the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity" (s 2).

What property is shared between the partners?

3.21 Property eligible for division between the partners when a relationship ends is what the PRA classifies as "relationship property."[235] Only property that has a connection to the relationship should be subject to division.[236]

3.22 Relationship property is defined in the PRA to include:[237]

(a) the family home and family chattels (including furniture, household appliances and motor vehicles), whenever acquired;

(b) all property owned jointly or in common in equal shares by the partners;

(c) all property owned by either partner before the relationship if the property was acquired in contemplation of the relationship and was intended for the common use or benefit of both partners;

(d) all property acquired by either partner after the relationship began;[238] and

(e) the proportion of the value of any life insurance policies and superannuation scheme entitlements that are attributable to the relationship.[239]

3.23 Property that is not relationship property is "separate property" under the PRA,[240] and is not subject to division at the end of a relationship. Separate property can include:

(a) property acquired by either partner while they were not living together as a couple;[241]

235 Property (Relationships) Act 1976, s 11.

236 See paragraph (c) above. The rationale for classifying certain types of property as relationship property is, as the Minister of Justice explained in the White Paper to the Matrimonial Property Bill 1975, to avoid partners having to show specific contributions to identified pieces of property to claim an interest in that property: see AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5-6.

237 Property (Relationships) Act 1976, s 8.

238 This is subject to several exceptions, including where the property acquired after the relationship began was acquired out of separate property: Property (Relationships) Act 1976, ss 8(1)(e)–(ee) and 9–10.

239 The value that is attributable to the relationship is normally calculated by reference to the contributions made during the period of the relationship. Contributions made prior to and after the relationship are not captured.

240 Property (Relationships) Act 1976, s 9(1).

241 Property (Relationships) Act 1976, s 9(4)(a).

(b) property acquired out of separate property, for example, dividends received from shares acquired before the relationship;[242]

(c) property acquired by a partner as an inheritance, gift or because the partner is a beneficiary under a trust;[243] and

(d) property with a special character, such as heirlooms and taonga.[244]

3.24 Separate property can, however, be converted to relationship property and be divided between the partners in some circumstances. This might happen when an increase in value in the separate property, or any income or gains received from the separate property, are due to the application of relationship property or the actions of the other partner.[245] Separate property may also become relationship property if it is used to acquire or improve relationship property, or if it is mixed with relationship property so that it becomes unreasonable or impracticable to regard that property as separate property.[246]

3.25 The PRA also classifies debts. A debt may be a relationship debt or a personal debt.[247] A relationship debt is, broadly speaking, a debt incurred for the common benefit of the partners or in the course of their common life together, and is eligible for division.[248] The net value of relationship property to be divided between the partners is calculated by determining the total value of the relationship property and then subtracting any relationship debts.[249]

How is relationship property divided?

3.26 The general rule is that all relationship property is divided equally between the partners.[250] This rule characterises the PRA as an

242 Property (Relationships) Act 1976, s 9(2); *Rowney v Rowney* (1981) 4 MPC 178 (HC) cited in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.38].

243 Property (Relationships) Act 1976, s 10(1).

244 Section 2 of the Property (Relationships) Act 1976 defines heirloom and taonga.

245 Property (Relationships) Act 1976, s 9A. For example, if one partner owned a holiday home before the relationship began, and the partners pay for the home to be upgraded using relationship property funds which then increases the home's market value, that increase in value would be relationship property. See *Hollingshead v Hollingshead* (1977) 1 MPC 108 (SC).

246 Property (Relationships) Act 1976, ss 9A(3) and 10(2).

247 Property (Relationships) Act 1976, s 20.

248 Property (Relationships) Act 1976, s 20(1). A personal debt is not a relationship debt. A personal debt relates solely to a partner's personal affairs.

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

250 Property (Relationships) Act 1976, s 11.

equal sharing regime.[251] The rule is built firmly on the principles that all forms of contribution to the relationship are treated as equal, and that a just division of property when a relationship ends should reflect those equal contributions.[252]

3.27 The PRA's general rule of equal sharing is not absolute. It does not apply to short-term relationships. There are also circumstances where equal sharing can be departed from even if the relationship is three years or longer:[253]

(a) **Extraordinary circumstances:** If there are "extraordinary circumstances" that would make equal sharing of relationship property "repugnant to justice", a court can order that each partner's share of property is to be determined in accordance with the contributions they made to the relationship.[254] This exception has a high threshold and will only apply in truly extraordinary cases.[255]

(b) **Economic disparity:** Sometimes the income and living standards of one partner after a relationship ends are likely to be significantly higher than the other partner, because of the division of functions within the relationship. The obvious example is where one partner stopped working to care for children, while the other partner continued to work and progressed their career. On separation, the partner that stopped working may struggle to restart their career (particularly if they have ongoing childcare responsibilities). In these cases, a court may order the partner with the higher income and living standards on separation to pay compensation to

251 In conceptual terms, the presumption of equal sharing means the Property (Relationships) Act 1976 can be described as a "community of property" system in relation to relationship property (see A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 258). This means the relationship property is deemed to be the joint property of both partners to the relationship. There are, however, some important qualifications to make. First, New Zealand's system is only a community of property system in respect of relationship property. It is not a full community of property system, which means all the property of the partners is jointly owned. Rather, it is only the relationship property that is equally divided under s 11 of the Property (Relationships) Act 1976 as the joint property of the partners. Second, the community of property system regarding relationship property is deferred. It is only after the partners have separated, or one partner has died and the surviving partner elects to divide their relationship property under the Act, that the interest in relationship property arises (subject to ss 42, 43 and 44 of the Property (Relationships) Act 1976 which provide some immediate protection of relationship property prior to division).

252 Property (Relationships) Act 1976, ss 1N(a) and 1N(b).

253 See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.21]; Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR11.03].

254 Property (Relationships) Act 1976 (PRA), s 13. A partner's contributions, within the meaning of the PRA, are defined in s 18 of the PRA.

