

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

Chapter 15 – The three year rule

Introduction

- 15.1 A marriage, civil union or de facto relationship must usually have lasted for three years or more before qualifying for the general rule of equal sharing.¹ If a relationship lasts for less than three years, it is a “relationship of short duration” (short-term relationship) under the PRA, and different property division rules apply.² In this Part we examine how the PRA applies to short-term relationships.
- 15.2 In this chapter we consider the reasons for treating short-term relationships differently to qualifying relationships, and ask whether the minimum duration for qualifying relationships (the three year rule) remains appropriate. The rest of Part E is arranged as follows:
- (a) In Chapter 16 we look at the property division rules for short-term marriages and civil unions.
 - (b) In Chapter 17 we focus on short-term de facto relationships. We ask whether the PRA should continue to treat short-term de facto relationships differently to short-term marriages and civil unions.

Options for reform in Part E may have human rights implications

- 15.3 The options explored in Part E may raise issues under human rights law. As we explained in Chapter 2, the New Zealand Bill of Rights Act 1990 prohibits unjustified discrimination, including indirect discrimination, on a range of grounds such as marital status and family status.³ Any option for reform of the PRA that proposes to treat relationships differently based on the type of relationship (marriage, civil union or de facto relationship) or

¹ Property (Relationships) Act 1976, ss 1C and 2E. The scope of Part E is limited to relationships ending on separation. A relationship may also be ended by the death of one partner. The provisions that apply to relationships that end on death are significantly different and are considered in Part M.

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

³ New Zealand Bill of Rights Act 1990, s 19; and Human Rights Act 1993, ss 21 (prohibited grounds of discrimination) and 65 (indirect discrimination).

the presence of children would need to be to be demonstrably justified in order to avoid contravening human rights law.⁴ Any recommendations we make in our final report will be reviewed for consistency with domestic human rights law and relevant international obligations.

Should the PRA have different rules for short-term relationships?

- 15.4 The PRA has always included a minimum duration requirement for qualifying relationships and special property division rules for short-term relationships. This is because the PRA can have significant consequences at the end of a relationship, which are only justified if a relationship has demonstrated a sufficient level of commitment and permanence.
- 15.5 A minimum duration requirement is a necessary (although blunt) way to distinguish fragile relationships from relationships to which the partners are assumed to have made a certain degree of commitment. As Atkin and Parker observe, it is not the PRA's intention to create a property sharing regime for "transient or fleeting associations."⁵ A minimum duration requirement recognises that commitment grows over time⁶ and avoids applying the general rule of equal sharing to early-stage relationships. It also provides some protection against a manipulative partner who enters a relationship with the aim of acquiring a share of the other partner's property.⁷
- 15.6 A minimum duration requirement also recognises that equal sharing is justified only where contributions to the relationship are equal.⁸ As Peart observes:⁹

⁴ New Zealand Bill of Rights Act 1990, s 5.

⁵ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 86.

⁶ See Vivienne Elizabeth and Maureen Baker "Transiting through cohabitation to marriage: emerging commitment and diminishing ambiguity" (2015) 4(1) *Families, Relationships and Societies* 53.

⁷ Bill Atkin "Property division: Lessons from New Zealand" in Panagiotis I Kanellopoulos, Elini Nina-Pazarzi and Cornelia Delouka-Inglessi (eds) *Essays in Honor of Penelope Agallopoulou* (Ant N Sakkoulas, Athens, 2011) 129 at 138.

⁸ See discussion in Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at 2.

⁹ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PRIntro.05(2)]. See also *H v C FC* Christchurch FAM-2007-057-337, 30 August 2011 at [39]; and *Burgess v Beavan* [2010] NZCA 625, [2011] NZFLR 609 at [32].

In short duration relationships the contributions are usually unequal, because there is often not enough time to build the non-financial contributions to a level where they can be appropriately equated with financial contributions.

