

Part B – What relationships should the PRA cover?

Chapter 5 – Who is covered by the PRA?

Introduction

- 5.1 New Zealand has undergone significant change in the last 40 years.¹ As a result of changing patterns in partnering, family formation, separation and re-partnering, what it means to be partnered has changed significantly since the 1970s. Public attitudes have also undergone major shifts towards matters such as couples living together before or as an alternative to marriage, separation and divorce, having and raising children outside marriage, and same-sex relationships.
- 5.2 In this chapter we explain the different relationships covered by the PRA, and the history leading up to the inclusion of de facto relationships in 2001. We look at why the PRA should continue to apply to de facto relationships, and on the same “opt-out” basis as marriages and civil unions. The rest of Part B is arranged as follows:
- (a) In Chapter 6 we consider the PRA’s definition of “de facto relationship”, and in particular what it means to “live together as a couple.” We consider potential issues with the definition, and set out some options for reform.
 - (b) In Chapter 7 we look at some specific types of relationships, including Māori customary marriage, and consider how they are treated under the PRA.

Relationships covered by the PRA

- 5.3 The PRA covers three types of relationships: marriages, civil unions and de facto relationships.²

¹ These changes are summarised in Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

² We use the term “long-term relationship” (as well as “long-term marriage”, “long-term civil union” and “long-term de facto relationship”) to refer to qualifying relationships of three or more years’ duration that are not treated as

Marriages

- 5.4 Marriage is defined as the union of any two people, regardless of their sex, sexual orientation or gender identity.³
- 5.5 Despite population growth, the number of marriages each year is decreasing.⁴ The marriage rate is now around one quarter of what it was when it peaked in 1971.⁵ Many factors will have contributed to the fall in the marriage rate, including the increasing prevalence of de facto relationships (discussed below), the increasing numbers of New Zealanders remaining single,⁶ and a general trend towards delaying marriage.⁷ In 2016, the median age at first marriage was 30 for men and 29 for women, compared to 23 for men and 21 for women in 1971.⁸
- 5.6 Marriage today offers few legal advantages over a de facto relationship. So why do couples still get married? One reason is to make the shift from a private to a public commitment, another is to celebrate a “successful” and enduring relationship and ensure that it is properly acknowledged by family and friends.⁹ Some couples may wish to marry before they have children, or for pragmatic reasons or to conform to expectations and pressures to marry.¹⁰ Some couples may marry for cultural or religious reasons, and in New Zealand cultural and religious identity is

relationships of short duration under s 2E of the Property (Relationships) Act 1976. Relationships of short duration are considered in Part E.

³ Marriage Act 1955, s 2 definition of “marriage.” In the Property (Relationships) Act 1976, “marriage” also includes a marriage that is void (for example a marriage of persons within prohibited degrees of relationship where no order is in force dispensing with the prohibition: see Marriage Act 1955, s 15 and sch 2, and Family Proceedings Act 1980, s 31) and a marriage that has ended by a legal process while both spouses are alive or by the death of one spouse: s 2A.

⁴ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 1.

⁵ Statistics New Zealand *Information Release – Marriages, Civil Unions and Divorces: Year ended December 2016* (3 May 2017) at 3. Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 1.

⁶ Analysis of census results identifies a decline in partnering rates amongst those aged 25–34, with the strongest decline being experienced between the 1986 and 1991 censuses. In 1986, 74% of women aged 25–34 were partnered, but by 2013 this had declined to 65%. For men, the partnership rate declined from 67% in 1986 to 61% in 2013. See Paul Callister and Robert Didham *The New Zealand ‘Meet Market’: 2013 census update* (Callister & Associates, Research Note, September 2014) at 11.

⁷ Families Commission / SuPERU *Families and Whānau Status Report 2014* (June 2014) at 164.

⁸ Statistics New Zealand *Information Release – Marriages, Civil Unions and Divorces: Year ended December 2016* (3 May 2017) at 5.

⁹ Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 45–46.

¹⁰ Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 50–54 and 54–62.

diversifying.¹¹ Baker and Elizabeth say that marriage has “... retained its cultural and symbolic value as the socially ordained vehicle for relationships of romantic love and commitment.”¹²

Civil unions

- 5.7 A civil union is a formal registered relationship that is similar to a marriage.¹³ Civil unions were introduced in 2004 to provide for heterosexual couples who wanted formal recognition of their relationship but who did not wish to marry, and to address the situation regarding same-sex couples who could not legally marry.¹⁴ Civil unions and marriages are both “opt-in” relationships that make a private commitment public. A civil union provides the opportunity to formalise a relationship without the religious and social associations that can arise with marriage.¹⁵ Civil unions are generally treated the same as marriages under the PRA.
- 5.8 The number of people entering civil unions since 2005 has remained relatively small, accounting for 1.4 per cent of all marriages and civil unions between 2005 and 2013.¹⁶ The number of civil unions has dropped even further since same-sex marriage was legalised in 2013. In 2016, there were only 48 civil unions, accounting for 0.2 per cent of all marriages and civil unions.¹⁷

De facto relationships

- 5.9 The decline in the rate of people entering marriages and civil unions has coincided with an increase in the number of people

¹¹ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction.

¹² Maureen Baker and Vivienne Elizabeth “A ‘brave thing to do’ or a normative practice? Marriage after long-term cohabitation” (2014) 50(4) *Journal of Sociology* 393 at 394.

¹³ The Civil Union Act 2004 provides that two people, whether they are of different or the same sex, may enter into a civil union if they are both aged 16 or over; they are not within the prohibited degrees of civil union; and they are not currently married or in a civil union with someone else: Civil Union Act 2004, ss 10, 18 and 19. In the Property (Relationships) Act 1976, a “civil union” includes a civil union that is void (for example a civil union where at the time of solemnisation either party was already married or in a civil union: see Civil Union Act 2004, s 23 and Family Proceedings Act 1980, s 31); and a civil union that has ended by a legal process while both civil union partners are alive or by the death of one civil union partner.

¹⁴ Hon David Benson-Pope, Associate Minister of Justice, (24 June 2004) 618 NZPD 13927.

¹⁵ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 1.11.1.

¹⁶ Excluding marriages and civil unions of overseas residents. See: Statistics New Zealand “Marriages and civil unions by relationship type, NZ and overseas residents (Annual-Dec)” (May 2017) <www.stats.govt.nz>.

¹⁷ Excluding marriages and civil unions of overseas residents. See: Statistics New Zealand “Marriages and civil unions by relationship type, NZ and overseas residents (Annual-Dec)” (May 2017) <www.stats.govt.nz>.

living in de facto relationships.¹⁸ In New Zealand, 409,380 people reported they were in a de facto relationship in 2013.¹⁹ This accounted for 22 per cent of all people partnered, or 13 per cent of the total adult population.²⁰ This has increased since 2001, when people in a de facto relationships accounted for 18 per cent of all people partnered, or 11 per cent of the total adult population. The increasing prevalence of de facto relationships follows international trends, however the rate is higher in New Zealand than in other comparable countries. The increase in de facto relationships is also likely driving the increase in the number of children born outside marriage.²¹ In 2016, 46 per cent of all births in New Zealand were ex-nuptial, up from 17 per cent in 1976.²²

- 5.10 Census data can tell us about some characteristics of people living in de facto relationships. A breakdown of census data by relationship type and age demonstrates that younger people are more likely to be in a de facto relationship, with people aged 15–24 being more likely to be in a de facto relationship than be married in 2013.²³ Marriage then becomes more common in the older age brackets, which suggests that many people are living in a de facto relationship before marriage.²⁴ De facto relationships are more prevalent among Māori compared to any other ethnic group. In the 2013 census, 40 per cent of Māori who were partnered identified they were in a de facto relationship, compared to the 22 per cent of all people part.²⁵

¹⁸ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 1. It is important to note that data collected on de facto relationships in New Zealand (including census data) generally defines a de facto relationship as one where the partners live together as a couple in a relationship in the nature of marriage. As we discuss in Chapter 6, this is different to the definition of a de facto relationship in the Property (Relationships) Act 1976, s 2D.

¹⁹ 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 Census (RC, TA)” <nzdotstat.stats.govt.nz>.

²⁰ 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 Census” <nzdotstat.stats.govt.nz>.

²¹ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 1.

²² Statistics New Zealand “Live births by nuptiality (Māori and total population) (annual-Dec)” (May 2017) <www.stats.govt.nz>.

²³ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 1.

²⁴ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 1. While we do not know how common it is for partners to be in a de facto relationship immediately preceding their civil union, we expect that the situation is similar to the prevalence of a de facto relationship preceding a marriage.

²⁵ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 1.

The inclusion of de facto relationships in the PRA

- 5.11 Prior to 2001, when a de facto relationship ended property rights were usually determined under general property law principles or the law of equity.²⁶ This often resulted in significant unfairness, particularly for women.²⁷ An analysis of de facto property cases between 1986 and 1990 had found that the average division of property for women in opposite-sex de facto relationships of between three and 10 years' duration ranged from 10–40 per cent.²⁸ Obtaining more than a 20–30 per cent division under this approach was described as “extremely difficult”,²⁹ and predicting outcomes as “somewhat of a lottery.”³⁰
- 5.12 There were attempts as early as 1975 to provide a statutory property regime for de facto relationships. The Matrimonial Property Bill 1975 originally provided for a court to consider applications by partners living in a “de facto marriage” of two or more years' duration.³¹ In a White Paper accompanying the Bill, the Minister of Justice at the time said that on “practical and humanitarian grounds” there was a strong case for including de facto relationships within the property division regime for marriages.³² Following a change of Government, de facto relationships were removed from the Bill at the Select Committee stage.³³ 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.”³⁴ The opposition described the decision as “unfortunate”

²⁶ 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. Note that the Domestic Actions Act 1975 provides a regime for the settlement of property disputes arising out of the termination of agreements to marry. This can apply to de facto relationships where the partners were engaged. The Domestic Actions Act is discussed further in Part H.

²⁷ (14 November 2000) 588 NZPD 6517.

²⁸ (14 November 2000) 588 NZPD 6517.

²⁹ (14 November 2000) 588 NZPD 6517.

³⁰ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 6.

³¹ Matrimonial Property Bill 1975 (125-1), cl 49.

³² AM Finlay “Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 13.

³³ Matrimonial Property Bill 1976 (125-2) as reported from the Statutes Revision Committee.

³⁴ Hon David Thomson MP, Minister of Justice (9 December 1976) 408 NZPD 4727.

and accused the Government of “closing its eyes” to the needs of people in de facto relationships and the future welfare of their children.³⁵

5.13 In 1988 a Working Group was established by the Ministry of Justice to revise and update the Matrimonial Property Act 1976. The Working Group was unanimous that the law as it applied to de facto relationships was unsatisfactory and should be reformed.³⁶ In 1998 the De Facto Relationships (Property) Bill 1998 was introduced, proposing a separate statutory property regime for de facto relationships.³⁷ The Bill defined de facto relationship as “a man and a woman... living together in a relationship in the nature of marriage, although not married to each other.”³⁸ The proposed regime was different to the regime for married couples, and only applied to de facto relationships of three or more years’ duration.³⁹

5.14 Supplementary Order Paper 25 signalled a new policy direction.⁴⁰ It was introduced in 2000 following a change of Government, and extended the Matrimonial Property Act 1976 to cover opposite-sex and same-sex de facto relationships.⁴¹ The same property division rules that applied to spouses would generally apply to de facto partners. The Associate Minister of Justice at the time said:⁴²

As we enter a new century it is about time that New Zealand caught up with the rest of the world and provided legal recognition and rights to the members of a considerable large and growing section of our community who freely chooses to organise their relationships outside the formality of marriage.

5.15 Supplementary Order Paper 25 was considered by the Parliamentary select committee in mid-2000.⁴³ Public interest

³⁵ Mary Batchelor MP (9 December 1976) 408 NZPD 4724.

³⁶ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 65–66. It gave as reasons: Many de facto partners fulfil the same family functions as legal spouses; it is inequitable to deny recognition to a relationship which is a marriage in substance; de facto partners and spouses encounter the same problems and therefore need comparable legal remedies; legal rights will reduce opportunities for exploitation and the need for litigation; the law should recognise the undeniable reality of de facto relationships and ameliorate unnecessary hardship and patent injustice; de facto partners can contract out of the legislative reforms; and a greater recognition of de facto relationships is consistent with the trend in similar overseas jurisdictions.

³⁷ De Facto Relationships (Property) Bill 1998 (108-1) (explanatory note) at i.

³⁸ De Facto Relationships (Property) Bill 1998 (108-1), cl 17.

³⁹ De Facto Relationships (Property) Bill 1998, (108-1), cl 50(1). See Government Administration Committee *Interim Report on the De Facto Relationships (Property) Bill* (September 1999) at 13 for a table summarising the main differences between the Matrimonial Property Act and the De Facto Relationships (Property) Bill 1998.

⁴⁰ Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2).

⁴¹ (4 May 2000) 583 NZPD 1926.

⁴² Hon Margaret Wilson MP, Associate Minister of Justice (4 May 2000) 583 NZPD 1927.

⁴³ (1 June 2000) 584 NZPD 2754–2770.

was high, and the select committee received 1,631 submissions.⁴⁴ While the vast majority of submissions (approximately 1,330) did not support extending the Matrimonial Property Act to de facto relationships,⁴⁵ the majority of the select committee supported the key changes, making these observations and recommendations:

- (a) The Matrimonial Property Act should be extended to cover both opposite-sex and same-sex de facto couples.⁴⁶ Statutory protection was necessary to safeguard children and the property rights of people whose de facto relationships end, particularly those in vulnerable positions.⁴⁷
- (b) The definition of “de facto relationship” should centre on two people who “live together as a couple”, rather than “a relationship in the nature of marriage.”⁴⁸
- (c) An “opt-out” regime for de facto couples is preferable to an “opt-in” regime.⁴⁹

5.16 The Property (Relationships) Amendment Bill was passed on 29 March 2001, with most amendments extending the regime to de facto relationships coming into force on 1 February 2002. The extension of the PRA to de facto relationships has been described as a “minor triumph for the traditional values of Kiwi pragmatism and tolerance.”⁵⁰ It is said that we “lead the world” by largely applying the same rules of property division to all relationship types.⁵¹

⁴⁴ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 45.