255 See for example *Martin v Martin* [1979] 1 NZLR 97 (CA) at 111 per Richardson J; and *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 697: "It is difficult to envisage any stronger use of language than is reflected in 'extraordinary circumstances' and 'repugnant to justice' to emphasise the stringency of the test which has to be satisfied in order to justify departure from the equal sharing regime."

the other partner out of their share of the relationship property.[256]

(c) **Dispositions of relationship property to a trust:** If one partner has disposed of relationship property to a trust, and this defeats the other partner's rights under the PRA, a court can order that the partner who disposed of the property to the trust to pay compensation to the other partner, either from their separate property or their share of relationship property.[257]

(d) **Settling relationship property for the benefit of children:** If the court makes an order settling relationship property for the benefit of children, that property is not divided between the partners, although a court can reserve an interest of either or both partners in that property.[258]

(e) **Two homes owned when the relationship began:** If, when the relationship began, the partners each owned a home that was capable of becoming the family home,[259] but only one home (or the sale proceeds of one home) came into the pool of relationship property, a court may adjust the partners' shares of relationship property to compensate for the inclusion of only one partner's home.[260]

(f) **Sustained or diminished separate property:** If the separate property of one partner has been sustained by the actions of the other partner or with the application of relationship property, a court may increase the share of relationship property to be received by the other partner.[261] Conversely, if the value of one partner's separate property has diminished in value because of the actions of the other partner, a court may reduce the other partner's share in relationship property.[262]

256 Property (Relationships) Act 1976, s 15.

257 Property (Relationships) Act 1976, s 44C.

258 Property (Relationships) Act 1976, s 26. As noted at paragraph 3.16 above, s 26 is seldom used.

259 The family home, being the dwellinghouse used as the family's principal family residence, is classified as relationship property (Property (Relationships) Act 1976, s 8(1)(a)).

260 Property (Relationships) Act 1976, s 16.

261 Property (Relationships) Act 1976, s 17.

262 Property (Relationships) Act 1976, s 17A.

(g) **Personal debts paid from relationship property:** If one partner has used relationship property to pay personal debts, a court can adjust the shares of relationship property to be divided between the partners or make orders requiring the partner to pay compensation to the other.[263]

The role of the courts in dividing property

3.28 Partners can agree to divide their property in any way they think fit. They are not required to apply the PRA's rules of division, however, if they want their agreement to be enforceable they must meet certain process requirements set out in the PRA.[264] Partners can resolve their property matters in a range of different ways, including by negotiation, with or without legal advice, or by mediation, arbitration or some other dispute resolution process.

3.29 If partners cannot agree on the division of property, then the PRA provides for property disputes to be decided by the Family Court.[265] A partner can apply for a determination as to the respective shares of each partner to the relationship property, or for orders dividing the relationship property between the partners.[266] The Court is bound to follow the rules of division in the PRA, but has a range of powers to implement its determination of each partner's share of the relationship property. In particular, the Court can order the sale of property and the distribution of the proceeds, order the vesting of any property in one partner and order the payment of money by one partner to the other.[267]

3.30 The Family Court can also make a range of orders that do not affect the division of relationship property (non-division orders). These provisions are needs-based and primarily give effect to the principle that a just division of relationship property has regard to the interests of children. Non-division orders include orders postponing the vesting of any share in the relationship property,

263 Property (Relationships) Act 1976, s 20E.

264 For an agreement to be binding it must be in writing and signed by both partners. Each partner must have had independent legal advice before signing, and their signature must be witnessed by a lawyer. That lawyer must also certify that they have explained the effect and implications of the agreement to the partner, before the partner signed. See Property (Relationships) Act 1976, s 21F.

265 Property (Relationships) Act 1976, s 22. This is subject to the Family Court's power to transfer proceedings to the High Court under s 38A, and the right of appeal of Family Court decisions to the High Court under s 39.

266 Property (Relationships) Act 1976, s 25.

267 Property (Relationships) Act 1976, s 33.

orders granting one partner a right of occupation of the family home (or other home forming part of the relationship property), orders vesting a tenancy in one partner, and orders giving one partner the right of possession and use of furniture.[268]

Application of the PRA on death

3.31 When a partner dies, the surviving partner chooses between applying for a division of relationship property under the PRA rules (option A), or accepting an entitlement under the deceased partner's will or the intestacy rules (option B).[269] If the surviving partner chooses option A, he or she does not usually receive anything under the will, as the PRA treats all gifts to the surviving spouse as having been revoked, unless the will expresses a contrary intention.[270] The choice must be made within six months of the grant of administration of the deceased partner's estate unless a court extends the time period.[271] If the surviving partner fails to make a choice, option B is the default option.[272]

3.32 There are several differences between the PRA rules that apply on death and the rest of the PRA. Notably, the surviving partner can divide the couple's relationship property on death by electing option A, while the deceased's personal representative must seek leave of a court for a division of property and show that a failure to grant leave would cause "serious injustice".[273] If the surviving partner elects option A, that entitlement takes priority over any beneficial interest under the will or the rules of intestacy, as well as any claim made under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949.

3.33 Short-term relationships on death are treated differently. A short term marriage or civil union is treated the same way as a qualifying relationship when one partner dies, unless the court considers that would be unjust.[274] Short-term de facto relationships that end on death are treated differently, and are

268 Property (Relationships) Act 1976, ss 26A–28D.

269 Property (Relationships) Act 1976, s 61.

270 Property (Relationships) Act 1976, s 76. We understand that few wills satisfy this requirement.

271 Property (Relationships) Act 1976, s 62.

272 Property (Relationships) Act 1976, s 68.

273 Property (Relationships) Act 1976, s 88(2).

274 Property (Relationships) Act 1976, ss 85(1) and 85(2).

subject to the rules that apply to short-term de facto relationships that end on separation.[275]

How New Zealand compares internationally

3.34 Jurisdictions around the world recognise the need for special rules of property division when relationships end, but differ on what shape these rules should take.[276] Most jurisdictions that have a specific statutory scheme follow a similar structure, with rules of classification and division, followed by adjustment provisions for the exceptional cases. There are two broad approaches, with some countries adopting a regime that has elements of both. The first is a "community of property" approach, where the property of the partners is considered to be held jointly. The second is the separate property approach, where the property of the partners is kept separate at all times. Most jurisdictions have moved away from separate property systems and have embraced some form of community of property regime. These regimes vary from a full community of property approach, where all property is shared,[277] to a "community of surplus" approach, whereby the partners share only the property gains made during the relationship.[278]