- 15.7 There will, of course, be short-term relationships where contributions are equal, for example where both partners have made financial contributions, or where one partner cares for a child while the other partner provides financial support for the family. How the PRA should operate in these circumstances is explored in the following chapters.
- 15.8 For these reasons our preliminary view is that the PRA should continue to include a minimum duration requirement for qualifying relationships and special property division rules for short-term relationships. What that minimum duration requirement should be, and how property should be divided when a short-term relationship ends, are the focus of this part of the Issues Paper.

CONSULTATION QUESTION

E1 Do you agree that the PRA should have a minimum duration requirement for qualifying relationships and special property division rules for short-term relationships?

How does the three year rule operate?

- 15.9 The three year rule has applied to marriages since the PRA was first enacted as the Matrimonial Property Act in 1976,¹⁰ to de facto relationships since 2001 and to civil unions since they were introduced in 2005.
- 15.10 Section 2E is the basis for the three year rule. It provides that a relationship of short duration is one in which the partners have lived together in a marriage, civil union or as de facto partners for a period of less than three years. A court can also treat a longer relationship as a short-term relationship if, having regard to all the circumstances, it considers it just to do so.¹¹ This might be appropriate if, for example, there have been long periods

¹⁰ See Matrimonial Property Act 1976, s 13(3) (as enacted).

¹¹ Property (Relationships) Act 1976, s 2E.

of separation during the relationship or some other factor has affected the quality of the relationship.¹²

Historical background

15.11 As early as 1975 there were calls for limited property rights for de facto relationships lasting longer than two years.¹³ In 1988 a Working Group reviewed the legal provision for de facto relationships and also recommended a minimum duration of two years before special rules of property division should apply, observing that:¹⁴

It does not seem to the group that the threshold for a de facto marriage need to be the same as the threshold for a short marriage under the Matrimonial Property Act. It must be remembered that until a de facto relationship has lasted for two years (if that period is chosen) there would be no rights at all of a matrimonial nature for the de facto partners. The situation under the Matrimonial Property is not analogous.

15.12 The amendments introduced into Parliament in 1998 proposed a minimum duration of three years for de facto relationships, consistent with the existing provisions for short-term marriages.¹⁵ The 1998 amendments, however, went further than the Working Group's recommendations because they also covered short-term de facto relationships.¹⁶

15.13 The Select Committee considering the 2001 amendments received submissions favouring several different qualifying periods for de

¹² Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [4.3.2]. See also *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 where the High Court said at [33] that it is appropriate to have regard to the factors in section 2D of the Property (Relationships) Act 1976 when assessing whether a relationship of longer than three years should be treated as a short-term relationship.

¹³ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 12–13. The Minister of Justice, responsible for introducing the Matrimonial Property Bill, noted there was a strong case for including de facto relationships within the new matrimonial property regime, on "practical and humanitarian grounds". However the Matrimonial Property Bill as enacted did not extend to de facto relationships. See Chapter 2 for further discussion of the legislative history of the Property (Relationships) Act 1976.

¹⁴ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (1988) at 67. The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to review the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships.

¹⁵ De Facto Relationships (Property) Bill 1998 (108–1), cls 42–43. The De Facto Relationships (Property) Bill proposed a separate property division regime for de facto relationships. However following a change of government in 1999 the Bill was withdrawn and amendments were proposed to the Matrimonial Property Amendment Bill to include de facto relationships within that regime. The three year minimum duration for qualifying de facto relationships, and provision for short-term relationships, was however carried over from the De Facto Relationships (Property) Bill: see Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2). See paragraph 17.3 below.

¹⁶ De Facto Relationships (Property) Bill 1998 (108–1), cl 59.

facto relationships.¹⁷ These ranged from two, three, five and seven years (but a shorter period where there are children).¹⁸ Other submitters suggested that the PRA should only apply to de facto relationships if there are children.¹⁹

- 15.14 The Select Committee concluded that three years was an appropriate length of time before the general rule of equal sharing should take effect for de facto relationships.²⁰ It also noted that three years was consistent with the principles of the Human Rights Act 1993 which prohibits discrimination on the grounds of marital status.²¹

Determining the duration of a relationship

- 15.15 Determining when a relationship begins and ends is important as it may decide whether the PRA's rules for short-term relationships apply. Relationship duration is also relevant to the classification of property under the PRA²² and to whether maintenance is available to de facto partners under the Family Proceedings Act 1980.²³

Start and end dates

- 15.16 Determining the start and end dates of a relationship can be difficult as they are not necessarily linked to specific events.
- 15.17 A marriage will often have a start date that is earlier than the date the partners actually married, because the PRA counts any time the partners spent together in a de facto relationship immediately before marrying.²⁴ Research indicates that most people live in a de

¹⁷ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9.