⁴⁵ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

⁴⁶ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

⁴⁷ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

⁴⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8 and cl 3A.

⁴⁹ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 10–12.

⁵⁰ Simon Jefferson “De facto or ‘friends with benefits’” (2007) 5 NZFLJ 304, at 1.

⁵¹ Wendy Parker “Sameness and difference in the Property (Relationships) Act 1976” (2001) 3 BFLJ 276.

Should the PRA continue to apply equally to long-term relationships that are substantively the same?

- 5.17 In Part A we said that an implicit principle of the PRA is that the law should apply equally to all relationships that are substantively the same. This principle is inherent in the PRA's core rules, which generally apply in the same way to marriages, civil unions and de facto relationships of three or more years' duration (long-term relationships).⁵² The principle is driven by equality as expressed in anti-discrimination laws and reflects a shift in family law policy towards greater recognition of a wide range of family relationships.⁵³
- 5.18 There may be potential issues with how the PRA ensures that only those unmarried relationships that are substantively the same as marriages and civil unions are covered. If the PRA is not capturing substantively similar relationships, it may be failing to provide for a just division of property because it imposes the same general rule of equal sharing on relationships that are different. These issues relate to the PRA's definition of de facto relationship, and are discussed in Chapter 6.
- 5.19 The broader question is whether the PRA should continue to apply in the same way to all long-term relationships that are substantively the same, regardless of relationship type. Our preliminary view is that it should. We think it would be inconsistent with human rights principles to have different rules for relationships that are substantively the same and that face the same property issues when they end.⁵⁴ Treating de facto relationships differently is also likely to be out of step with social trends such as the increasing prevalence of de facto relationships and changing attitudes on social issues such as living together before marriage (or not marrying at all), separation and having and raising children outside marriage.⁵⁵ Although legal remedies

⁵² Exceptions include ss 24 and 89 of the Property (Relationships) Act 1976 (timeframes for commencing proceedings); and ss 63 (maintenance during marriage or civil union) and 182 (orders as to settled property) of the Family Proceedings Act 1980, which do not apply to couples in a de facto relationships. Short-term relationships (those that last for less than three years) are discussed in Part E.

⁵³ 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.

⁵⁴ See New Zealand Bill of Rights Act 1990, ss 5 and 19; and Human Rights Act 1993, s 21(1)(b).

⁵⁵ See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

may be available in property law or equity, they may be difficult to access or less favourable than the PRA.⁵⁶ Retaining de facto relationships within the PRA may also minimise some of the social and economic costs of relationship breakdown to the State.⁵⁷

5.20 Atkin has also observed that:⁵⁸

... recognising unmarried relationships in financial statutes is unlikely to undermine marriage because the legal issues that arise in each case are usually when the marriage or relationship is in strife or when one of the parties has died; ... and definitions of the relevant relationship and a duration requirement as a condition of jurisdiction (in New Zealand three years) can weed out the fringe associations that should be outside a marriage-based regime.

5.21 We have also considered whether there should be a separate regime for de facto relationships, as originally proposed in 1998.⁵⁹ However we think that it would be a backward step to reconsider that proposal at this stage of the PRA's evolution. The current approach has its issues (discussed in Chapters 6 and 7 below), but is workable as a starting point for reform.

Should the PRA continue to apply to de facto relationships on an opt-out basis?

5.22 The PRA establishes a bilateral “opt-out” regime for all marriages, civil unions and de facto relationships.⁶⁰ This means that long-term de facto relationships are subject to the PRA, unless both partners agree to opt out by entering a “contracting out” agreement.⁶¹ A contracting out agreement is a way that partners

⁵⁶ For example, an alternative remedy may exist in the common law of contract, constructive trust, under the Law Reform (Testamentary Promises) Act 1949 or the Family Protection Act 1955.

⁵⁷ See Bill Atkin and Wendy Parker “De Facto Property Developments in New Zealand: Pressures Impeded Progress” in John Dewar and Stephen Parker (eds) *Family Law Processes, Practices and Pressures: Proceedings of the Tenth World Conference of the International Society of Family Law* (Hart Publishing, Portland, 2003) 555 at 556.

⁵⁸ Bill Atkin “The Legal World of Unmarried Couples: Reflections on ‘De Facto Relationships’ in Recent New Zealand Legislation” (2008) 39 VUWLR 793 at 794.

⁵⁹ See the De Facto Relationships (Property) Bill 1998 (108-1); and Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2).

⁶⁰ This reflects the implicit principle of the Property (Relationships) Act 1976 that partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards. See Part A, Chapter 3.

⁶¹ Property (Relationships) Act 1976, ss 1C(2), 14A and 21. Short-term de facto relationships are discussed in Part E. A court may treat a relationship of three years or longer as a short-term relationship if it considers it just: s 2E(1); and short-term relationships must pass a further test before a property division order can be made: s 14A.

can substitute the PRA's rules with their own arrangement.⁶² The contracting out agreement must comply with Part 6 of the PRA, and may be made during a relationship or in contemplation of entering a relationship.⁶³ The ability to contract out is said to be an "integral feature" of the PRA.⁶⁴

5.23 Alternatives to a bilateral opt-out regime include a:

- (a) unilateral opt-out regime, where de facto relationships are covered by the PRA unless one partner opts out (the other partner's agreement is not required);
- (b) unilateral opt-in regime, where de facto relationships are not covered by the PRA unless one partner opts in (the other partner's agreement is not required); and
- (c) bilateral opt-in regime, where de facto relationships are not covered by the PRA unless both partners agree to opt-in.

5.24 The Parliamentary select committee considered a bilateral opt-in regime for de facto relationships in 2000,⁶⁵ but preferred a bilateral opt-out regime because it would mean that vulnerable people unaware of their legal situation would be covered without having to try to contract in.⁶⁶ In contrast, under an opt-in regime some people might not be able to secure their partner's agreement to contract into the PRA – this was of particular concern where the relationship is a long one or where there are dependent children.⁶⁷

5.25 Our preliminary view is that the existing bilateral opt-out regime remains appropriate for de facto relationships. We have found no new evidence that questions the conclusion in 2000 that, while an opt-out regime may create unfair outcomes for some, it will

⁶² Contracting out of the Property (Relationships) Act 1976 is discussed further in Part J. A contracting out agreement may relate to the status, ownership and division of property in particular circumstances: s 21.

⁶³ Property (Relationships) Act 1976, s 21. Partners may also enter into a contracting out agreement to settle any differences that have arisen between them concerning their property: s 21A.

⁶⁴ *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

⁶⁵ Reasons in favour of an opt-in regime were noted by the Parliamentary select committee as: (1) people in de facto relationships may have chosen not to marry in order to avoid the statutory property regime; (2) an opt-in regime might, in terms of property sharing, be thought of as effectively "marrying" those couples without their consent; (3) couples in de facto relationships will bear the cost of contracting out of the PRA; (4) some de facto partners may be unable to secure the necessary support from their partner to contract out of the PRA: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 11.

⁶⁶ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 11.

⁶⁷ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 11.

“...protect more people, especially those who are vulnerable, and create less unfairness than an opt-in regime.”⁶⁸ Rather, the arguments in favour of an opt-out regime may be even stronger in 2017. An increasing number of people are living in de facto relationships,⁶⁹ and with the passage of time there is likely to be greater public awareness that de facto relationships carry property consequences. Public education about the PRA and how it works, as discussed in Part A, would also help to raise awareness.

CONSULTATION QUESTIONS

- B1 Do you agree with our preliminary view that the existing bilateral opt-out regime for de facto relationships is appropriate?
- B2 Is the PRA’s bilateral opt-out approach causing issues for de facto relationships? If so, would those issues be best addressed by re-examining that approach, or in other ways, such as education; changes to the definition of de facto relationship; changing the minimum duration requirement (see Part E); changes to the PRA’s rules of classification and division (see Parts C and D); changes to the PRA’s contracting out provisions (see Part J) or something else?

⁶⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 12.

⁶⁹ 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.

Chapter 6 – The definition of de facto relationship

- 6.1 Under the PRA, a “de facto relationship” is a relationship between two people, both aged 18 years or older; who “live together as a couple”; and who are not married to, or in a civil union with, each other.⁷⁰ The definition is flexible because it relies on a high level of judicial discretion and takes a functional approach that looks at how a couple’s relationship operates in practice rather than its form.⁷¹ The definition is set out in full below.⁷²

2D Meaning of de facto relationship

- (1) For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)–
- (a) who are both aged 18 years or older; and
 - (b) who live together as a couple; and
 - (c) who are not married to, or in a civil union with, one another.
- (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
- (a) the duration of the relationship;
 - (b) the nature and extent of common residence;
 - (c) whether or not a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
 - (e) the ownership, use, and acquisition of property;
 - (f) the degree of mutual commitment to a shared life:

⁷⁰ Property (Relationships) Act 1976, s 2D(1).

⁷¹ See Margaret Briggs “What relationships should be included in a property division regime? A New Zealand perspective” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

⁷² Determining the duration of a de facto relationship, including start and end dates, is discussed in Part E.

- (g) the care and support of children:
 - (h) the performance of household duties:
 - (i) the reputation and public aspects of the relationship.
- (3) In determining whether 2 persons live together as a couple,—
- (a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
 - (b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
- (4) For the purposes of this Act, a de facto relationship ends if—
- (a) the de facto partners cease to live together as a couple; or
 - (b) one of the de facto partners dies.

Two people who “live together as a couple”

6.2 At the heart of the definition of de facto relationship is the concept of two people who “live together as a couple.”⁷³ This was not always the case. Early drafts of the definition hinged on the central concept of a man and a woman living together “in a relationship in the nature of marriage.”⁷⁴ The more neutral concept of two people living together as a couple emerged in 2000 at Select Committee stage.⁷⁵

⁷³ The significance of the central concept of two people who “live together as a couple” is evident from the structure of the definition and several High Court decisions. The structure of the definition gives the concept of two people who “live together as a couple” in s 2D(1)(b) primacy over the factors listed in s 2D(2). In *Benseman v Ball* [2007] NZFLR 127 (HC) the High Court said at [20] that the “central inquiry must be whether the parties are living together as a couple and thus in a de facto relationship.” In *L v P*

92007)26 FRNZ 946 (HC) the High Court said at [44] that “[t]he central plank of a de facto relationship is the parties living together”.

⁷⁴ For example, “de facto relationship” was defined in cl 17 of the De Facto Relationships (Property) Bill 1998 (108-1) as where “a man and a woman are living together in a relationship in the nature of marriage, although not married to each other.” The concept of “a relationship in the nature of marriage” persisted in the definition of “de facto relationship” in Supplementary Order Paper No 25 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2).

⁷⁵ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7. The Select Committee had received submissions that the proposed definition was unclear, and would be difficult and costly to define in court. Some submitters were offended at de facto relationships being defined as

- 6.3 The Parliamentary select committee considered who should be covered by the definition of de facto relationship. It said that:⁷⁶

In considering what criteria to include in the definition of de facto relationship, we discussed who should be covered by this legislation. There is a wide variety of de facto relationships. At one end of the scale there are long-term relationships where a couple have children together, share property, operate as an economic partnership and are committed to sharing their lives. At the other end of the scale there are couples who live together, but are not committed to sharing their lives, remain financially independent and do not have children together. Such couples may be people who seek companionship and may be living in a de facto relationship expressly because they do not wish to share their property. We believe that a definition should aim to capture the first group, but avoid unduly covering the second.

The factors in section 2D(2)

- 6.4 In determining whether two people live together as a couple, all the circumstances of the relationship must be considered, including the nine factors in section 2D(2) where relevant. However no factors are prerequisites for a de facto relationship.⁷⁷ A court may have regard to such matters, and attach such weight to any matter, as may seem appropriate in the case.⁷⁸ This means that two people may “live together as a couple” even if they do not physically live together in the same house, or are financially independent. In *S v S* the High Court said that “...the approach must be broad, with various factors weighed up in an evaluative task.”⁷⁹
- 6.5 Whether two people live together as a couple is case specific.⁸⁰ If both parties say they were in a de facto relationship, then “that may well be decisive direct evidence, depending on the existence

relationships “in the nature of marriage.” The Select Committee saw the definition of de facto relationship in the New South Wales Property (Relationships) Act 1984 (NSW) and the criteria referred to in *T v Department of Social Welfare* (1993) 11 FRNZ 402 (HC) as a good starting point for what became the current definition of de facto relationship in s 2D of the Property (Relationships) Act 1976.

⁷⁶ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 8.

⁷⁷ Property (Relationships) Act 1976, s 2D(3).

⁷⁸ Property (Relationships) Act 1976, s 2D(3)(b).

⁷⁹ *S v S* [2006] NZFLR 1076 (HC) at [64]. See also *B v F* [2010] NZFLR 67 (HC) at [51]; and *Benseman v Ball* [2007] NZFLR 127 (HC) at [20].

⁸⁰ *PT v C* [2009] NZFLR 514 (HC) at [37]; and *S v S* [2006] NZFLR 1076 (HC) at [37].

of other characteristics.⁸¹ However it is not uncommon for one party to deny the existence of a de facto relationship.⁸² It is then up to a court to decide whether the parties lived together as a couple. As seen below, a range of committed relationships are de facto relationships. This highlights the flexibility of the definition. It also shows that relationships that are hard to categorise can end up in section 2D disputes.

The duration of the relationship

6.6 A long-term relationship is not necessarily a de facto relationship. In *C v S*⁸³ the parties had a 19 to 20 year relationship but did not share a common residence (even when they could have) and there was no financial commitment between them.⁸⁴ The parties carried on “an affair” of about two decades that never moved to where they were living together as a couple.⁸⁵ There the Family Court found that the parties were not in a de facto relationship.

6.7 A short-term relationship may still be a de facto relationship.⁸⁶ In *L v D*, a relationship of two years and three months was a de facto relationship.⁸⁷ Although the relationship was short, many of the section 2D(2) factors were present. The partners had a common residence for the whole period, a sexual relationship, the applicant carried out substantial unpaid work on the respondent’s property, and the partners presented themselves publicly to their friends as a couple.

The nature and extent of common residence

6.8 Sharing a home is an important indicator that two people are in a de facto relationship, but is neither essential nor conclusive.⁸⁸

⁸¹ *S v S* [2006] NZFLR 1076 (HC) at [64].