3.35 A key distinguishing feature of New Zealand's relationship property regime is the application of the same rules to de facto, married and civil union partners. Of the jurisdictions that New Zealand usually compares itself to,[279] only Australia and Scotland make specific provision for the division of property between de

275 Property (Relationships) Act 1976, ss 85(3) and 85(4).

276 Bill Atkin "Family property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 197 at 209.

277 Such as the universal property regime, found in the Netherlands until recently (the law change comes into effect on 1 January 2018) and in Portugal previously (where universal community of property was abandoned with reform of the 1966 Civil Code in 1977). Under a full or universal community of property regime all property of the partners is in principle owned by both partners from the start of the relationship and throughout the relationship. At the end of the relationship all the property is divided equally

278 This is also known as a community of acquests or acquisitions, or limited community of property. See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.61]. See also A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 240. The authors note however that rarely are the spouses in a community of surplus regime sufficiently business-like in their approach to their marriage to prepare an inventory of property held at the time of marriage. Consequently the marriage usually concludes with the spouses sharing all their property whenever acquired because of the operation of a presumption that what is not stated to have been acquired before marriage is deemed to have been acquired during marriage. We note however that behaviour may have changed since the date of publication of this article. An example of a jurisdiction that has a community of surplus or accrued gains as an option available to partners is Germany (known as *Zugewinngemeinschaft)*.

279 Including Australia, England and Wales, Ireland, Scotland and Canada.

facto partners along similar lines to married partners.[280] In other jurisdictions, de facto partners (or "cohabitants" as they are often referred to in Europe) are required to resolve any property disputes using other general legal remedies such as constructive trust, contract or unjust enrichment.[281]

3.36 Different jurisdictions prioritise the theories of entitlement, compensation and needs in different ways. There can be many variations in terms of how a regime is constructed, given the large number of policy choices to be made (for example deciding what, when and how property should be divided). The scope for variation means that those countries that New Zealand often compares itself with have radically different approaches to dividing relationship property.

3.37 In England and Wales for example, there is no statutory rule that each partner has an equal entitlement to relationship assets. Rather, the courts divide property at their discretion, with the first consideration being the welfare of any minor children.[282] In Australia, the courts have a significant discretion pursuant to the Family Law Act 1975 to alter the property division on the basis of what the court considers to be just.[283] A court will consider the contributions of the partners to the property, the welfare of the family and the partners' future needs.[284] In Canada there is a presumption of equal division of "net family property", which can

280 In Australia, the Family Law Act 1975 (Cth) provides for de facto couples to obtain property settlements on the same principles that apply to married couples. Qualifying relationships are those of two years or more, that have a child of the relationship, are registered, or where one party made substantial contributions so that serious injustice would arise if an order was not made. The Family Law (Scotland) Act 2006 provides a presumption that cohabitants will share equally in household goods acquired during the relationship. There are limited rights relating to the family home. For example, a partner can apply for a right to occupy the family home if the other partner is the legal owner. Financial provision may also be ordered if one of the partners suffered economic disadvantage arising from the relationship.

281 This is not to say that no legal protection is available to help cohabitants after a relationship ends. In Canada, spousal support (similar to maintenance) may be awarded on separation with regard to various factors including the length of time the partners cohabited and the division of functions during the relationship. On 29 September 2017 the Alberta Law Reform Institute published *Property Division: Common Law Couples and Adult Interdependent Partners* (Report for Discussion 30, September 2017) <www.alri.ualberta.ca>. This Report for Discussion is open for public consultation until 20 November 2017. We will consider this Report for Discussion and any subsequently available information from the ALRI as we prepare our Final Report. In other European jurisdictions there are varying levels of legal protection for cohabiting partners, often linked to the presence of children or the length of the relationship. For example, in certain parts of Spain cohabitants have inheritance rights and the right to some form of maintenance. In Norway, cohabitants likewise have various rights of inheritance if they have children together or have cohabited for more than five years: Inheritance Act (in force 1 July 2009) (Norway), s 28(b)–(c).

282 Matrimonial Causes Act 1973 (UK), ss 24 and 25.

283 Family Law Act 1975 (Cth), s 79. Recently questions have been raised as to whether the discretionary nature of the property division regime in the Family Law Act 1975 (Cth) should be replaced with a system based on prescriptive principles, in order to promote greater certainty, fairer outcomes and lower costs. In 2014 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: Australian Government *Access to Justice Arrangements: Productivity Commission Inquiry Report* (2014) at 874. In September 2017, the Australian Government commissioned the Australian Law Reform Commission to undertake a comprehensive review of the Family Law Act 1975 (Cth), including the substantive rules and general principles in relation to property division: Attorney-General for Australia "First comprehensive review of the family law act" (press release, 27 September 2017).

284 See the factors set out in s 75(2) of the Family Law Act 1975 (Cth).

be rebutted for example if equal division would be unconscionable (in Ontario) or unfair (in British Columbia).

3.38 There are also differences in the approach when a relationship ends on death. Most European civil law jurisdictions have a default matrimonial property regime that entitles spouses to an equal share of their matrimonial property on divorce and death.[285] Succession law governs the distribution of the estate, after the matrimonial property entitlement has been accounted for, and a surviving partner may have a fixed entitlement to property from the estate.[286] The surviving spouse may also be entitled to additional financial security in the form of either capital or income provision or a maintenance claim.[287]

3.39 In both Australia and England and Wales, the court's power to alter the spouses' matrimonial property interests (discussed at paragraph 3.37 above) does not apply if a relationship ends on death. Instead, succession law governs the distribution of the deceased partner's estate and will determine whether and to what extent the surviving partner shares in the assets of the deceased.[288] In Canada, a surviving spouse can apply to court for a division of the deceased's estate. The court's approach will be province dependant. In British Columbia for example, a court can order a just and equitable amount be paid from the deceased's estate if it considers the surviving spouse was left with an inadequate amount.