¹⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9.

¹⁹ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9.

²⁰ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9-10.

²¹ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 10; and Human Rights Act 1993, s 21(1)(b).

²² Property (Relationships) Act 1976, ss 8 and 9. The start and end dates of the relationship are relevant to the classification of property as relationship property or separate property because the status of some property is determined by when it was acquired or whether it is attributable to the relationship.

²³ Family Proceedings Act 1980, s 70B. Maintenance is only available in limited circumstances to partners who were in a short-term de facto relationship.

²⁴ Property (Relationships) Act 1976, s 2B.

facto relationship before marriage.²⁵ Therefore when the duration of a marriage is an issue, a court will often need to decide when the preceding de facto relationship began. This also applies to civil unions preceded by de facto relationships.²⁶

15.18 A de facto relationship begins when the criteria in the definition in section 2D are satisfied. This has been described by the Family Court as the point at which the relationship assumes a significant degree of mutual commitment and permanency, and at which the partners' lives become significantly intertwined.²⁷ This is not necessarily linked to when the partners moved in together. It can be difficult to determine when a de facto relationship began if the relationship gradually evolved over time from an initial phase of living in the same house that could be seen as “co-residential dating” to a de facto relationship.

15.19 A relationship ends if the partners cease to live together as a couple or if one of the partners dies.²⁸ Marriages and civil unions may also end on the formal dissolution of that relationship.²⁹ In *O’Shea v Rothstein* the High Court said that separation does not automatically bring a relationship to an end.³⁰ While sometimes that will undoubtedly be so, there will be other situations where that is not the case:³¹

There can be no hard and fast rule because all the circumstances of the particular matter under consideration have to be taken into account. The reasons for, and duration of, the separation are likely to be important considerations. An indicator that separation does not automatically bring a relationship to an end and that intermittent relationships were within the contemplation of the legislature can be found in s 2E which defines “relationship of short duration.”

²⁵ 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.

²⁶ Property (Relationships) Act 1976, s 2BAA. We do not know how common it is for couples to have a de facto relationship immediately preceding their civil union, however we have no reason to believe that it would be different to the prevalence of de facto relationships preceding a marriage. 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.

²⁷ *Boyd v Jackson* FC Napier FP041/363/01, 6 March 2003 at [3].

²⁸ Property (Relationships) Act 1976, ss 2A(2), 2AB(2), 2D(4).

²⁹ Property (Relationships) Act 1976, ss 2A(2) and 2AB(2).

³⁰ *O’Shea v Rothstein* HC Dunedin CIV-2002-412-8, 11 August 2003 at [22]. This case was concerned with the end date of a de facto relationship, but its principles appear to be equally applicable to marriages and civil unions. See also *Richmond* [2013] NZFC 6022 at [33].

³¹ *O’Shea v Rothstein* HC Dunedin CIV-2002-412-8, 11 August 2003 at [22].

Intermittent and sequential relationships

- 15.20 Sometimes partners will have an intermittent relationship. When determining the duration of an intermittent relationship a court may exclude a period of resumed cohabitation of up to three months and that had the motive of reconciliation.³²
- 15.21 As noted above, sometimes partners will have been in two different types of relationships together, one after the other. The most common example is a de facto relationship preceding a marriage.³³ If so, the period of each relationship is usually added together to determine the overall length of the relationship.³⁴

Should the qualifying period be longer?