⁸² In *C v W FC Morrinsville FAM-2009-039-160*, 26 April 2010 the Family Court found at [4] and [15] that a de facto relationship existed, despite one party’s “total denial” of the relationship and her “unyielding protestations” that the other party was never more than a boarder, albeit a boarder who did not always pay board.

⁸³ *C v S FC Dunedin FAM-2005-012-157*, 28 September 2006 at [71] and [74]. The issue in this case was whether the parties were in a de facto relationship as at 1 February 2002. The analysis was complicated by the fact that both parties were married to other people for periods of their relationship.

⁸⁴ *C v S FC Dunedin FAM-2005-012-157*, 28 September 2006 at [158].

⁸⁵ *C v S FC Dunedin FAM-2005-012-157*, 28 September 2006 at [159].

⁸⁶ However different rules apply to short-term de facto relationships: see Part E.

⁸⁷ *L v D HC Blenheim CIV-2006-406-293*, 2 November 2010.

⁸⁸ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2D.04(2)]. See also *W v L* [2017] NZHC 388, [2017] NZFLR 299 where at [26] the High Court agreed with the Family Court that living at the same address cannot be determinative.

In *O’Shea v Rothstein* the High Court said that the expression “two people who live together as a couple” means more than physically living together as a couple.⁸⁹ The fact that a common residence is not shared at all times does not break the period of a de facto relationship provided that the true nature and characteristic of a de facto relationship remains.⁹⁰ In *S v S* the extent of common residence was not great, with the longest period of continuous cohabitation being nine months during a five year relationship. The High Court observed that “the absence of sharing a common residence is not determinative.”⁹¹

- 6.9 Two people who share a home for a long period are not necessarily in a de facto relationship. In *PT v C* the parties shared a common residence for approximately 20 years.⁹² They also had a sexual relationship for around five years, shared the care and support of their child, had a degree of financial interdependence and had a business relationship.⁹³ Despite these factors the High Court found they were not in a de facto relationship.⁹⁴ The relationship lacked the degree of mutual commitment to a shared life indicative of a de facto relationship.⁹⁵ One party had “divided loyalties” due to an intimate relationship with someone else, from which a child was born.⁹⁶
- 6.10 In contrast, two people who live in separate homes can still be in a de facto relationship. In *G v B* the High Court found that the partners had been in a de facto relationship even though they maintained separate residences for lengthy periods of time because the interests of one partner’s children required it.⁹⁷ The Court said that:⁹⁸

There may be compelling reasons why a couple do not share a common residence for substantial periods of time whilst remaining totally committed to a long-term relationship. Ill-health and the need for medical treatment, the demands of

⁸⁹ *O’Shea v Rothstein* HC Dunedin CIV-2002-412-8, 11 August 2003 at [20].

⁹⁰ *S v S* [2006] NZFLR 1076 (HC) at [63].

⁹¹ *S v S* [2006] NZFLR 1076 (HC) at [42].

⁹² *PT v C* [2009] NZFLR 514 (HC) at [37].

⁹³ *PT v C* [2009] NZFLR 514 (HC) at [37] and [45].

⁹⁴ *PT v C* [2009] NZFLR 514 (HC) at [55] and [57].

⁹⁵ *PT v C* [2009] NZFLR 514 (HC) at [55].

⁹⁶ *PT v C* [2009] NZFLR 514 (HC) at [37]–[39] and [55].

⁹⁷ *G v B* (2006) 26 FRNZ 28 (HC) at [35].

⁹⁸ *G v B* (2006) 26 FRNZ 28 (HC) at [33].

employment or studies, the responsibility for childcare or other dependents, and financial need may separately or in combination require couples in committed relationships to live apart for long periods of time.

- 6.11 It can sometimes be difficult to determine if the parties had shared a common residence as flatmates, landlord and tenant or as de facto partners. This can be the case where a relationship starts as a commercial arrangement and evolves into something more. In *Z v C* the applicant, a migrant student, claimed that within 18 months of moving in she had started a de facto relationship with her elderly landlord.⁹⁹ The Family Court found they had developed an affectionate, mutually supportive and close relationship that included sexual contact.¹⁰⁰ Despite that, the Court was not satisfied that they were in a de facto relationship because "...[t]he range of their relationship simply did not develop to the extent that it can fairly or properly be said that they were "a couple" with a mutual commitment to a shared life for the foreseeable future."¹⁰¹
- 6.12 The reason the parties live in separate houses may be relevant.¹⁰² In *S v S* the High Court observed that there are many examples outside the PRA where people living in separate houses or with different families were nevertheless "cohabiting", "so long as the parties retained the intention of cohabiting whenever possible so that their "consortium" was regarded as continuous."¹⁰³

Whether or not a sexual relationship exists

- 6.13 Two people can be in a de facto relationship even if there is insufficient evidence of a sexual relationship.¹⁰⁴ A relationship where the partners' religious beliefs prevent them from living

⁹⁹ *Z v C* [2006] NZFLR 97 (FC). See also *C v W FC Morrinsville FAM-2009-039-160*, 26 April 2010; *[LC] v T* [2012] NZFC 1702; and *G v R* [2013] NZHC 89, [2014] NZFLR 563.

¹⁰⁰ *Z v C* [2006] NZFLR 97 (FC) at [47].

¹⁰¹ *Z v C* [2006] NZFLR 97 (FC) at [47].

¹⁰² See *G v B* (2006) 26 FRNZ 28 (HC) where the parties lived in separate houses for around half of their 12 year de facto relationship because the interests of one party's children required it, not because their level of commitment to each other changed.

¹⁰³ *S v S* [2006] NZFLR 1076 (HC) at [40].

¹⁰⁴ In *[LC] v T* [2012] NZFC 1702 the evidence fell short of establishing a sexual relationship at [14], but regardless the Family Court found that the parties were living together as couple, at [24].

together or having a sexual relationship can still be a de facto relationship.¹⁰⁵

- 6.14 Similarly, two people can be in a de facto relationship even if they do not have an exclusive sexual relationship.¹⁰⁶ In *S v S*, the partners were in a de facto relationship although they were not monogamous.¹⁰⁷ The High Court said that:¹⁰⁸

There may be instances where couples in a relationship operate on an understanding that each might have, from time to time, other sexual partners. There may be instances where intermittent sexual behaviour occurs but is kept secret from a partner for many years. Sexual fidelity may be a factor which, depending on the circumstances, may indicate a lack of commitment but it depends on all the circumstances.

The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties

- 6.15 Financial dependence, interdependence or support is not a requirement for a de facto relationship but it can be an important factor. One text states that “[c]ouples who do not live together and maintain complete financial independence are unlikely to be regarded as living in a de facto relationship.”¹⁰⁹ In *C v S* the absence of any financial commitment between the parties was a material consideration leading to the conclusion that their 19 to 20 year relationship was not a de facto relationship (see paragraph 6.6).¹¹⁰ In that case, there was little pooling of resources or use of the other’s independent funds and neither consulted the other regarding their future financial wellbeing.¹¹¹ However in a more recent case the High Court observed that the parties’ separate finances were not a “...reliable indicator of the nature of the relationship between them, as separate financial arrangements

¹⁰⁵ In *S v S* [2006] NZFLR 1076 (HC) at [37] Gendall and France JJ had “no doubt” that the relationship in *H v G* (2001) 20 FRNZ 404 (CA) would have been a de facto relationship for the purposes of the Property (Relationships) Act 1976.

¹⁰⁶ Property (Relationships) Act 1976, ss 2D(3), 52A and 52B (which provide special property division rules for some contemporaneous relationships).

¹⁰⁷ *S v S* [2006] NZFLR 1076 (HC).

¹⁰⁸ *S v S* [2006] NZFLR 1076 (HC) at [44].

¹⁰⁹ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2D.04(4)].

¹¹⁰ *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [158].

¹¹¹ *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [158].

can be quite a common feature of settled de facto or married couples.”¹¹²

- 6.16 Partners may still provide financial support to each other even if they have separate bank accounts and manage their money independently. In *S v S*, while the partners kept their financial affairs largely separate, Ms S depended financially on Mr S in the sense he provided her with a rent-free home and other benefits that enabled her to maintain a “generous lifestyle.”¹¹³
- 6.17 Two people can be in a de facto relationship even if one partner receives a State benefit as a sole parent or has made a declaration for benefit purposes that they are not in a relationship.¹¹⁴
- 6.18 Two people can also be in a de facto relationship even if one pays rent to the other. In *C v W* board payments were evidence of a degree of financial interdependence, and represented the parties “having thrown their lot in together.”¹¹⁵ In all the circumstances of that case the Family Court found there was a de facto relationship.¹¹⁶

The ownership, use, and acquisition of property

- 6.19 It may be relevant whether property was acquired before or during the relationship; whether it is held in the name of one or both parties and to what degree; and whether it was used for family, investment or other purposes.
- 6.20 Two people can be in a de facto relationship even if they hold property in separate names. In *G v B* the High Court observed that how the parties had acquired and owned property showed a clear intention to maintain separate ownership, which “pointed away from a de facto relationship.”¹¹⁷ No property was acquired in joint names and, with the sole exception of cars bought for one party by the other, each paid for their own property when it

¹¹² *W v L* [2017] NZHC 388, [2017] NZFLR 299 at [31]. In that case the parties did not operate a joint bank account and appeared to have kept their finances relatively separate. The High Court did not find a de facto relationship in that case, but for other reasons. See also *B v B* [2016] NZHC 1201, [2017] NZFLR 56.

¹¹³ *S v S* [2006] NZFLR 1076 (HC) at [45]–[47] and [65].

¹¹⁴ See *A v T* [2012] NZFC 7836; *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011; and *[LC] v T* [2012] NZFC 1702 for examples of how receipt of a benefit can affect the analysis of whether the parties were in a de facto relationship.

¹¹⁵ *C v W* FC Morrinsville FAM-2009-039-160, 26 April 2010 at [7], [15] and [20].

¹¹⁶ *C v W* FC Morrinsville FAM-2009-039-160, 26 April 2010 at [20].

¹¹⁷ *G v B* (2006) 26 FRNZ 28 (HC) at [16] and [38].

was purchased.¹¹⁸ But the parties were in a de facto relationship due to their level of commitment, the existence of a constant physical and emotional relationship and the provision of financial support.¹¹⁹

The degree of mutual commitment to a shared life

- 6.21 The attitude of each party to the relationship can be important evidence, and is often “...used to distinguish an affair or infatuation from a de facto relationship, because it signifies a deeper and more meaningful relationship.”¹²⁰
- 6.22 A common argument is that the parties were merely “friends with benefits” and not de facto partners. In *G v R* the High Court found that despite Mr G’s arguments that he was a boarder and the parties were “friends with benefits”, the evidence supported a mutual commitment to a shared life to the extent that the conclusion that the parties were in a de facto relationship was “inevitable.”¹²¹

The care and support of children

- 6.23 Care and support of any children may include physical care, financial support and non-financial support. In this context “children” is not limited to children of the relationship. While having children together may indicate that two people are living together as a couple, it is not determinative. In *PT v C*, two parents shared a common residence and cooperated in the upbringing of their daughter for over 20 years, but were not in a de facto relationship (see paragraph 6.9).¹²²

The performance of household duties

- 6.24 Household duties may include home maintenance, gardening, cooking and cleaning. The way domestic work is shared in a relationship may need to be viewed in the light of other factors such as living arrangements and financial support. Household

¹¹⁸ *G v B* (2006) 26 FRNZ 28 (HC) at [16].

¹¹⁹ *G v B* (2006) 26 FRNZ 28 (HC) at [35].

¹²⁰ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2D.04(6)].

¹²¹ *G v R* [2013] NZHC 89, [2014] NZFLR 563 at [4].

¹²² *PT v C* [2009] NZFLR 514 (HC).

duties performed for payment may suggest a commercial relationship rather than two people who live together as a couple.

The reputation and public aspects of the relationship

- 6.25 Establishing the public face of the relationship may require evidence from family, friends and colleagues; and may be illustrated through attendance at family and work functions as a couple, photographs of the parties presenting as a couple, and public displays of affection.
- 6.26 A clandestine relationship however may still be a de facto relationship. In *[LC] v T* the parties described their relationship to others as landlord/tenant or flatmates.¹²³ There was a considerable age gap between the parties, their relationship was a talking point in their community and they were in fraudulent receipt of a benefit. Yet other factors satisfied the Family Court that although the public aspects of the relationship were “somewhat problematic but understandable”, the parties were living together as a couple.¹²⁴

Issues with the definition of de facto relationship

- 6.27 Achieving a universal definition of de facto relationship is not an object of this review. The current legislative landscape contains three definitions of what is essentially the same concept: de facto relationship as defined in the PRA;¹²⁵ de facto relationship as defined in the Interpretation Act 1999;¹²⁶ and the phrase “a relationship in the nature of marriage.”¹²⁷ The PRA’s definition of de facto relationship is unique in that it hinges on the concept of two people who “live together as a couple” as opposed to a marriage/civil union analogy. Inconsistency across the statute

¹²³ *[LC] v T* [2012] NZFC 1702 at [14] and [22].

¹²⁴ *[LC] v T* [2012] NZFC 1702 at [22]–[24].

¹²⁵ Property (Relationships) Act 1976, s 2D.

¹²⁶ Interpretation Act 1999, s 29A.

¹²⁷ The phrase “a relationship in the nature of marriage” is still used in s 63(b) of the Social Security Act 1964, s 66(2)(a) of the Veterans’ Support Act 2014, s 8A of the Credit Contracts and Consumer Finance Act 2003, and s 384 of the Accident Compensation Act 2001.

book raises wider issues, because two people may be in a “de facto relationship” for some purposes but not others.