3.40 Ultimately, each country takes a unique approach not only to the division of relationship property but also to the other "pillars" of financial support that may be used to assist partners affected by the end of a relationship. Some countries will place more emphasis on private transfers between individuals (such as maintenance or child support) while others have strong State assistance systems. The approach of each country will, as with New Zealand, be influenced by the values that each society prioritises. For example, the degree of importance placed on the

285 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). See also Jens M. Scherpe "The Financial Consequences of Divorce in a European Perspective" in Jens M. Scherpe (ed) *European Family Law* (Edward Elger Publishing, Cheltenhan, 2016) vol 3 at 202–205.

286 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

287 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

288 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). For England see Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 1. For Australia see for example Succession Act 2006 (NSW).

interests of the children can influence whether provision is made to protect their interest in the family home.

Chapter 4 – What are the big questions of this review?

4.1 In this chapter we introduce what we think are the "big questions" about how the PRA is working in contemporary New Zealand. These are big questions because the responses could result in substantial change to the law. These questions, and possible options for reform, are then discussed in detail throughout the Issues Paper.

Is the framework of the PRA sound?

4.2 The PRA as passed in 1976 "was easy to understand and apply to most marriages."[289] Since then New Zealand has undergone a period of significant social change, including in patterns of partnering, family formation, relationship breakdown and re-partnering. The PRA itself has also undergone significant change during this period, extending to de facto relationships, civil unions, same-sex relationships and relationships ending on death. Before we turn to how the PRA is working in practice, it is important to first consider whether the framework of the PRA (explained in Chapter 3) still reflects what most New Zealanders want now and in the foreseeable future. If evidence suggests that this framework no longer reflects the values and expectations of most New Zealanders, this will affect our consideration of the PRA rules, as "the principles that we choose to guide us are the DNA of law reform."[290]

The policy of a just division remains sound

4.3 While there may be different views on how the PRA framework ought to be implemented through rules, we consider that the policy of a just division of property at the end of a relationship remains appropriate for New Zealand both now and into the future.

289 Bill Atkin "Financial support – who supports whom?" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 209 at 224.

290 Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

4.4 We think that there is an ongoing need for specific legislation that ensures a just division of property when relationships end. The general law of property does not respond well to the issues that arise on separation or the death of one partner. In many cases where the partners have made different contributions to the relationship, general property law principles will not achieve a just result.

4.5 Our preliminary view is that there should continue to be a comprehensive statutory regime setting out the rules to provide for a just division of property when partners separate.

4.6 We also take the preliminary view that the rules to provide for a just division of property when a partner dies should be set out in a separate statute that also addresses the interests of third parties and relevant aspects of succession law. The death of a partner gives rise to different issues than separation and in some respects the rules that apply to relationships ending on death are at odds with the framework that applies on separation. The remainder of this discussion focuses on the PRA as it applies to separation. We discuss the rules that apply on death at paragraphs 4.50 to 4.52 below.

The PRA strikes the right balance between the theories of entitlement, compensation and needs

4.7 We consider that the primary theory underpinning the rules of division in the PRA, based on a partner's *entitlement* to certain property as a result of the (presumed) equal contributions they made to the relationship, remains sound. We have considered fundamentally different approaches prioritising the different theories of compensation or need. However changing the approach would require a substantial redesign of the PRA rules, involve making difficult policy decisions[291] and would introduce a much greater measure of discretion into the rules of division. As discussed in Chapter 3, greater discretion comes at a cost to certainty and predictability, both of which are important in

[291] If we adopted rules of division based primarily on compensation, policy decisions would need to be made about what is being compensated for, whether and to what extent there would need to be proof of a causal connection between the loss or gain and the relationship, how multiple factor causation should be dealt with, and how the loss or gain should be quantified. Rules based on need would also involve policy decisions including how we measure the claimant's needs (subjectively or objectively), how we account for the other partner's needs (for example, if he or she has limited assets), whether there should be a causation requirement (for example, that the needs are generated as a result of the relationship ending), and how long the payments should continue for. See discussion in Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268.

promoting resolution of disputes.[292] We are also mindful of the costs of significant structural change and the risk of unintended consequences.

4.8 The theory of compensation already has a role in the PRA. Section 15 is aimed at remedying situations where the roles each partner took during the relationship have led to a disparity in their income and living standards after separation. It compensates a partner for the economic disadvantages he or she suffers as a result of the division of functions during the relationship. This can, where necessary, provide "a more sophisticated concept of equality" than equal division alone can achieve.[293]

4.9 A theory based on needs is different in nature. The entitlement and compensation theories focus on past events and have the same broad objective of achieving economic equality at the end of a relationship.[294] In contrast, a needs-based theory is forward-looking and imposes an ongoing financial responsibility as if the relationship were continuing.

4.10 Our preliminary view is that property should not primarily be divided according to need at the end of a relationship, for several reasons:

(a) First, the PRA, as social legislation, plays an important role in promoting gender equality. It does so largely by recognising that non-monetary contributions to a relationship, that have traditionally been the remit of women, are equal in worth to monetary contributions and create enforceable property rights. In contrast, framing a claim in terms of future need has the effect of "casting claimants in the passive role of supplicants", encourages or at least prolongs dependency (as future re-partnering may affect their eligibility to receive relief), and fails to recognise the legitimacy of their claim to property of the relationship.[295]

(b) Second, a division of relationship property based primarily on needs does not strike the right balance

[292] See paragraph 3.10 (d) above.

[293] Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 288.

[294] 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 at 288–289.

[295] Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 287.

with the concepts of "no-fault" relationship dissolution or a "clean break". The concept of a "clean break" is that the property of the relationship is divided upon separation and the parties are free to go their separate ways without any competing continuing demands on their property.[296] The clean break concept will often be inappropriate where there are children of the relationship (discussed in Part I), or where the there is financial inequality between the partners resulting from the relationship (discussed in Part F).[297] But we appreciate that the concept of a clean break is still valued by many people, particularly given that more people are now entering into more than one qualifying relationship throughout their lifetime.