- 15.22 The three year rule does not appear to cause issues for marriages. The median duration of marriages ending in divorce has been rising since the early 1990s, and was 14 years in 2016, compared to 12 in 1977.³⁵ This data does not capture any time spent in a de facto relationship immediately preceding marriage, which is also counted when calculating the duration of a marriage under the PRA.³⁶ Although this data must be treated with caution,³⁷ it suggests that few marriages are short-term marriages, and that few marriages are likely to be affected by a three or even five year qualifying period. This data includes civil unions that end in dissolution, although this is likely to be a small group.³⁸

³² Property (Relationships) Act 1976, s 2E(2).

³³ 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.

³⁴ Property (Relationships) Act 1976, ss 2B–2BA.

³⁵ Information prior to 1977 is not available. Median duration of marriage includes civil unions ending in dissolution. The median is the mid-point value. See Statistics New Zealand “Divorces by duration (marriages and civil unions) (Annual-Dec)” (2017) <www.stats.govt.nz>.

³⁶ Property (Relationships) Act 1976, s 2B.

³⁷ This data does not necessarily suggest that marriages are longer lasting than other relationship types, as a couple may be separated for some time before divorcing. It does not include the period of any immediately preceding civil union or de facto relationship, which counts as part of the marriage for the purposes of the Property (Relationships) Act 1976: see ss 2B and 2BA. This is important because most people live in a de facto relationship before marriage: 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.

³⁸ As noted in n 35 above, the median duration of marriage includes civil unions ending in dissolution. The number of people entering into civil unions has remained small, accounting for 1.4% of all marriages and civil unions between 2005 and 2013, and has dropped since same sex marriage was legalised in 2013 so that civil unions only accounted for 0.2% of all marriages and civil unions in 2016: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand “Marriages and civil unions by relationship type, NZ and overseas residents (Annual-Dec)” (May 2017) <www.stats.govt.nz>.

15.23 The three year rule is more significant for de facto relationships. This is because short-term de facto relationships are not normally covered by the PRA, as we discuss in Chapter 17.³⁹ Whether or not a de facto relationship satisfies the three year rule is a question that carries significant consequences under the PRA.

Issues with the three year rule

15.24 During our research and preliminary consultation we noted the concern that the three year rule is not achieving a just division of property when some de facto relationships end. Some may argue that a longer qualification period is needed because:

- (a) Some people drift into de facto relationships without focusing on the property consequences. While partners that marry or enter into a civil union can reasonably be expected to understand that property consequences will follow under the PRA, this expectation might not apply to partners in de facto relationships. They need longer to recognise their legal state is changing and organise their affairs accordingly.
- (b) De facto relationships take longer than marriages and civil unions to reach functional equivalence, or to “mature” into the kind of relationship to which the general rule of equal sharing should apply.
- (c) De facto relationships have a different status to marriage because one is commonly a stepping stone to the other, and because of the way marriage is considered by some to strengthen the commitment between partners. We discuss what we know about the similarities and differences between how different relationships function in Chapter 17.⁴⁰
- (c) People who have more than one intimate relationship in their lifetime need a longer qualifying period to protect their assets from gradual erosion.⁴¹

³⁹ Property (Relationships) Act 1976, ss 1C(2)(b) and 14A.

⁴⁰ Most people live in a de facto relationship before marriage: Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

⁴¹ See data on re-partnering after separation in Chapter 4 of Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

- (d) It would be more consistent with certain religious beliefs (for example the special status of marriage) and cultural or social values to have a longer qualifying period for de facto relationships.

15.25 These arguments need to be evaluated in the light of what we know about the duration of de facto relationships.

What do we know about the duration of de facto relationships?

15.26 The Parliamentary select committee considering the 2001 amendments was advised that there was no available data on the average length of de facto relationships in New Zealand.⁴² We face the same challenge in 2017. While some evidence suggests that many de facto relationships result in marriage, there is little available data on the duration of de facto relationships that continue long-term or end in separation. We explore the data that is available in our Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (Study Paper).⁴³

15.27 There are conflicting views on whether de facto relationships are more fragile than marriages. One New Zealand study from 1995 identified that first cohabiting unions⁴⁴ have become increasingly more likely to end in separation rather than marriage.⁴⁵ Among those who entered into their first cohabitation before 1970, 75 per cent had married and 14 per cent had separated within five years. In contrast, of those who entered their first cohabitation between 1980–1989, 41 per cent had married and 45 per cent had separated within five years.