- 6.28 Our preliminary view is that having a unique definition of de facto relationship in the PRA is not an issue. The PRA defines de facto relationship for a specific purpose, to establish which relationships are subject to its rules about property division when the relationship ends. The central concept of the PRA definition (two people who live together as a couple) has advantages over a marriage/civil union analogy. The concept of two people who “live together as a couple” is comparatively neutral and may better accommodate couples who reject the religious and social connotations of marriage. The language of “couplehood” also allows room for a variety of two person relationships to be recognised in the PRA, and for de facto relationships to be recognised as a genuine “third option.” Adopting a marriage/civil union analogy would not achieve a universal definition of de facto relationship because the inquiry will always be context specific.¹²⁸ We do however recognise that historical objections to a marriage analogy may not be as strong in 2017 as they were when this approach was rejected in 2000.¹²⁹ Same-sex marriage is now possible, and the meaning of marriage may have changed for some people.¹³⁰

Does the definition include relationships that are not substantively the same as marriages and civil unions?

- 6.29 In Chapter 5 we set out our preliminary view that the PRA should continue to apply in the same way to all long-term relationships that are substantively the same, regardless of relationship type (see paragraphs 5.17 to 5.20). However we signalled there may be issues with whether the definition of de facto relationship captures relationships that are substantively the same as marriages and civil unions.

¹²⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8. For this reason a list of factors equivalent to those in s 2D(2) of the Property (Relationships) Act 1976 were not included in the definition of “de facto relationship” in s 29A of the Interpretation Act 1999: Relationships (Statutory References) Bill 2005 (151-2) (select committee report) at 4.

¹²⁹ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8.

¹³⁰ The Marriage (Definition of Marriage) Amendment Act 2013 amended the definition of marriage in the Marriage Act 1955 to allow same-sex marriage. Maureen Baker and Vivienne Elizabeth *Marriage in an Age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 188 said that “[c]learly, a diminishing number of people in the English-speaking countries see marriage as a sacrament, or even a union between a man and a woman.”

- 6.30 There is an argument that the definition of de facto relationship risks capturing relationships that are not substantively the same as marriages and civil unions. This may be because the definition does not prioritise factors that are more indicative of a qualifying relationship. It may also be because of perceived differences in how de facto relationships function that are not sufficiently taken into account by the definition. If so, the PRA may fail to provide for a just division of property because it imposes the same general rule of equal sharing on relationships that are different.
- 6.31 There is also an argument that the current approach is appropriate. This may be because the flexibility inherent in the definition is thought to give courts the ability to exclude relationships that are not substantively the same as marriages and civil unions. It may be because the definition rightly avoids imposing additional requirements on de facto partners that do not exist for couples that are married or in a civil union, because to do so would raise issues under human rights law. Prioritising factors may set a higher bar for de facto relationships and could expect them to exhibit characteristics of a traditional marriage that are no longer hallmarks of a marriage or civil union today.
- 6.32 We consider below whether more weight should be given to some section 2D(2) factors in the definition of de facto relationship. This may be necessary to avoid unduly capturing relationships that are not substantively the same as marriages and civil unions. It may also be favoured to give more prominence to factors considered more indicative of a de facto relationship, in line with public expectations, or to address issues for particular groups.

CONSULTATION QUESTION

B3 Does the definition of de facto relationship unduly capture relationships that are not substantively the same as marriages and civil unions?

Should more weight be given to the nature and extent of common residence?

- 6.33 It might be more appropriate to give more weight to this factor because of what it suggests about the nature and quality of a relationship, and the extent to which the partners' lives are

intertwined. Some overseas jurisdictions have explored whether living together in a joint household should be a requirement.¹³¹

- 6.34 A relationship between two people who live in the same house may be more likely to exhibit other section 2D(2) factors (such as financial interdependence, shared ownership and use of property and performing household duties) than a relationship between a couple that live in separate houses. Such relationships may have a stronger link to the property divided when the relationship ends, such as the family home and chattels. Giving more weight to this factor would recognise that, for some couples, moving in together is a significant step and evidences a strengthening commitment to the relationship.
- 6.35 As this factor is said to probe both the quality and quantity of shared living,¹³² it may also distinguish between an initial phase of living in the same house that could be seen as “co-residential dating” and couples for whom living together has taken on a deeper meaning.
- 6.36 The current approach to common residence may be surprising for some partners who live apart, in what are described as “Living Apart Together” (LAT) relationships. LATs are committed couples who live in separate houses for social, moral, religious or other reasons, including that it is more financially advantageous to do so.¹³³ There is little research about LATs in New Zealand. Most international studies agree that just under 10 per cent of adults are LAT, including studies in the United Kingdom and Australia.¹³⁴ Research from the United Kingdom identified four distinct profiles of LATs, occurring at different stages in the life

¹³¹ The Law Commission of England and Wales recommended that people should be “cohabitants” to be eligible to apply for financial relief on separation, that is where they are living together as a couple in a joint household and they are neither married to each other nor civil partners: Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.13]. Note that the Law Commission of England and Wales rejected the option of extending or modifying the Matrimonial Causes Act 1973 (UK) for cohabitants. In Sweden some rules apply at the end of a relationship between two people who live together permanently as a couple and with a joint household (so chores and expenses are shared): Cohabitees Act (2003:376) (Sweden), s 1. See also Ministry of Justice, Sweden *Cohabitees and their joint homes – a brief presentation of the Cohabitees Act* (2012) at 1. Note that the Cohabitees Act only provides a minimum level of protection for the financially vulnerable party upon the dissolution of a cohabitee relationship, and the value of the protection depends on what property is to be shared: Margareta Brattström “The Protection of a Vulnerable Party when a Cohabitee Relationship Ends – An Evaluation of the Swedish Cohabitees Act” in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Austria, 2009) 345 at 346 and 354.

¹³² RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [2.12].

¹³³ Families Commission *The Kiwi Nest: 60 Years of Change in New Zealand Families* (Research Report No 3/08, June 2008) at 6.

¹³⁴ 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.

course.¹³⁵ One profile was “seniors” (13 per cent of individuals in LAT relationships). Most seniors were aged 50 and over and most had been married.¹³⁶ Seniors were most likely to be in long-term relationships and LATs out of choice, and least likely to have intentions to live in the same house.¹³⁷ This may be a growing group in New Zealand given our demographics.¹³⁸ The PRA’s current approach to common residence may be an issue for older New Zealanders in LAT relationships where there is no expectation of property sharing when the relationship ends, or who do not appreciate that they may be in a de facto relationship even if they do not live in the same house. These LATs may wish to preserve their independence, and may seek to protect property acquired during a previous relationship for succession.

- 6.37 Giving more weight to common residence may, however, exclude relationships that should be subject to the PRA, for example some LAT relationships where the partners live in separate houses because of their children’s needs or work commitments, or because they are forced to live apart for economic reasons, or because one partner is in prison or overseas.

CONSULTATION QUESTIONS

B4 Did you know that common residence is not a requirement for a de facto relationship?

B5 Should more weight be given to the nature and extent of common residence? If so, why?

Should more weight be given to financial dependence or interdependence and financial support?

- 6.38 Giving more weight to this factor might better align the criteria for a de facto relationship with the consequences of the PRA. It may avoid perceived unfairness, for example where the general rule of equal sharing is applied to relationships where finances were not shared. It may also better align with the partners’ expectations and the way they conducted themselves during their relationship.

¹³⁵ Rory Coulter and Yang Hu “Living Apart Together and Cohabitation Intentions in Great Britain” (2015) 1 *Journal of Family Issues* 1 at 13. This research investigated 3,112 individuals in “living apart together” relationships.

¹³⁶ Rory Coulter and Yang Hu “Living Apart Together and Cohabitation Intentions in Great Britain” (2015) 1 *Journal of Family Issues* at 13.

¹³⁷ Rory Coulter and Yang Hu “Living Apart Together and Cohabitation Intentions in Great Britain” (2015) 1 *Journal of Family Issues* at 14-15. Note that the study did not identify whether this group also included people who were LAT because their partner had gone into an aged care facility.

¹³⁸ The proportion of New Zealand’s population aged 65 and over is expected to increase from 14.3 per cent in 2013 to 26.7 per cent by 2063: *Statistics New Zealand 2013 Census QuickStats about people aged 65 and over* (June 2015) at 7.

Using more individualised systems of money management is viewed by some as evidence of lower levels of commitment to the relationship.¹³⁹ There is precedent for this approach in other contexts. For example, financial interdependence is a prerequisite for a relationship in the nature of marriage for some benefit purposes.¹⁴⁰

Case Study: financial independence

Aroha (55) and Justin (59) were in a relationship for just over ten years. During the relationship, they lived together in Justin's house on Linwood Street with Aroha's daughter Hine (13) and Justin's son, Hayden (32). Aroha and Justin both had good jobs. Both had been married before, and kept their money completely separate. They had no joint bank account. They valued their independence and liked the feeling of equality that came from splitting all the bills evenly down the middle, including the mortgage on the Linwood Street house. Aroha and Justin had an active social life together and shared a passion for motorsport. During their relationship they bought a rally car together which Hayden and Justin used in several events, with Aroha and Hine providing crew support. They also jointly owned several other cars, a bach and a boat. While they were together they hosted a reunion for Aroha's whānau and Christmas dinner each year for Justin's wider family. The Linwood Street house was dilapidated when Aroha moved in, and she did significant work to the property during the relationship including building a garden and deck, painting the bedrooms, sewing curtains and doing all the cleaning.

When the relationship ends, Aroha claims she was in a de facto relationship with Justin and is entitled to half of the house on Linwood Street. Justin consults his lawyer, Crystal. Crystal says that Justin and Aroha were probably in a de facto relationship because, among other things, their relationship lasted for just over ten years; they lived in the same house; they had a sexual relationship; owned and used property together; had a mutual commitment to a shared life and were considered by whānau and friends to be a couple. Crystal thinks Aroha probably has a good claim to half the relationship property. Justin is horrified that Aroha can claim half of the Linwood Street house even though they kept their money separate during their relationship. If Aroha is successful, the house will need to be sold, because Justin can't afford to buy out Aroha's share. Aroha's claim would also frustrate Justin's plans to leave the Linwood Street house to Hayden in his will.

- 6.39 However, giving more weight to this factor would risk excluding relationships where equality and commitment are expressed in different ways. It may be unwise to assume that independent money management indicates a lack of commitment without

¹³⁹ Katherine J Ashby and Carole B Burgoyne "Separate financial entities? Beyond categories of money management" (2008) 37 *Journal of Socio-Economics* 458 at 462, referring to KR Heimdal and SK Houseknecht "Cohabiting and married couples' income organization: approaches in Sweden and the United States" (2003) 65 *Journal of Marriage and Family* 525, and RS Oropesa, NS Landale and T Kenkre "Income allocation in marital and cohabiting unions: the case of mainland Puerto Ricans" (2003) 65 *Journal of Marriage and Family* 910.

¹⁴⁰ Social Security Act 1964, s 63; and *R v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

considering what the partners are trying to achieve by organising their money in a particular way.¹⁴¹ It could also risk excluding vulnerable people in relationships that should otherwise be captured by the PRA, for example abusive relationships where no financial support is provided. The Parliamentary select committee ruled out making financial interdependence a prerequisite for a de facto relationship in 2001 for this reason.¹⁴²

- 6.40 There is also an argument that the current approach is achieving its aim of not unduly capturing couples that remain financially independent.¹⁴³ In *C v S* the Family Court observed that:¹⁴⁴

The lack of financial dependence or interdependence or support is not, in my view, an insignificant matter particularly when one considers that the object of the [PRA] itself is to ensure an equitable division of assets and income taking into account financial and non-financial contributions couples make in any union and it is reasonable to expect as an indicator of mutual commitment and living together as a couple that there would be some demonstration of financial regard for the other party in some fashion or mutual benefit even if segregation of income.

- 6.41 We also note there are other ways of dealing with any perceived unfairness created by the current approach. For example, the application of the general rule of equal sharing to a de facto relationship characterised by financial independence may also be addressed by reconsidering how the PRA classifies relationship property which we discuss in Chapter 9.
- 6.42 These competing arguments should be evaluated in the light of what we know about the way couples who live together manage money.

What do we know about the way couples who live together manage money?

- 6.43 Some international research suggests a tendency for married couples to operate more or less as single economic units; whereas

¹⁴¹ Katherine J Ashby and Carole B Burgoyne “Separate financial entities? Beyond categories of money management” (2008) 37 *Journal of Socio-Economics* 458 at 476.

¹⁴² Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8.

¹⁴³ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 8.

¹⁴⁴ *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [105].

unmarried couples¹⁴⁵ are more likely to operate largely as two separate autonomous economic units.¹⁴⁶ The differences in how couples manage money appear to be more pronounced among “nubile”¹⁴⁷ and post-marital¹⁴⁸ unmarried couples, when compared to married couples.¹⁴⁹ The main exception is unmarried couples with children, who seem to organise their money in broadly similar ways to married couples.¹⁵⁰ Other international research paints a more nuanced picture.¹⁵¹

6.44 The available literature on money management within relationships in Australia and New Zealand is sparse and based on older data:¹⁵²

- (a) An Australian study using data from a 1997 nationally representative survey found that most unmarried couples, like most married couples, combined some or all of their income.¹⁵³ The authors suggested this indicated that living together is somewhat institutionalised in Australia and viewed as similar to marriage.¹⁵⁴ Children affected how couples organised their money, and couples with children aged under 13

¹⁴⁵ “Unmarried couples” refer to couples who live together (or “cohabit”) in the same household but are not married to each other. Some will be in a de facto relationship under the Property (Relationships) Act 1976. Others will not, because their relationship does not satisfy the criteria in s 2D of the Property (Relationships Act) 1976 (note that living together in the same house is not a requirement for a de facto relationship: ss 2D(2) and 2D(3)).

¹⁴⁶ Carolyn Vogler “Cohabiting couples: rethinking money in the household at the beginning of the twenty first century” (2005) 53 *Sociological Review* 1 at 12–13, referring to KR Heimdal and Houseknecht “Cohabiting and married couples income organisation: approaches in Sweden and the United States” (2003) 65 *Journal of Marriage and the Family* 525, and J Treas and E Widmer “A multi-level analysis of financial management in marriage for 23 countries” in J Weesie and W Raub (eds) *The Management of Durable Relations* (Thela Thesis, Amsterdam, 2000).

¹⁴⁷ “Nubile” unmarried couples who live together are young, childless and have never been married.

¹⁴⁸ “Post-marital” unmarried couples are couples who live together after one or both have experienced a marital divorce.