(c) Third, the PRA does not operate in a vacuum and cannot be expected to resolve all of the financial consequences of separation. Partners should ideally be able to meet the future needs of their families from their own incomes, and where that is not possible by payments under other pillars of financial support that are needs-focused (discussed in Chapter 2), including maintenance under the Family Proceedings Act 1980, child support under the Child Support Act 1991 and State benefits under the Social Security Act 1964.

(d) Fourth, a distribution of property based on entitlement and/or compensation may be sufficient to meet a partner's needs in any event. In contrast, distribution based on need is effectively defined by and limited to one partner's needs, which may in fact result in a smaller distribution (with the other partner retaining more than an equal share of the property).[298]

296 While the clean break concept is not given expression in the Property (Relationships) Act 1976, it is recognised by the courts. In *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), the Court of Appeal noted 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" at 269. See also *Haldane v Haldane* [1981] 1 NZLR 554 (CA) and *M v B* [2006] 3 NZLR 660 (CA).

297 The difficulty with a clean break when there are children of the relationship was discussed during Parliamentary debates of the De Facto Relationships (Property) Bill 1998 (108-1) and Matrimonial Property Amendment Bill 1998 (109-1) (which later became the Property (Relationships) Amendment Bill 2000). Patricia Schnauer from the ACT Party NZ said that "there is no doubt an adverse effect from applying the clean-break principle on the separation of couples. While there can be a clean break in terms of dividing up property, I suggest that it is totally impossible emotionally to have a clean break from one's children", at (5 May 1998) 567 NZPD 8233. Chris Fletcher from the National Party noted that the idea of a clean break "is a good one" but that "[t]he reality, particularly for the partner who has been at home raising the children…she is much less likely to get back on her feet as quickly as her ex-husband", at (6 May 1998) 567 NZPD 8280.

298 Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 284 and 287–288.

4.11 However, that is not to say that a needs-based theory should play no role in the PRA. In practice section 15 compensation payments (discussed at paragraph 4.8 above) often meet a partner's post-separation needs. Our preliminary view, discussed in Part F, is that section 15 requires reform, and one option we consider is to unite the section 15 compensation payments and maintenance payments by requiring one partner to make financial reconciliation payments to the other partner in certain circumstances. Such an approach would be based on both the compensation and needs theories. It would not, however, detract from the general rule of equal sharing under the PRA based on a theory of entitlement.

4.12 The needs of the partners and any children of the relationship are also relevant to the court's implementation of the (generally equal) division of relationship property under the PRA and its consideration of whether to make non-division orders. These orders grant a partner temporary rights to use or occupy property, but do not affect each partner's entitlement to a share of relationship property when division occurs. Non-division orders are usually made to reflect the needs of the other partner or their children.

Some principles may need to change

4.13 Our preliminary view is that, broadly speaking, the principles of the PRA remain sound in 2017. Some principles may, however, need to change to better reflect people's changing values and expecations about what is fair when relationships end.

4.14 In Part C we consider the principle that all property that has a connection to the relationship should be divided when a relationship ends. Repartnering and stepfamilies are more common today, and this might mean more people want to keep property separate. The PRA automatically treats some property as relationship property because of its use, such as use of a house for the family home. There is a question as to whether this principle remains appropriate in contemporary New Zealand.

4.15 In Part I we also consider whether the PRA should take a more child-centered approach, and propose options for promoting children's best interests that might require a redefinition of the existing principle that a just division of property should have regard to children's interests.

Recognising tikanga Māori in the PRA

4.16 We discussed in Chapter 3 the implicit principle that a just division of property under the PRA should recognise tikanga Māori and in particular whanaungatanga. At paragraphs 4.48–4.49 below we identify some potential issues with the way that the rules allow tikanga to operate, and ask whether this means aspects of the PRA should be changed.

4.17 A further question we have considered is whether the current approach of accommodating and responding to tikanga Māori within the framework of the PRA, rather than having a separate regime for property division according to tikanga Māori, remains appropriate. Our preliminary view is that the PRA framework can respond to matters of tikanga Māori, and that these matters should not be treated separately. We would like to hear from anyone who has a different view, with their suggestions for reform.

The principles should be explicit

4.18 As a matter of good drafting practice, particularly where a statute substitutes the general law and introduces rules based on distinct values, we commend the approach of a comprehensive principles section at the outset of the legislation. The Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.[299] The principles will guide the reader with a clear understanding of the values that are promoted through the legislation and what Parliament intended to be achieved.[300]

299 Interpretation Act 1999, s 5(1). The Legislation Bill 2017 (275-1) currently before Parliament proposes to relocate the Interpretation Act within the new legislation. Legislation Bill 2017 (275-1), cls 10-12 (general principles of interpretation) and cl 150 (repeal of Interpretation Act 1999).

300 See Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990) at [229]; Law Commission *The Format of Legislation* (NZLC R27, 1993) at 9; Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [30]. See also R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 122–123. See also Law Commission *Reforming The Law Of Contempt Of Court: A Modern Statute* (NZLC R140, 2017). We note too that this approach has been recommended by the New Zealand Law Society in its submission on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill (New Zealand Law Society "Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill"at [34]).

Do you agree?

4.19 Our preliminary view is that the framework of the PRA is sound. On the whole, we think that the current framework can achieve a just division of property when partners separate.

4.20 This preliminary view is significant, but it does not necessarily preclude major change. We discuss below what we think are big questions with the way the PRA is currently working, and potential options for reform. Changes in these areas could have considerable consequences for outcomes under the PRA.

CONSULTATION QUESTION

A1 Does the framework of the PRA described in Chapter 3 remain appropriate both in 2017 and in the foreseeable future?

a. Should this regime continue to be based primarily on a theory of entitlement, supplemented by theories of compensation and need?

b. Have we accurately articulated the explicit and implicit principles which should guide the content and interpretation of the rules in the PRA? Should any of the principles be amended or removed? Should any other principles be added?

c. Does further consideration need to be given to how tikanga Māori is taken into account in the framework of the PRA? If so, what might this look like?