15.28 That study also identified, however, that the proportion of first cohabiting unions that were still intact five years on had increased, from 11 per cent of cohabitations entered into before

⁴² Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 10.

⁴³ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017).

⁴⁴ That is, where the participant's first union was cohabitation rather than marriage. "Cohabitation" refers to couples who were in an intimate relationship and living together in the same household but who were not married. Some cohabitations, but not necessarily all, will be de facto relationships under s 2D of the Property (Relationships) Act 1976.

⁴⁵ The New Zealand Women: Family, Employment and Education survey was a nationwide retrospective survey of 3,017 women aged 20–59. The survey investigated family formation and change between 1950–1995. For a discussion of the methodology and results of this survey see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 3, citing Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 237 and Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, 2004) at 18 and 26 (Table 2.9).

1970, to 14 per cent of cohabitations entered into between 1980–1989.⁴⁶ It was said that this “fits with the argument that enduring cohabiting unions were increasingly likely to be acceptable to the wider community and in that sense ‘formalised’.”⁴⁷

15.29 That study is now over 20 years old and was undertaken before the PRA was extended to include de facto relationships. It is unknown whether the trends it identified have continued or if they have been altered by subsequent changes to the legal and social context, such as greater legal recognition of de facto relationships⁴⁸ or increasing public acceptance of de facto relationships.

15.30 More recent research from Australia suggests that cohabiting unions may now be more enduring than the New Zealand study suggests.⁴⁹ Research in England and Wales also challenges the view that cohabiting relationships are more fragile than marriages.⁵⁰ That research observed that, while statistics may indicate that marriages, on average, last longer than de facto relationships:⁵¹

The evidence suggests that if we compared like with like, for example young secular childless couples, or older couples in a long-term union with children, there would probably be little difference between separation rates for cohabiting couples and married couples.

⁴⁶ The study also identified that cohabiting unions that followed marriage were less likely to end within a given duration than other cohabiting unions: Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 237.

⁴⁷ Subsequent cohabiting unions include cohabitations that were preceded by an earlier cohabitation or marriage, or both. These results are discussed in Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017).

⁴⁸ Note the Relationships (Statutory References) Act 2005 which amended Acts and regulations that contained unjustified discrimination on the grounds of marital status or sexual orientation.

⁴⁹ An Australian study based on data collected in the Household, Income and Labour Dynamics in Australia Survey identified that 61 per cent of cohabiting couples were still cohabiting three years on (from 2001 to 2003). Nineteen per cent had separated and 20 per cent had married. This excluded those cohabiting couples for whom no information was available in 2003: see Lixia Qu, Ruth Weston and David de Vaus “Cohabitation and Beyond: The Contribution of Each Partner’s Relationship Satisfaction and Fertility Aspirations to Pathways of Cohabiting Couples” (2009) 40(4) *Journal of Comparative Family Studies* 587, as cited in Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 3.

⁵⁰ Simon Duncan, Anne Barlow and Grace James “Why don’t they marry? Cohabitation, commitment and DIY marriage” (2005) 17(3) *CFLQ* 383 at 388. Note that the legal situation in England and Wales is very different because the statutory property regime (the Matrimonial Causes Act 1973 (UK)) does not apply to de facto relationships.

⁵¹ Simon Duncan, Anne Barlow and Grace James “Why don’t they marry? Cohabitation, commitment and DIY marriage” (2005) 17(3) *CFLQ* 383 at 389.