¹⁴⁹ Carolyn Vogler “Cohabiting couples: rethinking money in the household at the beginning of the twenty first century” (2005) 53 *Sociological Review* 1 at 9 and 17.

¹⁵⁰ Carolyn Vogler “Cohabiting couples: rethinking money in the household at the beginning of the twenty first century” (2005) 53 *Sociological Review* 1 at 12–13, referring to S McRae *Cohabiting Mothers* (Policy Studies Institute, London, 1993), J Lewis *The End of Marriage* (Edward Elgar, Cheltenham, 2001), and A Winkler “Economic decision making by cohabitators: findings regarding income pooling” (1997) 29 *Applied Economics* 1079.

¹⁵¹ For example Lars Evertsson and Charlott Nyman “Perceptions and Practices in Independent Management: Blurring the Boundaries Between ‘Mine,’ ‘Yours’ and ‘Ours’” (2014) 35 *J Fam Econ Iss* 65.

¹⁵² See also Supriya Singh and Jo Lindsay “Money in heterosexual relationships” (1996) 32(2) *ANZJS* 57, and Robin Fleming in association with Julia Taiapa, Anna Pasikale and Susan Kell Easting *The Common Purse* (AUP with Bridget Williams Books, Auckland, 1997).

¹⁵³ Edith Gray and Ann Evans “Do couples share income? Variation in the organisation of income in dual-earner households” (2008) 43(3) *Australian Journal of Social Issues* 441 at 450.

¹⁵⁴ Edith Gray and Ann Evans “Do couples share income? Variation in the organisation of income in dual-earner households” (2008) 43(3) *Australian Journal of Social Issues* 441 at 450, referring to A Evans and E Gray “What makes an Australian family?” in S Wilson and others (eds) *Australian Social Attitudes: The first report* (UNSW Press, Sydney, 2005).

were more likely to combine their incomes completely than couples with no children or older children.¹⁵⁵

- (b) A New Zealand study of unmarried couples, based on 20 in-depth interviews during the early 1990s, found that some unmarried couples jointly managed their money.¹⁵⁶ Joint money management was most common among unmarried couples with children; however the majority had initiated joint money management many years previously when they moved in together and prior to having children.¹⁵⁷ This study also found that independent money management was adopted by some unmarried couples to avoid financial dependency and achieve equality and autonomy, by retaining control over separate money and a sense of contributing equally to the relationship.¹⁵⁸ It was suggested that independent money management is likely to become increasingly significant as the number of unmarried couples continues to grow in New Zealand.¹⁵⁹

Should more weight be given to the degree of mutual commitment to a shared life?

- 6.45 Mutual commitment to a shared life is often regarded as central to the definition of de facto relationship.¹⁶⁰ It is also the only factor in section 2D(2) that touches on the “emotional commitment” described in *R v Department of Social Welfare* as one of the two prerequisites of a relationship in the nature of marriage.¹⁶¹ There may be a case for giving more weight to this factor because a de facto relationship is unlikely to exist without the

¹⁵⁵ Edith Gray and Ann Evans “Do couples share income? Variation in the organisation of income in dual-earner households” (2008) 43(3) *Australian Journal of Social Issues* 441 at 446–447.

¹⁵⁶ Vivienne Elizabeth “Managing money, managing coupledom: a critical examination of cohabitant’s money management practices” (2001) 49 *Sociological Review* 389 at 395.

¹⁵⁷ Vivienne Elizabeth “Managing money, managing coupledom: a critical examination of cohabitant’s money management practices” (2001) 49 *Sociological Review* 389 at 395.

¹⁵⁸ Vivienne Elizabeth “Managing money, managing coupledom: a critical examination of cohabitant’s money management practices” (2001) 49 *Sociological Review* 389.

¹⁵⁹ Vivienne Elizabeth “Managing money, managing coupledom: a critical examination of cohabitant’s money management practices” (2001) 49 *Sociological Review* 389 at 389.

¹⁶⁰ *M v P [De facto relationship]* [2012] NZFLR 385 (HC) at [27], referring to *S v S* [2006] NZFLR 1076 (HC) at [32], and Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change” (2009) 39 *VUWLR* 813 at 823.

¹⁶¹ Emotional commitment and financial interdependence and support are the two prerequisites for a relationship in the nature of marriage for some benefit purposes. See *Social Security Act 1964*, s 63 and *R v Department of Social Welfare* [1997] 1 *NZLR* 154 (CA).

“mental ingredient”, being commitment by the partners to their relationship.

Should more weight be given to the care and support of children?

6.46 Our preliminary view is that the existence of a child is not conclusive evidence that his or her parents were in a de facto relationship. Sometimes it may be appropriate to attach significant weight to this factor, for example where the parties have made a planned, joint decision to have a child. However, a child may not always be a reliable indicator of a relationship between two people, for example where the child is the unplanned result of a fleeting association.

Should less weight be given to some section 2D(2) factors?

6.47 Giving more weight to some section 2D(2) factors requires a decision that other factors are less important in determining whether two people live together as a couple. We are interested in whether some section 2D(2) factors should be given less weight than others. In particular:

- (a) **Whether or not a sexual relationship exists.** The existence of a sexual relationship may be less important in 2017. Sexual mores are said to have become more liberal over time, and today a sexual relationship is not necessarily indicative of a mutual commitment to a shared life.¹⁶² There may be greater recognition of romantic and loving non-sexual relationships based on companionship or where one or both partners identify as asexual. Undue focus on the existence, nature or extent of a sexual relationship may also be seen as inconsistent with the PRA’s focus on how property is divided up when a relationship ends.¹⁶³ It may also raise evidential issues that may be less relevant when assessing property entitlements.¹⁶⁴

¹⁶² *Craig v Keith* [2017] NZHC 1720 at [44].

¹⁶³ Property (Relationships) Act 1976, s 1C(1); and Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

¹⁶⁴ See for example *D v B* FC Napier FAM-2005-041-591, 17 May 2007.

- (b) **The performance of household duties.** This may be a less important factor because of the way work is shared or outsourced in some relationships, or because it is considered to have less or no bearing on whether two people live together as a couple. Giving less weight to this factor may, however, be thought to undervalue work in the home and may not be a good conceptual fit with the way the PRA treats all forms of contribution to the relationship as equal.¹⁶⁵

¹⁶⁵ Property (Relationships) Act 1976, s 1N(b). See *King v Church* [2002] NZFLR 555 (CA) at [33].

CONSULTATION QUESTION

B6 Do the range of factors in section 2D(2) still reflect what should be considerations when deciding whether two people are in a de facto relationship? Are any of the factors more, or less important?

Does the definition achieve the right balance between flexibility and certainty?

6.48 McCarthy says that the “biggest criticism” levelled at the PRA’s treatment of de facto relationships surrounds the definition of de facto relationship and how it has been interpreted and applied by the courts.¹⁶⁶ In particular:

- (a) The definition is criticised for being too broad to provide effective guidance. Grainer notes that key terms and phrases like “relationship” and “live together as a couple” are not defined in the PRA:¹⁶⁷

The operative phrase “living together as a couple” is hardly less vague than the term “de facto relationship.” Nor is the matter significantly clarified by the enumerated factors. Taken together, they convey virtually every aspect of human interaction.

- (b) It is difficult to look to previous cases to find guidance on when two people are “living together as a couple”, or even to distil any “universal principles.”¹⁶⁸ This is because none of the factors in section 2D(2) are prerequisites and each case turns on its own facts.¹⁶⁹ For example, in *PT v C* the parties shared a common residence for over 20 years but were not in a de facto relationship,¹⁷⁰ and in *G v B* the partners maintained separate residences for lengthy periods but were in a de facto relationship.¹⁷¹ Although there were other factors at play in those cases, they illustrate the point that section 2D cases have limited precedent value.

¹⁶⁶ Frankie McCarthy “Playing the Percentages: New Zealand, Scotland and a Global Solution to the Consequences of Non-Marital Relationships?” (2011) 24 NZULR 499 at 505–506.

¹⁶⁷ Virginia Grainer “What’s Yours is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand” (2002) 11(2) Pacific Rim Law & Policy Journal 285 at 303.

¹⁶⁸ Simon Jefferson “De facto or ‘friends with benefits’” (2007) 5 NZFLJ 304.

¹⁶⁹ Property (Relationships) Act 1976, s 2D(3).

¹⁷⁰ *PT v C* [2009] NZFLR 514 (HC).

¹⁷¹ *G v B* (2006) 26 FRNZ 28 (HC).

- (c) The discretion in the definition is an awkward fit with the PRA's rules-based regime. Briggs says that:¹⁷²

...[t]he broad discretion in s 2D is an awkward inclusion in legislation that has stripped so many other discretions away from the judiciary. By comparison, the court has little or no discretion on the issue of the division of the relationship property. While there are some provisions that allow a departure from equal sharing, these provisions are designed to apply in exceptional cases only. None relates to a discretion so central as that found in s 2D, where the court must rule on the status of the relationship, which in turn, either qualifies or disqualifies entry to the [PRA's] inflexible equal sharing rules. Such an uncertain access route into a rigid code can turn the process into an expensive gamble for potential applicants.

- 6.49 There are however advantages in having a flexible definition of de facto relationship. The lack of prerequisites for “living together as a couple” allows the definition to accommodate the diversity of relationships that should be subject to the PRA's rules, and flexibility allows the definition to evolve through judge-made law as relationship formation and separation patterns change.
- 6.50 Some research suggests that the definition of de facto relationship is fulfilling the original aims of the Parliamentary select committee (see paragraph 6.3).¹⁷³ A study from 2002 to 2009 found that an issue about whether a relationship was wholly or in part a de facto relationship arose in 43 per cent of de facto cases.¹⁷⁴ However only 12 per cent involved questions about whether the entire relationship had crossed the threshold to become a de facto relationship.¹⁷⁵ Cleary said that there is no

¹⁷² Margaret Briggs “The Formalization of Property Sharing Rights For De Facto Couples in New Zealand” in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Austria, 2009) 329 at 337.

¹⁷³ Thomas Cleary “Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976” (Summer Research Paper, University of Otago, 2012) at 9–10; Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (University of Otago, 2012) at 3.27; and Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 8.

¹⁷⁴ Thomas Cleary “Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976” (Summer Research Paper, University of Otago, 2012). Cleary identified and analysed 316 electronically available cases on the Brookers and LexisNexis legal databases involving relationship property disputes. At 9: “From the reported judgments 144 relationship property cases involved de facto partnerships or de facto relationships that had evolved into marriage. In 83 of these cases the existence of a de facto relationship was not an issue but in 61 cases s 2D was an issue. This represents 42.7% of de facto cases involving issues around whether they existed in their entirety or at certain points.” See also Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (University of Otago, 2012) at [3.26].

¹⁷⁵ Thomas Cleary “Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976” (Summer Research Paper, University of Otago, 2012) at 9.

real need to change the definition unless it catches people unintentionally.¹⁷⁶ He concluded that the cases seem to suggest that the definition is working as the Parliamentary select committee intended (see paragraph 6.3).¹⁷⁷ This research is, however, based on data drawn from reported cases and only gives us information about the small proportion of de facto relationships that end in a dispute resolved by the court. These are more likely to be contentious cases because they involve unusual facts. We do not know what happens in those cases that are resolved out of court, which makes public consultation on this issue important.

6.51 Whether the definition of de facto relationship achieves an appropriate balance between flexibility and certainty is an important question:

- (a) The PRA has significant implications for de facto relationships. If a de facto relationship lasts for three years, the general rule of equal sharing usually applies. People should know if they are subject to the PRA so they can organise their personal affairs accordingly. If the definition is sufficiently certain, couples can make a conscious decision whether to enter a de facto relationship. They can also make better informed decisions about resolving any disputes.
- (b) If the definition is too uncertain, it can:
 - undermine the right to contract out of the PRA,¹⁷⁸ if partners do not appreciate that they are drifting towards a de facto relationship or that they are already in one, they will not have the same opportunity to exercise this right; and
 - increase the need for couples to obtain legal advice or litigate to determine whether they are in a de facto relationship, which may undermine the principle in section 1N(d) that issues should be resolved “as inexpensively, simply, and speedily as is consistent with justice.”

¹⁷⁶ Thomas Cleary “Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976” (Summer Research Paper, University of Otago, 2012) at 9.

¹⁷⁷ Thomas Cleary “Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976” (Summer Research Paper, University of Otago, 2012) at 10.

¹⁷⁸ The Property (Relationships) Act 1976 is an “opt-out” regime because it applies to a de facto relationship unless the partners have agreed on a different way to divide property: see pt 6.

CONSULTATION QUESTION

B7 Does the definition of de facto relationship achieve the right balance between flexibility and certainty?

Options for reform

- 6.52 If the issues identified above require reform, there are three possible options that could achieve a better balance between certainty and flexibility, or would better capture the essence of what it means to be in a de facto relationship for the purposes of the PRA.

Option 1: Make section 2D(2) an exhaustive list of factors

- 6.53 One option is to limit the matters that are relevant when determining whether two people live together as a couple to the factors specified in section 2D(2). A court would no longer have the discretion to consider all the circumstances of the relationship.¹⁷⁹ This would make section 2D(2) an exhaustive (rather than inclusive) list of factors.¹⁸⁰
- 6.54 This option would increase certainty by restricting a court's inquiry to a known list of factors that capture what might be considered to be key matters relevant to determining whether two people live together as a couple. It is, however, unlikely to increase certainty in a significant way unless the list of factors is prioritised or reduced. This is because the list is so wide-ranging that it is said to convey "virtually every aspect of human interaction."¹⁸¹

¹⁷⁹ Property (Relationships) Act 1976, s 2D(2).

¹⁸⁰ The current definition of de facto relationship requires a court to consider all the circumstances of the relationship, including any relevant s 2D(2) factors: Property (Relationships) Act 1976, s 2D(2).

¹⁸¹ Property (Relationships) Act 1976, s 2D; *L v P* 26 FRNZ 946 (HC) at [44]; and Virginia Grainer "What's Yours is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand" (2002) 11(2) Pacific Rim Law & Policy Journal 285 at 303.