The big questions

4.21 We have identified eight "big questions" with how the PRA is working in contemporary New Zealand. These raise questions about whether the PRA always achieves a just division of property at the end of a relationship. In response to these big questions we are considering whether substantial change is needed to the PRA rules. This may require the PRA to embrace new ideas and new concepts.

4.22 These big questions are summarised below and are then explored in depth throughout this Issues Paper.

Big question 1: Does the PRA always apply to the right relationships in the right way?

4.23 Since the PRA was first enacted over 40 years ago, there have been significant changes in relationship patterns, including how relationships form and end.[301] In essence, relationships are now much more diverse and this diversification is expected to continue. For example:

(a) Fewer people are marrying.[302]

(b) More people are living in de facto relationships.[303] There is evidence to suggest that most married couples now spend a period of time living together before marriage.[304]

(c) Remarriages have increased, and in 2016 accounted for 29 per cent of all marriages, compared to 16 per cent in 1971.[305] No information is collected about re-partnering in a de facto relationship, but it is expected that these rates will have also increased.

(d) Legal recognition and social acceptance of same-sex relationships has also coincided with more people recording that they are in a same-sex relationship.[306]

4.24 While there is little New Zealand-based research about the changing dynamics within relationships, we have heard anecdotally that there is an increasing variety in approaches

301 For further discussion about changes in relationships and families see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

302 The marriage rate has declined from 35.5 (people per 1000 unmarried people age 16 and over) in 1976, to 10.9 in 2016: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand "General Marriage Rate, December years (total population) (Annual-Dec)" (June 2017) <www.stats.govt.nz>

303 In 2013, 409,380 people reported they were in a de facto relationship, which accounts for 22 per cent of all couples, up from 8 per cent in 1986: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing 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>; and Statistics New Zealand *Population Structure and Internal Migration* (1998) at 10.

304 Dharmalingam and others found that 90% of the first marriages of women born after 1960 were preceded by one or more de facto relationships: Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, 2004) at 8. Superu observes that it is now the norm for a de facto relationship to be the first form of partnership for most New Zealanders, and for partners who marry to first spend time in a de facto relationship: Superu *Families and Whānau Status Report 2014* (June 2014) at 164.

305 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 4 citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

306 In 2013, 8,328 same-sex couples lived together, up from 5,067 in 2001: See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand 2013 Census QuickStats about families and households – tables (November 2014).

to managing finances. We understand that more partners are choosing not to share their finances, or keep a joint account only for shared expenses such as rent or food. We have also heard about people who, having been through one relationship separation and property division, prefer to keep their finances separate in subsequent relationships. This is sometimes because one or both partners have children from previous relationships and prefer to organise their affairs so that each partner is financially responsible for his or her own children.

4.25 Similarly, we are aware of the increasing research attention being given to partners who live apart. Little is known about how common these types of relationships are in New Zealand, but research in the United Kingdom and Australia suggests that just under 10 per cent of adults are in a relationship but do not live with their partner.[307] This research suggests that partners can live apart for very different reasons. Some partners may face constraints to living together, for example, they may work in different locations, or have commitments to dependent children or elderly parents. For others, living apart may be a conscious choice.[308]

4.26 The increasing diversity of relationships requires us to consider whether the PRA still applies to the right relationships in the right way. While we think the PRA's application to marriages, civil unions and de facto relationships is broadly appropriate, we have identified the following possible issues:

(a) Does the definition of de facto relationship capture the right relationships?

(b) Is three years an appropriate period of time before the PRA's general rule of equal sharing applies, or should it be longer?

(c) Are the different rules of division for relationships shorter than three years justified?

307 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Rory Coulter and Yang Hu "Living Apart Together and Cohabitation Intentions in Great Britain" (2015) Journal of Family Issues 1 at 20; and Vicky Lyssens-Danneboom and Dimitri Mortelmans "Living Apart Together and Money: New Partnerships, Traditional Gender Roles" (2014) 76 Journal of Marriage at 950.

308 For further discussion about partners who "live apart together", see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

(d) Are the different rules that apply to short-term de facto relationships, compared to short marriages and civil unions, appropriate?

(e) Does the PRA apply appropriately where partners live or have lived outside New Zealand, or hold property in a number of jurisdictions?

4.27 We address question (a) in Part B, questions (b), (c) and (d) in Part E, and question (e) in Part L of the Issues Paper.

Big question 2: Does the PRA divide property that should be kept separate?

4.28 The PRA classifies property as either relationship property or separate property as a means of identifying which property should be divided at the end of the relationship.

4.29 The PRA's definition of relationship property, consistent with the principle that all property central to the relationship be shared, includes some items that may have been acquired by one partner before the relationship began. In particular, the couple's family home and the family chattels are deemed relationship property "whenever acquired."

4.30 We have encountered criticism that the PRA forces some people to divide property that was not acquired through joint effort. For example, when one partner brings a home into the relationship but the other does not, people have told us that it is unfair that the full value of the house be divided between the couple. There are also various anomalies that may arise depending on the use to which property has been put. For example, if a valuable item of property acquired before the relationship is placed within the family home and used for family purposes, it may be deemed a family chattel and subject to equal sharing. If, however, the item was kept separate to family life (for example if a piece of art was displayed at the partner's workplace) the item may not be considered a family chattel.

4.31 These complaints suggest that the definition of relationship property could be reformed to exclude assets that were acquired before the relationship began. Instead, the concept of relationship property would only extend to property that was acquired during the relationship. This would have significant consequences for the

size of the property pool available for division in some cases, and therefore requires careful consideration.

4.32 We discuss this question in Part C.

Big question 3: How should the PRA deal with trusts?

4.33 Property held on trust will generally not be subject to the PRA's rules of division, even if one or both partners enjoy the use and benefits of that property.[309] Many families in New Zealand use trusts as a means of holding property. Consequently, the PRA does not apply to a significant amount of property attributable to relationships, undermining the policy of a just division and the principle that all property central to a relationship ought to be divided equally.