Duration of de facto relationships in PRA cases

- 15.31 Research into a snapshot of reported PRA cases from 2002 to 2009 found that in 44 per cent of cases involving a de facto relationship, the relationship was shorter than five years.⁵² This appears to suggest that a longer qualifying period might be better at capturing only those partners that intended to enter a de facto relationship (or should have reasonably known that they were entering a de facto relationship) while reducing the risk of capturing partners who slip inadvertently into one.⁵³
- 15.32 This data must, however, be treated with caution. It only gives a snapshot of the small proportion of de facto relationships that end in litigation. It does not capture de facto relationships where property matters are resolved out of court or where the partners are unaware that the PRA applies to them. It also does not capture de facto relationships that “end” in marriage or civil union, or that are ongoing. Perhaps more importantly, the prevalence of cases involving de facto relationships shorter than five years might simply reflect the fact that these relationships fall into the “grey area” where the existence of a qualifying relationship might be contestable if the start and/or end dates of the relationship are unclear.⁵⁴

Advantages of the three year rule

- 15.33 Despite its issues, the three year rule has a long history, is simple to remember and sets a “bright-line test.” Changing the qualifying period for de facto relationships without a solid evidence base would be difficult to justify and is likely to cause confusion.

⁵² 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 4 and 9. Cleary identified and analysed 316 electronically available cases on the Brookers and LexisNexis legal databases involving relationship property disputes. See also Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (Commission for Financial Capability, August 2012) at [3.26].

⁵³ 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. See Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (Commission for Financial Capability, August 2012) at [3.26].

⁵⁴ As we discuss in Chapter 6, some research suggests that it may be more common for couples to dispute the start and end dates of a de facto relationship than the existence of a de facto relationship. See 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). This study 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. However only 12 per cent involved questions about whether the entire relationship had crossed the threshold to become a de facto relationship.

- 15.34 Changing the qualifying period might raise issues that are more significant than the issues associated with the current approach. A longer qualifying period risks excluding relationships that should be covered by the PRA and may not provide the best protection for a vulnerable partner when a relationship ends. It may not reduce disputes but simply shift the likelihood of disputes to longer relationships. Excluded partners may still seek other legal remedies.⁵⁵
- 15.35 The three year rule does not exist in isolation: a relationship must also qualify as a de facto relationship before the general rule of equal sharing applies. Therefore concerns that the PRA does not apply to the right relationships may be addressed by other means. These include changing the definition of de facto relationship (see Chapter 6) and engaging the PRA's rules around contracting out (see Part J).

CONSULTATION QUESTIONS

- E2 Do you think the three year rule is fair, or is it problematic for some or all relationship types?
- E3 Do you think the three year rule is well understood?

Options for reform

- 15.36 We explore some different options below, should reform be necessary to address the concern that the three year rule is not achieving a just division of property when some de facto relationships end.
- 15.37 Whether reform of the three year rule is necessary, and if so what option is preferred, must be considered in light of any changes proposed elsewhere in this Issues Paper. It is important that the minimum duration requirement is appropriate for the rules that apply when that requirement is met. For example, a three year qualifying period may remain appropriate if the PRA's core rules remain the same, or if the definition of relationship property is narrowed so there is a smaller pool of property available for division at the end of a relationship (see option 4 below).

⁵⁵

Legal remedies may include a claim in equity such as a constructive trust claim. Prior to the inclusion of de facto relationships in the Property (Relationships) Act 1976 regime in 2001, constructive trust claims were the main avenue of redress for de facto partners. This was a difficult process and a key aim of the 2001 reforms was to avoid the need for de facto partners to make such claims.

- 15.38 Some of these options work together. It may be possible to implement option 1 (increasing the qualifying period for all relationship types) with or without option 3 (allowing a court to treat a short-term relationship as a qualifying relationship), depending on the length of the new qualifying period. Option 2 (increasing the qualifying period for some or all de facto relationships) and option 3 must be implemented together to avoid injustice.

Option 1: Increase the qualifying period for all relationship types

- 15.39 This option would treat all relationship types the same, but in practice it could have a disproportionate effect on de facto relationships if those relationships are generally shorter than marriages. We have no way of knowing how many de facto relationships would be disadvantaged by this option as we lack data on the average duration of de facto relationships. While many PRA cases that make it to court involve de facto relationships under five years, for the reasons given at paragraph 15.322 we are not convinced that this alone points to a problem with the qualifying period being too short.