Option 2: Give more weight to one or more section 2D(2) factors

- 6.55 This option could be achieved by requiring a court to have *particular regard* to one or more of the section 2D(2) factors in deciding whether two people live together as a couple.¹⁸² The remaining section 2D(2) factors would remain relevant as “indicators” to be considered, where relevant.
- 6.56 This option could increase certainty and give more weight to factors considered more important characteristics of a relationship to which the PRA should apply. It could address issues for particular groups. For example, giving more weight to common residence would make it harder for some couples in LAT relationships to qualify as de facto partners. It would retain elements of section 2D and some associated case law may therefore remain relevant. Giving more weight to some factors as opposed to making them requirements would retain a relatively high level of judicial discretion and flexibility.¹⁸³

Option 3: Introduce rebuttable presumption(s) that two people are in a de facto relationship

- 6.57 The final option we are considering is adopting one or more rebuttable presumptions that two people are in a de facto relationship if certain factors are present.
- 6.58 The American Law Institute’s¹⁸⁴ proposed definition of “domestic partners” is an example of this approach. That definition contains three elements:¹⁸⁵

¹⁸² The factors we considered at [6.29]–[6.39] were common residence; financial interdependence and support; mutual commitment to a shared life; and the care and support of children.

¹⁸³ We have not put forward, as a separate option, making some or all of the factors listed in s 2D(2) mandatory requirements. While this would significantly increase certainty, it would also be considerably less flexible than the current approach. We think that it risks excluding relationships to which the Property (Relationships) Act 1976 should apply. It would also impose requirements on de facto relationships that do not exist for marriages or civil unions (see [6.31]) and may raise issues under human rights law.

¹⁸⁴ The American Law Institute (ALI) is an independent organisation in the United States that produces scholarly work to clarify, modernise and improve the law: see <www.ali.org>. In *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) the ALI reviewed and analysed divorce and related family law issues throughout the United States, and described approaches to areas such as child custody, child and spousal support, division of property, marital agreements and unmarried domestic partners. It proposed a wide range of regulations for the legal termination of domestic unions.

¹⁸⁵ The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03].

- (a) first, a basic definition of “domestic partners” as two unmarried people who, for a significant period, share a primary residence and a life together as a couple;¹⁸⁶
- (b) second, an absolute rule that two people are domestic partners where they have maintained a common household with their children for a set period, such as two years;¹⁸⁷ and
- (c) third, a presumption that two people without children are domestic partners when they have maintained a common household for a set period, such as three years, which is rebuttable by evidence that the parties did not share a life together as a couple.

6.59 The American Law Institute expected that this approach would minimise the need for detailed inquiry into couples’ lives, as most cases would be decided under the absolute rule or the rebuttable presumption.¹⁸⁸

6.60 A similar approach could be adopted in the PRA. For example, the basic definition of de facto relationship in section 2D could be retained, and new rebuttable presumption(s) could be introduced, for example:

- (a) partners are presumed to be in a de facto relationship when they have shared a primary residence and maintained a common household with a child of the relationship for a set period, such as two years;¹⁸⁹ and
- (b) partners are presumed to be in a de facto relationship when they have shared a primary residence and maintained a joint household for a set period, such as three years.

¹⁸⁶ Whether two people share a life together as a couple is to be determined by reference to all the circumstances, including listed matters such as the extent to which the parties intermingled their finances and the emotional or physical intimacy of the parties’ relationship: The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(7)].

¹⁸⁷ The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(4)]: “[p]ersons maintain a common household when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household”

¹⁸⁸ The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at 920.

¹⁸⁹ We do not adopt the approach of the American Law Institute in making this an absolute rule, as this raises issues under human rights law: see New Zealand Bill of Rights Act 1990, s 19, and Human Rights Act 1993, s 21(l). We also think that it would be too great a generalisation to assume that all couples with children are in a de facto relationship.

- 6.61 A presumption could be rebutted by evidence that the parties did not live together as a couple, to be determined by considering all the circumstances, including the factors in section 2D(2). This would retain some of the existing building blocks of section 2D while accommodating a need to give more weight to other section 2D(2) factors such as common residence.
- 6.62 This option could increase certainty and reduce the need for detailed inquiry where a presumption applies, while retaining an element of flexibility and judicial discretion. It would also change which party has the burden of proof. At present the party asserting that a de facto relationship existed must generally prove that in court.¹⁹⁰ This option would shift that burden to the party wishing to avoid the PRA's rules where a presumption applies. This may protect a vulnerable applicant, but also has the potential to harm a vulnerable defendant, for example an older person that drifts into circumstances that satisfy a presumption unawares. The burden of proof in PRA proceedings is discussed further in Part H.

CONSULTATION QUESTION

B8 Would any of these options achieve a better balance between flexibility and certainty, or better capture the essence of what it means to be in a de facto relationship?

Should any changes have retrospective or prospective effect?

- 6.63 A final issue for consideration is when any changes to the definition of de facto relationship should take effect. The general rule is that new legislation should be forward looking, or prospective, and not apply to peoples' past actions.¹⁹¹ The 2001 amendments were unusual because they extended the PRA to include de facto relationships on a retrospective basis.¹⁹² This meant that the PRA applied to de facto relationships that began before the amendments came into force on 1 February 2002, and

¹⁹⁰ See *H v G* FC Lower Hutt FAM-2005-032-527, 6 December 2006 at [3]; and *M v B* [2006] 3 NZLR 660 (CA) at [39]: "... although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists. Notions of onus of proof fit uncomfortably within this legislative regime." See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.23]: "The role of the Courts under the [PRA] is to some degree an inquisitorial one to do justice between the parties rather than to consider a claim in a strictly adversarial context."

¹⁹¹ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

¹⁹² Property (Relationships) Act 1976, s 4C.

were still in existence as at that date.¹⁹³ As a result, the actions of unmarried couples before 1 February 2002 were given legal consequences they may not have anticipated.¹⁹⁴ There was a delay between the date the amendments were made and the date they came into force to enable people to learn about the new regime and organise their affairs.¹⁹⁵

- 6.64 Changing the definition of de facto relationship on a retrospective basis would follow the approach taken in 2001.¹⁹⁶ It would avoid the confusion and complexity associated with having a different definition for relationships that began before any amendments came into force. It would, however, be inconsistent with the general rule that legislation should have prospective, not retrospective effect.¹⁹⁷ Legislation should not interfere with accrued rights and duties.¹⁹⁸ While retrospective legislation might be appropriate where it is intended, for example, to be entirely to the benefit of those affected,¹⁹⁹ a new definition of de facto relationship may not satisfy that goal. A new definition could disadvantage people by eroding their property rights or overturning property arrangements made before the PRA was extended to apply to them.²⁰⁰

CONSULTATION QUESTION

B9 Should any new definition of de facto relationship have retrospective or prospective effect?

¹⁹³ Property (Relationships) Act 1976 (PRA), s 4C; and Property (Relationships) Amendment Act 2001, s 2. Note that an order cannot generally be made under the PRA for the division of relationship property in respect of a de facto relationship of short duration unless the test in s 14A is passed.

¹⁹⁴ See Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at PR4C.01.

¹⁹⁵ The Property (Relationships) Amendment Bill had its third reading on 29 March 2001: (29 March 2001) 591 NZPD 8640; and received Royal Assent on 3 April 2001. The relevant provisions of the Property (Relationships) Amendment Act 2001 came into force on 1 February 2002: Property (Relationships) Amendment Act 2001, s 2. Note that some contracting out provisions came into force earlier on 1 August 2001: Property (Relationships) Amendment Act 2001, ss 2 and 21(2).

¹⁹⁶ Any change to the definition of de facto relationship in the Property (Relationships) Act 1976 (PRA) will also require careful consideration to avoid unintended consequences. This is because the PRA definition in s 2D is also used in other Acts, for example in s 60(1) of the Family Proceedings Act 1990; s 2(1) of the Administration Act 1969; s 2(1) of the Family Protection Act 1955; and s 75A of the Estate and Gift Duties Act 1968.

¹⁹⁷ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

¹⁹⁸ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

¹⁹⁹ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

²⁰⁰ A potential middle ground is a partially retrospective option that applies the Property (Relationships) Act 1976 regime to existing relationships if they continue for a certain period, such as 3 years, from the commencement of the legislation. This option was identified by the Ministry of Justice in advice to the Parliamentary select committee considering Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill (109-2). The Ministry noted that this was likely to be seen as unfairly favouring one class of relationships over another. Another partially retrospective option identified by the Ministry of Justice was to include existing relationships where there were children, which they also noted could be seen as unfairly favouring one class of relationships over another. See Ministry of Justice *Advice to the Justice and Electoral Committee on the SOP to Matrimonial Property Amendment Bill*, (5 September 2000) at [1].

Chapter 7 – Specific relationship types and family arrangements

- 7.1 This chapter considers issues with the definition of de facto relationship that may arise for specific relationship types and family arrangements. We look at Māori customary marriage, relationships involving young people, contemporaneous relationships and relationships with and between members of the LGBTQI+ community.²⁰¹ We also consider whether the PRA should be extended to include other relationship types such as multi-partner relationships and domestic relationships (platonic, interdependent relationships between two people who provide care and support for each other).

Māori customary marriages

- 7.2 Māori customary marriages have as their basis tikanga Māori and whānau approval. Traditionally it was the public expression of whānau approval, as opposed to a formal ceremony or cohabitation, which established a couple as married.²⁰² The breakdown of the relationship would bring the union to an end.²⁰³ Metge has said that Māori were “...well ahead of the rest of New Zealand society in accepting de facto unions and non-blame divorce.”²⁰⁴
- 7.3 As discussed in Part A, most Māori married according to their own custom until the early twentieth century.²⁰⁵ Successive marriage laws required Māori to conform more closely to the legal requirements for establishing marriage until, in the 1950s, legal recognition of customary marriage was removed.²⁰⁶ However

²⁰¹ LGBTQI+ means Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex+.

²⁰² 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.

²⁰³ Joan Metge “Succession Law: Background Issues Relating to Tikanga Maori” (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

²⁰⁴ Joan Metge “Succession Law: Background Issues Relating to Tikanga Maori” (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

²⁰⁵ Megan Cook “Marriage and partnering - Marriage in traditional Māori society” (4 May 2017) Te Ara – the Encyclopedia of New Zealand <<https://teara.govt.nz>>.

²⁰⁶ 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. Section 8(1) of the Māori Purposes Act 1951 and s 78 of the Māori Affairs Act 1953 both provided that:

subsequent law changes that eliminated the discrimination of children based on their parents' marital status, and the growing prevalence of de facto relationships among non-Māori, reduced pressure for Māori couples to officially register a marriage.²⁰⁷ It is not known how many Māori marry according to custom in contemporary New Zealand, but two relatively recent court cases illustrate that the practice continues.²⁰⁸

7.4 It likely that a Māori customary marriage would fall within the definition of a de facto relationship.²⁰⁹ This means that in a formal legal sense Māori who have married according to custom are governed by the PRA, not by principles of whanaungatanga.

7.5 In contrast to the law applying to de facto relationships, customary marriage does not carry with it any rights to property held by the other spouse.²¹⁰ For example, it was common practice for the wife's parents to gift land to the married couple.²¹¹ If the land was gifted to the husband, the right to occupy could terminate on the wife's death and the land would revert to her family as gifting only conveyed a temporary right.²¹² Whanaungatanga may be more important to property rights than marriage:²¹³

... because of the emphasis they place on descent, Maori do not in general give marriage the priority over all other relations that it has in law. They accept that there are times and circumstances where a person's loyalty and commitment lies with his or her

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).

²⁰⁷ Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Review" (1998) 10 Social Policy Journal of New Zealand at 6.

²⁰⁸ *Re Adoption of T* (1992) 10 FRNZ 23 (DC); and *Re R (Adoption)* (1998) 17 FRNZ 498 (FC). Both were cases concerning the Adoption Act 1955 and whether the couples in question could adopt without being legally married: Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 487.

²⁰⁹ Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 International Journal of Law, Policy and the Family 327 at 335.

²¹⁰ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 450–451. See also the discussion on marriage and property practices in traditional Māori society in Part A.

²¹¹ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 450–451.

²¹² Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 451, citing N Smith *Māori Land Law* (AH and AW Reed, Wellington, 1960) at 37. Ruru refers to situations where the husband has a blood link to the land and where there are children of the marriage as possible exceptions.

²¹³ Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

descent line before his or her spouse: e.g. with regard to the transmission of ancestral land and taonga, contribution to whānau activities (especially in connection with tangihanga) and support of kin.

- 7.6 Ruru states that the extension of the PRA to de facto relationships allows someone in a Māori customary marriage to turn his or her back on the nature of the relationship and, upon death or separation, claim a half-share in relationship property as an entitlement under the PRA.²¹⁴ Conflict could conceivably arise between the whānau and the person claiming a half-share in property that may, under tikanga, more properly be property of the whānau.²¹⁵ However the extent to which this is an issue may be affected by the exclusion of Māori land from the PRA's ambit and the exclusion of taonga from the definition of family chattels.²¹⁶

CONSULTATION QUESTIONS

B10 To what extent should Māori customary marriage be subject to the PRA?

B11 Should different rules apply to Māori customary marriage? If so, what would those rules provide? Would they still apply if the parties to the Māori customary marriage also entered a marriage or civil union? Would they be affected by the PRA's approach to classification of property (discussed in Part C) (including or excluding Māori land from the PRA and taonga from the definition of family chattels)?

Relationships involving young people

- 7.7 The PRA requires that both partners in a de facto relationship be aged 18 or over.²¹⁷ This has two important consequences for young people:
- (a) first, a de facto relationship will not be covered by the PRA if it ends before the youngest partner turns 18;²¹⁸ and

²¹⁴ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 488. See also Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 *International Journal of Law, Policy and the Family* 327 at 335.

²¹⁵ Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 488.

²¹⁶ Property (Relationships) Act 1976, ss 2 and 6.

²¹⁷ Property (Relationships) Act 1976, s 2D(1)(a).

²¹⁸ Property (Relationships) Act 1976, s 2D(1)(a).

- (b) second, a de facto relationship that ends before the youngest partner turns 21 will be a short-term de facto relationship, even if the relationship was longer than three years.²¹⁹

7.8 This means that the earliest point at which a division order could be made, applying the PRA's general rule of equal sharing, is when the youngest partner turns 21. This may disadvantage young people in relationships that, but for the age limit, would be covered or treated differently by the PRA. This is illustrated in the case study below.