4.34 The PRA has provisions designed to expose trust property and require the partner who disposed of property to a trust to pay compensation to the other partner. However these provisions are widely criticised for being of limited effect and easy to avoid.

4.35 While there are a number of possible remedies outside the PRA regime that a partner could pursue in relation to trust property, they generally depend on different principles, leaving the law complex and conflicting. Their existence also undermines the principle that a single, accessible and comprehensive statute should regulate the division of property at the end of a relationship.

4.36 One significant option for reform is to amend the definition of relationship property in the PRA so that certain interests in a trust or even the trust property itself could, in defined circumstances, be divided. Broadening the relationship property definition in this way would enable the partners to share property that had a connection to the relationship. It would in effect prevent the policy of the PRA being undermined by the use of trusts to hold property that would otherwise be attributable to the relationship and subject to division.

4.37 We are also considering whether section 182 of the Family Proceedings Act 1980, which relates to setting aside nuptial settlements, should be either repealed or brought within the

309 Unless a partner has a vested or contingent beneficial interest under the trust.

PRA and amended, consistent with the principle that a single, accessible and comprehensive statute should regulate the division of property at the end of a relationship. Another option for reform is to improve the existing provisions in the PRA that deal with dispositions of property to a trust.

4.38 We discuss this question in Part G.

Big question 4: What should happen if equal sharing does not lead to equality?

4.39 In some cases, separation may impose disproportionately greater economic disadvantages on one partner, as a result of the division of functions within the relationship. For example, in some relationships the career of one partner is prioritised (explicitly or implicitly) over the career of the other. This may mean that the other partner (the supporting partner) instead prioritises the care of any children of the relationship and maintaining the family home. He or she may leave the workforce to do so, work part-time and/or deliberately choose a less demanding and ambitious job. The supporting partner may also relocate with their partner when their partner's job requires it. When the relationship ends, the supporting partner may find it more difficult to recover economically from the separation. Because of the decisions the partners made about the division of functions during the relationship, the supporting partner may lack the skills and experience to find rewarding employment, whereas the other partner leaves the relationship with the benefits of an advanced career. In this scenario, the supporting partner loses the economic benefits that he or she expected to receive from the investment in the relationship.

4.40 One of the principles of the PRA is that a just division of property has regard to the economic advantages or disadvantages to the partners arising from their relationship or from its end. This principle is given effect by section 15. Having reviewed section 15 and the case law, we conclude that it has been largely ineffective in remedying the disproportionate economic disadvantages one partner may suffer.

4.41 We are considering a number of options to address this issue. The first option is to lower the hurdles that a partner must overcome to obtain an award under section 15. The second option is to

treat a partner's ability to earn income as an item of property which could be divided to the extent it has been enhanced by the relationship. The third option is unite the section 15 remedy with maintenance in a form of periodic financial reconciliation payments.

4.42 We discuss this question in Part F.

Big question 5: How should the PRA recognise children's interests?

4.43 The interests of children are referred to in a limited number of provisions in the PRA. We have found that in practice children's interests are seldom expressly taken into account in relationship property matters. This is probably due to the uncomfortable fit of needs-based provisions focused on children's interests within an entitlement-based property division regime for adults. Children of relationships are, however, affected when parents or step-parents separate, and New Zealand family law has increasingly adopted a more child-centred approach within social legislation, consistent with New Zealand's obligations under the United Nations Convention on the Rights of the Child.

4.44 A key question we consider is whether the PRA should be reformed to take greater account of children's interests and, if so, what form those amendments should take. We explore this question further and consider a number of potential options in Part I.

Big question 6: Does the PRA facilitate the inexpensive, simple and speedy resolution of PRA matters consistent with justice?

4.45 We understand that the vast majority of partners who separate will not go to court to resolve the division of their property. Some will not even consult a lawyer. There is a critical need to ensure that the PRA's rules, the court process and any dispute resolution mechanisms facilitate the inexpensive, simple and speedy resolution of PRA matters in a manner that is consistent with justice. Agreements reached outside court must be just, efficient and enduring.

4.46 We currently lack the information to fully analyse how couples are resolving PRA matters. We welcome submissions on how the regime is operating in practice, and any areas of concern. Our research and preliminary consultation to date has identified two broad problems:

(a) **Lack of information and support for resolution of PRA matters**. International research suggests that access to information about property rights and the available processes for resolving disputes is vital in ensuring a just and prompt resolution of relationship property disputes.[310] The clarity and certainty of the rules themselves is also important in facilitating just agreements. We are concerned that the current information and support available to people at the end of their relationship may be lacking. We are considering a range of reform options, including the promotion of online resources about the PRA rules and the Family Court process, and online dispute resolution tools. We also identify the range of options for more formal out of court dispute resolution, and ask whether the State should have a greater role in facilitating any of these options for PRA disputes.

(b) **Undue delay in resolving property matters in the court system**. This includes delays as a result of inefficiencies in the case management procedure for PRA cases in the Family Court, as well as delays caused by one partner, for example, by failing to provide full disclosure or comply with other process requirements. We are considering reforms to improve the court process, including changes aimed at early issue identification and minimising undue delay through stricter timeframes, clear rules of disclosure and tougher penalties for breaching process requirements. We are also considering reform options designed to clarify the jurisdiction of the Family Court and High Court to deal with PRA and related matters.

4.47 We consider issues relating to the resolution of PRA matters in Part H.

310 Emma Hitchings, Jo Miles and Hilary Woodward "Assembling the jigsaw puzzle: understanding financial settlement on divorce" [2014] Fam Law 309 at 316-317.

Big question 7: Does the PRA provide adequately for tikanga Māori to operate?

4.48 The PRA recognises tikanga Māori in the exclusion of Māori land from the ambit of the PRA and the exclusion of taonga from the definition of family chattels.[311] In this Issues Paper, we raise a range of other specific matters where tikanga Māori is especially relevant, and question whether the PRA is adequately providing for tikanga Māori to operate. These matters relate to:

(a) recognising customary marriage without subsuming it into de facto relationships (discussed in Part B);

(b) recognising whāngai children (discussed in Part I);

(c) addressing family homes built on Māori land (discussed in Part C);

(d) exempting taonga from division (discussed in Part C);

(e) whether contracting out agreements can be used to accommodate tikanga Māori (discussed in Part J); and

(f) how should tikanga Māori interact in dispute resolution processes (discussed in Part H).