Option 2: Increase the qualifying period for some or all de facto relationships

- 15.40 This option could accommodate concerns that the three year rule is not achieving a just division of property when some de facto relationships end. A longer qualifying period could apply to either some or all de facto relationships. For example, de facto relationships with children could remain subject to the existing three year rule. This would recognise the importance of children as an indicator of the kind of relationship to which the PRA should apply, and the PRA's role in protecting children's interests (see Part I). Under this option, a court should be able to treat a short-term relationship as if it were a qualifying relationship in certain circumstances to avoid injustice (see option 3).
- 15.41 This option is consistent with the view that different relationship types tend to form, function and endure in different ways, and that treating all relationships in the same way does not always lead to a just result. Giving the courts a power to treat

short-term relationships as qualifying relationships in certain circumstances could mitigate injustice or disadvantage resulting from the distinctions drawn by this option.

- 15.42 This option would be a significant departure from the PRA's current rules and, in our preliminary view, a backwards step. It would effectively treat relationships differently depending on the form the relationship took, rather than how that relationship functioned. Different treatment raises issues under human rights law. It may devalue de facto relationships and relationships without children, and stigmatise these groups as less worthy of statutory protection than couples in other types of relationships. While there is some evidence that might support this approach, as noted above, we are not convinced that the evidence available is sufficiently robust to support this option.

Option 3: Allow the court to treat a short-term relationship as if it were a qualifying relationship

- 15.43 Currently there is no discretion for a court to treat a short-term relationship as if it were a qualifying relationship.⁵⁶ This may not be an issue if the three year rule remains because it is unlikely that there are many relationships shorter than three years to which the general rule of equal sharing should be applied. If, however, option 1 or option 2 is adopted, there may be a need to allow a court to depart from the minimum duration requirement in certain circumstances. This is because longer the qualifying period, the greater the need for flexibility to avoid unjust outcomes for some short-term relationships.
- 15.44 The PRA could be amended to give the court discretion to treat a short-term relationship as if it were a qualifying relationship if satisfied that failure to do so would result in "serious injustice." This would set a high threshold, recognising that the qualifying period should be fit for purpose for most relationships. This option may, however, complicate the PRA as "serious injustice" tests are already used in other provisions.⁵⁷ This may raise issues as to whether case law on those provisions is (or should be) relevant in this context.

⁵⁶ In contrast, a court can treat a qualifying relationship as if it were a short-term relationship if it considers it just, having regard to all the circumstances of the relationship: Property (Relationships) Act 1976, s 2E.

⁵⁷ See for example Property (Relationships) Act 1976, ss 14A and 21J. See paragraph 17.5 in relation to s 14A.

15.45 An alternative is to give a court discretion to treat a short-term relationship as if it were a qualifying relationship if the partners lived together as a couple for a “significant period of time” and the court considers it just. This would draw on a concept developed by the American Law Institute, which suggested using a “significant period of time” requirement rather than a set period for some relationships.⁵⁸ Whether the requirement is met would be determined in the light of a list of factors (similar to the list in section 2D(2)), and the extent to which those factors wrought change in the life of one or both partners.⁵⁹ The greater the change, the shorter the period necessary to satisfy the requirement.⁶⁰ Other factors that may be relevant might include a substantial contribution to the relationship or a considerable intermingling of property.⁶¹ This option may require a court to focus on circumstances related to the character and quality of the relationship (as it currently does with the existing discretion to treat a qualifying relationship as if it were a short-term one) and the significance of the life events that occurred during the relationship.

Option 4: Retain the three year rule and address issues with its application to de facto relationships in other ways

15.46 The final option is to retain the three year rule for relationships, recognising that its advantages outweigh the issues we have identified with its application to de facto relationships. These issues might then be addressed in other ways, for example:

- (e) changing the definition of de facto relationship (see Chapter 6);
- (f) changing the definition of relationship property (see Chapter 9); and

⁵⁸ The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(6)].