Case study: Young people in a relationship

Samara (16) begins a relationship with Marcus (25) that, but for the age limit in the PRA, would immediately qualify as a de facto relationship. They have a child, Asha, who is born when Samara is 18. The relationship lasts for four years, ending when Samara is 20. But for the age limit, this would be long enough for the PRA's general rule of equal sharing to automatically apply. However, due to the age limit, a qualifying de facto relationship only started when Samara turned 18. When the relationship ended Samara was 20, making the relationship a short-term de facto relationship. Samara must therefore satisfy the court that failure to make an order under the PRA for the division of relationship property would cause serious injustice.²²⁰ If she can establish serious injustice, the relationship property will be divided in accordance with each partner's contribution to the relationship.²²¹

7.9 The PRA's age limit for de facto relationships is inconsistent with the age limit in the general definition of de facto relationship in the Interpretation Act 1999 (18 years, or 16 or 17 years with the consent of both guardians or, if that cannot be obtained, a Family Court Judge).²²² It is also different to the age for entering a marriage or civil union (18 years, or 16 or 17 years with consent of specified individuals such as guardians).²²³ Different treatment based on age raises issues under human rights law.²²⁴ It may also

²¹⁹ This is because the "clock starts ticking" when the youngest partner turns 18, not when the de facto relationship commenced (if earlier): Property (Relationships) Act 1976, ss 2D(1)(a) and 2E(1)(b). Note that a court can also treat a long-term relationship as a short-term relationship if it considers it just: s 2E(1)(b)(ii). Special rules apply to short-term relationships: s 14A. Short-term relationships are discussed in Part E.

²²⁰ Property (Relationships) Act 1976, s 14A(2)(b).

²²¹ Property (Relationships) Act 1976, s 14A.

²²² Interpretation Act 1999, s 29A. Note that cl 14 of the Legislation Bill 2017 (275-1) would replace the definition of de facto relationship in s 29A of the Interpretation Act, but retain the age limit and the central concept of two people who "live together as a couple in a relationship in the nature of marriage or civil union."

²²³ Marriage Act 1955, ss 17 and 18; and Civil Union Act 2004, ss 7 and 19. Note that the Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017 (256-1) proposes that 16 and 17 year olds who wish to marry must obtain consent to the marriage from a Family Court Judge (cl 5). This Bill has arisen out of the concern that some 16 and 17 year olds may be undergoing forced marriage.

²²⁴ See Human Rights Act 1993, s 21(1)(i), and New Zealand Bill of Rights Act 1990, s 19(1).

enable partners to escape obligations they would have had, had they been in a marriage or civil union.

- 7.10 However there is another view that the higher age limit for de facto relationships in the PRA may protect young people who drift into a de facto relationship, as it gives them more time to recognise that their legal status is changing and contract out of the PRA should they wish to.²²⁵
- 7.11 Younger people are more likely to be in a de facto relationship.²²⁶ This may in part reflect the legal restriction on people marrying before age 18.²²⁷ We do not know how many young people are adversely affected by the PRA's age limit for de facto relationships. Situations involving young people with substantial assets are likely to be rare, although that will not always be the case, for example where a young person has received an inheritance.²²⁸ There are also restrictions built into the definition of de facto relationship itself, which limit the number of young people in a de facto relationship under the PRA.²²⁹
- 7.12 Young people may also look to the general law of contract or equity for a remedy when their relationship ends, for example a claim that a constructive trust existed over certain assets. However those remedies may be difficult and costly to access and may lead to a less favourable result for the claimant than would have been the case if the PRA applied.
- 7.13 An option would be to amend section 2D(1)(a) to lower the age limit for entering into a de facto relationship. This could be done by amending section 2D(1)(a) to reflect the age limit for entering into a de facto relationship under the Interpretation Act 1999 (see paragraph 7.9).

²²⁵ Note that there is an exception to the general age of contractual capacity (18 years) that allows a minor who is not and has not been in a marriage or civil union to contract out of the Property (Relationships) Act 1976 with court approval. See Minors Contracts Act 1969, ss 2(1) and 6(1), and Property (Relationships) Act 1976, s 21I.

²²⁶ 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.

²²⁷ Marriage Act 1955, ss 17 and 18. Consent to marriages between 16 and 17 year olds occurs on average about 80 times each year: Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017 (256-1) (explanatory note) at 1. Consent for a marriage involving a party aged 16 or 17 must be obtained from specified individuals such as the minor's guardians: see ss 17 and 18 of the Marriage Act 1955.

²²⁸ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 2.4.3; and Margaret Briggs "The Formalization of Property Sharing Rights For De Facto Couples in New Zealand" in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Austria, 2009) 329 at 334.

²²⁹ Property (Relationships) Act 1976, s 2D.

CONSULTATION QUESTIONS

B12 Can the age limit of 18 years for a de facto relationship be justified, and if so, on what grounds?

B13 Should the age limit for entering into a de facto relationship be 18 years, or 16 or 17 years with consent of both guardians or, if that cannot be obtained, a Family Court Judge?

Relationships with and between members of the LGBTQI+ community

7.14 The LGBTQI+ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex+) community includes:²³⁰

... people who identify as takataapui, lesbian, gay, bisexual, queer, heterosexual, intersex, female, male, transsexual, transgender, whakawāhine, tangata ira tane, mahu (Tahiti and Hawaii), vakasalewalewa (Fiji), palopa (Papua New Guinea), fa'afafine (Samoa, American Samoa and Tokelau), akava'ine (Cook Islands), fakaleiti or leiti (the Kingdom of Tonga), or fakafifine (Niue).

7.15 The PRA's definition of de facto relationship clearly includes same-sex relationships that satisfy the criteria in section 2D. Under the PRA, a de facto relationship includes "... a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman) ..."²³¹ The definition does not use the inclusive language now in other statutes such as the Marriage Act 1955, which defines a marriage as the union of two people "regardless of their sex, sexual orientation or gender identity."²³² The same inclusive language is proposed in the Legislation Bill 2017, which would amend the general definition of de facto relationship in the Interpretation Act 1999.²³³

²³⁰ Human Rights Commission "Sexual Orientation, Gender Identity, and Sex Characteristics" <www.hrc.co.nz>. The Human Rights Commission defines intersex as a term "...used for a variety of conditions in which a person is born with reproductive or sexual anatomy that does not seem to fit the typical biological definitions of female or male"; a transsexual is defined as "[a] person who has changed, or is in the process of changing, their physical sex to conform to their gender identity"; and a person who is transgender is defined as someone "... whose gender identity is different from their physical sex at birth": see Human Rights Commission "Trans People: Facts and Information Resource – Terminology" <www.hrc.co.nz>. See also Elizabeth Kerekere "Part of the Whānau: The Emergence of Takatāpui Identity *He Whāriki Takatāpui*" (PhD Thesis, Victoria University of Wellington, 2017) for recent research on takatāpui.

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

²³² Marriage Act 1955, s 2(1). The same language is proposed in the Legislation Bill 2017 (275-1) for the general definition of de facto relationship in the Interpretation Act 1999.

²³³ Legislation Bill 2017 (275-1), cl 14; and Interpretation Act 1999, s 29A.

- 7.16 The flexibility inherent in the PRA's definition of de facto relationship may work well for some members of the LGBTQI+ community.²³⁴ For example, some people may have trouble evidencing factors in section 2D(2) such as the reputation and public aspects of their relationship because they have not disclosed their sexuality to friends and family.²³⁵ The Lavender Islands study found that only 35 per cent of respondents had disclosed their sexual identity to everyone in their lives, and one per cent said they had not disclosed to anyone and did not plan to do so.²³⁶ The PRA's definition of de facto relationship may, however, be able to accommodate this. In *S v M* the High Court acknowledged there may be situations where a same-sex relationship is kept private, "...[b]ut in a case such as this, where the parties mixed in the gay community, the public appearance or reputation of their relationship may be an important factor."²³⁷ There are also instances where a court has used the flexibility inherent in the definition to consider the clandestine nature of some relationships.²³⁸ But few cases focus on whether relationships involving members of the LGBTQI+ community are de facto relationships. We do not have information about relationships involved in property matters resolved out of court.
- 7.17 We are interested in whether the definition of de facto relationship, and the way it is applied makes "heteronormative" assumptions. Male and female respondents in the Lavender Islands study experienced same-sex relationships and identity in different ways.²³⁹ We are also cognisant of the "...complex realities of family lives that differ from traditional forms and norms of those headed by heterosexuals."²⁴⁰
- 7.18 We have no evidence that the PRA's three year minimum duration requirement for long-term de facto relationships is causing issues

²³⁴ The definition of de facto relationship is flexible because none of the factors in s 2D(2), such as the reputation and public aspects of the relationship, are requirements. No finding in respect of any of them is necessary, and the court is entitled to attach such weight to any matter as may seem appropriate in the circumstances: Property (Relationships) Act 1976, s 2D(3).

²³⁵ Property (Relationships) Act 1976, s 2D(2)(i).

²³⁶ Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) *Journal of Homosexuality* 223 at 237. Lavender Islands: Portrait of the Whole Family (Lavender Islands) was a national study of 2,269 lesbian, gay and bisexual individuals conducted in 1994 by the School of Social and Cultural Studies, Massey University at Albany.

²³⁷ *S v M* HC Wellington CIV-2006-485-1940, 17 April 2007 at [27].

²³⁸ For example in *[LC] v T* [2012] NZFC 1702 the opposite-sex parties generally described their relationship as that of landlord and tenant.

²³⁹ Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) *Journal of Homosexuality* 223.

²⁴⁰ See Families Commission *We're a Family: how lesbians and gay men are creating and maintain family in New Zealand* (Blues Skies Report No 29/09, August 2009) at 7.

that are specific to the LGBTQI+ community.²⁴¹ The PRA applies differently to marriages and civil unions that last for less than three years, and usually only applies to de facto relationships that last for three years or more.²⁴² The Lavender Islands study identified that the average longest same-sex relationship that respondents had (or have) was around six years.²⁴³ There was no significant difference between men and women, and many respondents noted that their longest same-sex relationships were still going on.²⁴⁴ This study suggests that same-sex relationships at least may not be overly troubled by the three year rule.

CONSULTATION QUESTIONS

B14 Is the PRA working well for members of the LGBTQI+ community?

B15 Is more inclusive language required in the PRA's definition of de facto relationship?

B16 Does the definition of de facto relationship make "heteronormative" assumptions?

Contemporaneous relationships

- 7.19 The PRA addresses some situations where a person is in two relationships at the same time, in the form of:²⁴⁵
- (a) a marriage or civil union and a de facto relationship; or
 - (b) two de facto relationships.
- 7.20 The PRA calls these "contemporaneous relationships."²⁴⁶ The special property division rules that can apply to contemporaneous relationships are discussed in Part D.²⁴⁷
- 7.21 Contemporaneous relationships in the form of two marriages, or two civil unions, are not covered by the PRA. This may be

²⁴¹ Property (Relationships) Act 1976, ss 2E and 14–14A.

²⁴² See Property (Relationships) Act 1976 ss 1C and 14–14A. Relationships of short duration are discussed in Part E.

²⁴³ Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) *Journal of Homosexuality* 223 at 238.

²⁴⁴ Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) *Journal of Homosexuality* 223 at 238.

²⁴⁵ Property (Relationships) Act 1976, ss 52A and 52B. The PRA also addresses some situations where a partner has successive relationships, one after the other, with no period of overlap. See Part D.

²⁴⁶ For example, partner A is married to partner B and at the same time is in a de facto relationship with partner C. The contemporaneous relationships are partner A's marriage to partner B, and partner A's de facto relationship with partner C. Some polyamorous relationships, where a partner has intimate relationships with more than one partner, may be contemporaneous relationships for the purposes of the Property (Relationships) Act 1976 depending on the circumstances. For a recent account of polyamorous relationships in New Zealand see Eleanor Black "Polyamory and the complicated lives of those with multiple lovers" (17 September 2017) [stuff <www.stuff.co.nz>](http://www.stuff.co.nz).

²⁴⁷ Property (Relationships) Act 1976, ss 52A and 52B.

because bigamy is an offence under the Crimes Act 1961.²⁴⁸ We note however that the definitions of marriage and civil union in the PRA include void marriages and void civil unions.²⁴⁹ A void marriage or civil union might therefore be treated as a de facto relationship for the purposes of section 52A. But in any event this scenario is likely to be unusual.

- 7.22 Although the PRA recognises the possibility of some contemporaneous relationships, establishing a contemporaneous relationship under the PRA appears to be difficult in practice.²⁵⁰ One possible reason for this is that the features of a contemporaneous de facto relationship may differ from an “orthodox” de facto relationship.²⁵¹ For example, a contemporaneous relationship may be more clandestine, making it difficult to prove the reputation and public aspects of the relationship.²⁵² The partners may not share a common residence or be financially interdependent, particularly if the relationship is clandestine. A contemporaneous relationship is also by its nature unlikely to be monogamous. In *M v P* the High Court observed that “[t]he statutory indicia of a shared life are broadly consistent with a substantial degree of exclusivity in qualifying relationships.”²⁵³ The Court said that:²⁵⁴

... contemporaneous de facto relationships are not likely merely because the legislation admits their existence. A contemporaneous de facto relationship with a different partner shows that the relationship before the court lacks the character of a life lived as a couple. The legislation governs division of the property of a relationship between two people and there must be natural

²⁴⁸ See Crimes Act 1961, ss 205–207. In essence, bigamy is the act of going through a form of marriage or civil union; either on the part of a person already married or in a civil union, or on the part of a person who knows the other party to the ceremony is married or in a civil union.

²⁴⁹ Property (Relationships) Act 1976, ss 2A(1)(a) and 2AB(1)(a).

²⁵⁰ Property (Relationships) Act 1976, ss 52A and 52B. See for example *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905; *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385; and *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006.

²⁵¹ Unsuccessfully argued on appeal in *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905 at [11]. Application for leave to appeal was declined as there was no question of general or public importance such as to outweigh the cost and delay of a second appeal.

²⁵² Property (Relationships) Act 1976, s 2D(2)(i). Unsuccessfully argued on appeal in *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905 at [11].