4.49 In some, or all of these areas, reform might be needed to ensure tikanga Māori can operate effectively.

Big question 8: How should the PRA's rules apply to relationships ending on death?

4.50 The are tensions between the rules set out in Part 8 of the PRA that govern property division when one partner dies and succession law. There is considerable difficulty in the way Part 8 tries to bring the two regimes together. First, when one partner dies different interests are at stake than if the partners separate during their lifetime. The law has to grapple with the obligations the deceased may have owed to third parties such as other family members. These obligations may conflict with a surviving partner's interest in the deceased's estate under the PRA. Second, the rules that apply on death are generally complex and inaccessible. We understand that many will-makers, surviving

311 Property (Relationships) Act 1976, s 6 (exclusion of Māori land), s 2 (exclusion of taonga from definition of "family chattels").

partners and even advisers struggle to come to terms with how the law applies. Third, Part 8 is silent on key matters, such as how the rules are to apply when the deceased's representative seeks a division of relationship property under the PRA.

4.51 We question whether the PRA framework remains appropriate for relationships ending on death, given the increase in re-partnering and the prevalence of step-families. Our preliminary view is that while surviving partners should not lose their right to an equal share of relationship property when one partner dies, the provisions that relate to the division of property on death should be placed in a separate statute, which would also address the interests of third parties. Any such legislation would fall outside the scope of this review and would need to be progressed separately. Such legislation would also need to consider issues arising from the intersection of tikanga Māori and succession law.

4.52 We discuss these issues and options for reform further in Part M.

Other general issues

4.53 In addition to the big questions discussed above, there are some smaller points that we wish to raise here because they have an overarching application to the PRA and this review.

Should relationship neutral terms be used in the PRA?

4.54 The PRA uses specific terms to describe different types of relationships, even though the same rules generally apply regardless of the relationship type.[312] In particular the PRA uses the terms "marriage", "spouse", "husband" and "wife"; "civil union" and "civil union partner"; and "de facto relationship" and "de facto partner".[313]

4.55 The Select Committee considering the 2001 amendments decided to retain specific terms to describe the different relationship types in response to concerns that failure to do so would

312 There are some instances in which the Property (Relationships) Act 1976 distinguishes between relationship types, for example the rules applicable to relationships of short duration, ss 14, 14A and 14AA.

313 There is one partial exception: the phrase "spouse or partner" is sometimes used in the Property (Relationships) Act to mean a spouse or civil union partner or de facto partner (see the definition of "partner" in s 2).

undermine the sanctity of marriage.[314] New Zealand society has undergone considerable change since 2000. There may be less social significance attached to different types of relationship, and objections to the use of relationship neutral terms may no longer be so strong. We think it is timely to reconsider whether these objections remain today, or if it is appropriate to use relationship neutral terms in the PRA where the same rules apply to all relationship types.

4.56 While sensitive to the concerns raised in 2001, our preliminary view is that relationship neutral terms should now be adopted, for two primary reasons:

(a) First, the use of specific terms is out of step with the principles of the PRA discussed in Chapter 3. The PRA seeks to achieve substantive equality and neutrality in terms of relationship type. Relationship neutral terms may better reflect the principle that the law should apply equally to all relationships that are substantively the same.

(b) Second, the use of specific terms can make the PRA complicated and long-winded. The introduction of civil unions in 2004 means there are now three different categories of relationship that must be specified in the PRA. For example, section 13 of the PRA currently provides that if the exception to equal sharing applies:

> *…the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.*

This could be simplified, without loss of meaning; to read "…the share of each partner in that property or money is to be determined in accordance with the contribution of each partner to the relationship." Simpler language would make the PRA more concise and accessible to the public.

314 See Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 2000 (109 – 3) (select committee report) at 6: "[some submitters] claim that it is degrading to refer to a spouse as a 'partner', and to call marriage a 'partnership relationship', because they believe that marriage has a quality of sanctity that de facto relationships do not possess." and Wendy Parker "Sameness and difference in the Property (Relationships) Act 1976" (2001) 3 BFLJ 276. The Rt. Hon. Jenny Shipley said at the time "We are now required to …swallow the amoral and gender-neutral, politically correct line and call our husbands 'partners'. Marriages are now just relationships. …Well, Burton's my husband. I'm his wife. And that's the way we like it." (Rt. Hon. Jenny Shipley, Address to the New Zealand National Party Conference 2000, 19 August 2000).

CONSULTATION QUESTION

A2 Should specific terms be substituted with the neutral terms of "relationship" and "partner" where there is no need to distinguish between relationship types?

Should there be more public education about the PRA and how it works?

4.57 In our preliminary consultation, practitioners told us that most of their clients understand that after three years a de facto relationship will become subject to the general rule that relationship property is divided equally under the PRA. However there are many things that people don't know. People are often unaware that a de facto relationship does not require cohabitation. Nor do they realise that a surviving partner can choose to receive his or her entitlement under the PRA and not under the will. People often do not understand the implications of property being held in trust.

4.58 We would like to know whether greater public awareness of the PRA is needed and, if so, how this could be achieved. Some ideas we have are:

(a) Informing buyers of residential property of potential future obligations under the PRA.

(b) Providing couples who are getting married or entering a civil union with information about the PRA when they apply for a marriage or civil union licence.

(c) New immigrants being told, as part of the information package they receive on arriving in New Zealand, of the existence of the PRA, its general provisions and that the regime is likely to be very different to that regime in the person's country of origin.

(d) Education on the PRA at secondary school.

CONSULTATION QUESTIONS

A3 Do you agree that there needs to be greater public education about the PRA and the obligations and responsibilities that arise under it?

A4 Do you have any ideas about ways to promote public education relating to the PRA? Do you agree with any or all of the ideas we have suggested?