²⁵³ *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [26]. These comments are described as observations, or *obiter dicta*. This is because the issue on appeal in that case was the end date of the relationship, not whether there were contemporaneous de facto relationships. These comments were, however, said to correctly reflect the law in *Greig v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [63]. See also *S v S* [2006] NZFLR 1076 (HC) at [44].

²⁵⁴ *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [29]. These comments are described as observations, or *obiter dicta*. This is because the issue on appeal in that case was the end date of the relationship, not whether there were contemporaneous de facto relationships. These comments were, however, said to correctly reflect the law in *Greig v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [63].

limits to one's capacity to spend the only life that one has in contemporaneous bilateral relationships with more than one person.

- 7.23 However the factors in section 2D(2) are simply matters that a court may consider when determining whether a relationship is a de facto relationship. They are not requirements.²⁵⁵ A court can take a flexible approach, and the Family Court in *Greig v Hutchison* noted that in contemporaneous relationships a common residence is unrealistic.²⁵⁶ This can be contrasted with a comment made by the High Court in *M v P*, to the effect that contemporaneous relationships may be most likely when the relationships follow an “orthodox” format, i.e. when “A cohabits intermittently with each of B and C, maintaining two households on an indefinite basis.”²⁵⁷
- 7.24 Contemporaneous relationships may also be viewed as “primary” and “secondary” relationships, particularly where one relationship is a marriage and is covered by the PRA. This approach may make it difficult for a “secondary” relationship to qualify as a de facto relationship. In *Greig v Hutchison*, the High Court said that to assess the nature of contemporaneous relationships, it is unnecessary to view each in isolation and distinct from the other.²⁵⁸ Rather, it is appropriate to compare the two relationships.²⁵⁹
- 7.25 The practical difficulties in establishing a contemporaneous relationship risk relationships falling outside the PRA because they do not follow an orthodox format. In an extreme case partner A may escape legal obligations to partners B and C by pleading that neither relationship is sufficiently public, robust or exclusive to qualify as a de facto relationship.²⁶⁰
- 7.26 There may be a case for changing the provisions for contemporaneous relationships to address these practical difficulties. We have considered three possible options for reform:

- (a) **Option 1: Amend the definition of de facto relationship or enact a new definition of contemporaneous de facto relationship:** We are not

²⁵⁵ Property (Relationships) Act 1976, ss 2D(2) and (3). See also *S v S* [2006] NZFLR 1076 (HC) at [44].

²⁵⁶ *Greig v Hutchison* [2014] NZFC 2895 at [262].

²⁵⁷ *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [29].

²⁵⁸ *Greig v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [57].

²⁵⁹ *Greig v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [57].

²⁶⁰ See *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [29].

attracted to this option. It is difficult to see how the existing definition of de facto relationship could be any broader or more flexible than it already is to better accommodate contemporaneous relationships. A new definition of contemporaneous de facto relationship would bring an additional layer of complexity to the PRA to accommodate a situation that may be relatively rare.

- (b) **Option 2: Provide guidance in sections 52A and 52B on how to apply the definition of de facto relationship to a contemporaneous relationship:** Guidance may direct a court to take a different approach to the factors in section 2D(2) where there is the possibility of a contemporaneous de facto relationship, for example having particular regard to some factor(s) or giving some factor(s) less weight. Alternatively, guidance may direct a court to take a specific approach, such as considering each relationship in isolation, avoiding a comparative approach.
- (c) **Option 3: Exclude contemporaneous relationships:** This would simplify the PRA. It could, however, allow a person in two relationships to avoid his or her obligations to one or both partners. It may also simply shift the point in dispute to which relationship was the qualifying relationship, which would likely result in a bias towards marriages and civil unions and undermining the principle that the law should apply equally to all relationships that are substantively the same. It could also exclude vulnerable people from the PRA's protection.

CONSULTATION QUESTION

B17 How should contemporaneous relationships be recognised by the PRA?

Multi-partner relationships

7.27 The definition of de facto relationship excludes relationships of more than two people (multi-partner relationships).²⁶¹ The PRA

²⁶¹ Property (Relationships) Act 1976, s 2D. We use the general term “multi-partner relationship” to refer to a consensual relationship among an emotionally and/or sexually intimate group larger than two: see Elisabeth Sheff and Megan M

may however cater for some contemporaneous relationships between members of a multi-partner relationship.²⁶² For example, a relationship which comprised three people may be recognised under the PRA as a series of contemporaneous relationships. We have no evidence as to the number of multi-partner relationships in New Zealand, although the number is likely to be small.

CONSULTATION QUESTION

B18 Should the PRA specifically recognise multi-partner relationships? If so, how should they be defined and what property division rules should apply?

Domestic relationships

- 7.28 The PRA does not apply to domestic relationships. These are platonic, interdependent relationships between two people who provide care and support for each other. Domestic relationships can include relationships between family members such as siblings, parents and adult children; relationships between unrelated parties such as companions; and relationships between unpaid²⁶³ informal carers²⁶⁴ and those they care for. Domestic relationships are included in property regimes in several Australian states.²⁶⁵
- 7.29 We know little about the prevalence of domestic relationships in New Zealand. Domestic relationships within families may be more common due to the increasing number of people sharing their household with members of their extended family.²⁶⁶ Domestic relationships between carers and those they care for may become more common due to the predicted increase in the demand

Tesene "Consensual Non-Monogamies in Industrialized Nations" in J DeLamater and R F Plante (eds) *Handbook of the Sociology of Sexualities* (Springer International Publishing, Switzerland, 2015) 223 for a discussion of non-monogamous relationship forms.

²⁶² Property (Relationships) Act 1976, ss 52A and 52B.

²⁶³ Relationships where companionship, care and support are provided for payment or on behalf of another person or organisation (including a government agency, body corporate or a charitable organisation) are not considered to be domestic relationships for the purposes of this Issues Paper.

²⁶⁴ The National Advisory Committee on Health and Disability explains that: Informal caring differs from the usual tasks and responsibilities that form part of a relationship between, for example, partners in older age or a child and parent, because it requires a commitment beyond usual levels of reciprocity. The role is different from formal care supports and services because it is unpaid and is not based on any formal agreement or service specifications, although it can be the carer's main occupation." – National Advisory Committee on Health and Disability *How Should we Care for the Carers, Now and into the Future?* (Ministry of Health, 2010) at 3.

²⁶⁵ See for example Relationships Act 2003 (Tas) and Relationships Act 2008 (Vic). Note however that these states take different approaches to the definition and entitlements arising out of domestic relationships.

²⁶⁶ 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 5.

for informal caring due to factors such as New Zealand's ageing population.²⁶⁷

Should the PRA cover domestic relationships?

- 7.30 There is a view that the PRA should apply to some domestic relationships. This is because some domestic relationships may be functionally similar to a marriage, civil union or de facto relationship.²⁶⁸ People in a domestic relationship may live in the same house and provide support and care to each other over a long period. One person may make personal sacrifices for the other to provide services as an informal carer. For example, the relationship between two adult siblings in *Re C (dec'd)* exhibited all of the section 2D(2) factors of a de facto relationship except a sexual relationship and the care and support of children.²⁶⁹ Excluding domestic relationships functionally similar to qualifying relationships raises questions of discrimination, equality and fairness.²⁷⁰ It has also been described as a little anomalous because of the PRA's focus on property law rather than the nature of the relationship.²⁷¹
- 7.31 However, domestic relationships are different to qualifying relationships covered by the PRA. While a sexual relationship is not a prerequisite for a qualifying relationship, it is a common feature that often distinguishes it from a domestic relationship. In addition, a domestic relationship may not give rise to the same expectation of property sharing as a qualifying relationship. For example, siblings may live together for a long period in a domestic relationship while each maintaining the hope of meeting a partner and getting married.

²⁶⁷ National Advisory Committee on Health and Disability *How Should we Care for the Carers, Now and into the Future?* (Ministry of Health, 2010) at 7, 8 and 45.

²⁶⁸ Margaret Briggs "Rethinking Relationships" (2015) 46 VUIWLR 649 at 665, referring to *Re C (dec'd)* HC Dunedin CP18/00, 5 April 2001.

²⁶⁹ *Re C (dec'd)* HC Dunedin CP18/00, 5 April 2001; and Property (Relationships) Act 1976, s 2D.

²⁷⁰ Legal rights for non-sexual relationships received some political attention on this basis in 2004, where Members of Parliament said that civil unions discriminate against non-sexual relationships: Richard Worth MP (9 December 2004) 622 NZPD 17638 (online version); and registering a relationship did not have to be a "bedroom issue": Judy Turner MP (7 December 2004) 622 NZPD 17497 (online version). See also Supplementary Order Paper 2004 (314) Civil Union Bill 2004 (149-2) which proposed removing the provisions of the Civil Union Bill 2004 (149-2) relating to prohibited degrees of relationship. Its purpose was to "wide[n] the number of couples who will be able to register their relationship and enjoy the protection and benefits that the Relationships (Statutory References) Bill may provide."

²⁷¹ Bill Atkin and Wendy Parker "De Facto Property Developments in New Zealand: Pressures Impeded Progress" in John Dewar and Stephen Parker (eds) *Family Law Processes, Practices and Pressures: Proceedings of the Tenth World Conference of the International Society of Family Law* (Hart Publishing, Portland, 2003) 555 at 562.

- 7.32 People in domestic relationships must rely on general remedies in property law or equity, and may have difficulty finding a viable basis for making a property claim when the relationship ends.²⁷² If a domestic relationship ends on the death of one party, the survivor may have a claim under the Law Reform (Testamentary Promises) Act 1949 and/or the Family Protection Act 1955. Those statutes have their limitations. A successful claim under the Law Reform (Testamentary Promises) Act requires a promise by the deceased to reward the claimant for services by making testamentary provision.²⁷³ A testamentary promise may be absent or difficult to prove in some domestic relationships. A claim for provision from the deceased's estate can only be made under the Family Protection Act 1955 by a partner, children, grandchildren and, in certain circumstances, stepchildren and parents of the deceased.²⁷⁴ Siblings cannot claim.
- 7.33 People living in domestic relationships do however have options to secure property rights during the relationship. The parties may change the way property is owned, for example by holding property as joint tenants,²⁷⁵ creating a trust, agreeing by contract on how their property is to be shared, and/or providing for each other in their wills. However, while these options exist in theory, we do not know how common it is for people in domestic relationships to formalise property sharing rights in this way.
- 7.34 If domestic relationships should be included in the PRA, there are several parameters that need to be explored. In particular:
- (a) **The definition of domestic relationship:** Definitions of caring relationships used in some Australian states may provide a helpful starting point. These generally require care and support.²⁷⁶ Some also require common

²⁷² See Margaret Briggs "Rethinking Relationships" (2015) 46 VUWLR 649 at 670. In this regard people in domestic relationships are in a similar position to de facto partners prior to the 2001 amendments to the Property (Relationships) Act 1976 (PRA). They have a relationship that is functionally similar to a qualifying relationship but are not entitled to the benefit of the property sharing rules applicable to qualifying relationships in the PRA.

²⁷³ The key elements of claim under s 3 of the Law Reform (Testamentary Promises) Act 1949 are: (1) the claimant must have rendered services to, or performed work for, the deceased in his or her lifetime; (2) there must be an express or implied promise by the deceased to reward the claimant; (3) there must be a nexus between the services or work and the promise; and (4) the deceased must have failed to make the promised testamentary provision or otherwise remunerate the claimant.

²⁷⁴ Family Protection Act 1955, s 3.

²⁷⁵ If property is held by two domestic partners as joint tenants, when one of them dies his or her interest in the property accrues by operation of law to the survivor, who then becomes the sole owner. See *The Laws of New Zealand Land Law* at [46].

²⁷⁶ For example, Tasmania has a broad definition of "caring relationship" that hinges on the provision of "domestic support and personal care": Relationships Act 2003 (Tas), s 5.

residence or financial commitment.²⁷⁷ Relationships where care is provided for fee or reward or on behalf of another person or organisation are excluded.²⁷⁸ Other qualifying criteria, such as a minimum duration requirement, may also be appropriate.

- (b) **Whether a domestic relationships regime should be opt-in or opt-out:** Including domestic relationships in the PRA on an “opt-in” basis through a registration scheme would ensure personal autonomy and take account of the assumptions some people in domestic relationships may have about property rights. Requiring independent legal advice as a prerequisite to registration could help ensure the parties make an informed decision and protect vulnerable people from exploitation. A registration scheme may not, however, best protect the vulnerable because registration rates are likely to be low and domestic partners may not see the need to register.²⁷⁹
- (c) **Multiple relationships:** People in domestic relationships may also have spouses, civil union partners or de facto partners. It may be unnecessarily restrictive to prevent people in qualifying relationships from having a secondary domestic relationship if the PRA were extended to domestic relationships on a registration basis. The property classification and division rules may, however, be complex and would require careful consideration.
- (d) **Property entitlements arising at the end of a domestic relationship:** One option is to treat domestic relationships like marriages, civil unions or de facto relationships. This would be relatively straightforward and would avoid a separate set of rules for domestic relationships. Another option is a discretionary model that allows a court to adjust the parties’ property

²⁷⁷ For example, Victoria has a definition of “registrable caring relationship” that require the provision of “personal or financial commitment and support of a domestic nature for the material benefit of the other”, but does not require the parties to live under the same roof. See Relationships Act 2008 (Vic), s 5.

²⁷⁸ For example the definition of “caring relationship” in the Tasmanian legislation expressly excludes relationships where domestic support and personal care are provided for fee or payment, under an employment relationship or on behalf of another person or organisation: Relationships Act 2003 (Tas), s 5(2).

²⁷⁹ Rundle notes in her 2011 paper that at the time there were only four registered caring relationships in Australia, all of which were in Tasmania: Olivia Rundle “An examination of relationship registration schemes in Australia” (2011) 25 AJFL 121 at 146.

interests in a way that is just and equitable in the circumstances. However, as Briggs notes, “...the philosophical objection to [a discretionary model] in the New Zealand context would be that singling-out domestic partnerships for different treatment undermines the functional equivalence argument.”²⁸⁰

CONSULTATION QUESTION

B19 Should the PRA apply to domestic relationships? If so, on what basis?

²⁸⁰ Margaret Briggs “Rethinking Relationships” (2015) 46 VUWLR 649 at 669.