⁵⁹ The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(6)].

⁶⁰ The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(6)] and 924.

⁶¹ See Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (1988) at 67.

- (g) promoting awareness of the PRA's rules including the ability to contract out (see Part J) through a public education campaign (see Chapter 4).

CONSULTATION QUESTION

E4 Which option for reform do you prefer, and why? If you prefer option 1 or option 2, what should the qualifying period be increased to?

Chapter 16 – Short-term marriages and civil unions

- 16.1 Short-term marriages and civil unions are automatically covered by the PRA.⁶² A court can order the division of relationship property according to the applicable rules, and can make non-division orders such as occupation and tenancy orders.⁶³
- 16.2 Section 14 sets out the property division rules for short-term marriages. These rules are mirrored in section 14AA, which applies to short-term civil unions. The discussion in this chapter primarily concerns section 14 as that section has a longer legislative history and has been the subject of more extensive judicial debate. We have no reason to believe that this discussion is not equally applicable to short-term civil unions.

The property division rules

- 16.3 Section 14 dilutes the general rule of equal sharing in certain specified circumstances. In those circumstances some or all relationship property is shared on the basis of each spouse's contribution to the marriage.

Dividing the family home and chattels

- 16.4 Section 14(2) provides that the general rule that the family home and family chattels are shared equally⁶⁴ does not apply:
- (a) to any asset owned wholly or substantially by one spouse at the date on which the marriage began; or
 - (b) to any asset that has come to one spouse, after the date on which the marriage began,—
 - (i) by succession; or
 - (ii) by survivorship; or

⁶² Property (Relationships) Act 1976, ss 2A(1)(a), 14 and 14AA. The definitions of “marriage” in s 2A and “civil union” in s 2AB include a marriage or civil union that is void.

⁶³ Property (Relationships) Act 1976, ss 27, 28 and 28A.

⁶⁴ Property (Relationships) Act 1976, ss 11(1)(a), 11(1)(b), 11A, 11B and 12.

- (iii) as the beneficiary under a trust; or
- (iv) by gift from a third person; or
- (c) where the contribution of one spouse to the marriage has clearly been disproportionately greater than the contribution of the other spouse.

- 16.5 In *Chesham v Chesham* the High Court considered what “substantially” owning an asset meant under section 14(2)(a).⁶⁵ It said that a house purchased before marriage by the spouses as tenants in common in equal shares was not “owned wholly or substantially” by one spouse. Rather, it was wholly owned by both spouses.⁶⁶ The Court then considered the position if the legal title were ignored, and said that “[a] three to one disparity does not bring the house within the concept of substantially owned by one.”⁶⁷
- 16.6 A sense of relativity between each spouse’s contribution to the marriage is incorporated into the test in section 14(2)(c).⁶⁸ In *Burgess v Beavan* for example the Court of Appeal said that not only must the financial contribution of one spouse be clearly greater, it must also have brought a disproportionate benefit to the other spouse, having regard to the tangible and intangible contributions made by the other spouse to the marriage.⁶⁹
- 16.7 If one of the section 14(2) exceptions applies, each spouse’s share of the affected property (the asset that satisfies the test in section 14(2)(a) or 14(2)(b), or all relationship property if the test in section 14(2)(c) is satisfied) is determined in accordance with his or her contribution to the marriage.⁷⁰ Contributions are set out in section 18, and include monetary contributions and non-monetary contributions such as childcare and the performance of household duties. It is open to a court to take a technical approach to determining each spouse’s contribution (whereby a numerical weighting between financial and non-financial contributions is determined and applied) or to make a “broad-brush” assessment.⁷¹

⁶⁵ *Chesham v Chesham* [1993] NZFLR 300 (HC). See also *Treloar v Treloar* (1988) 5 NZFLR 209 (HC).

⁶⁶ *Chesham v Chesham* [1993] NZFLR 300 (HC) at 310.

⁶⁷ *Chesham v Chesham* [1993] NZFLR 300 (HC) at 312.

⁶⁸ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 4.3.2(a).

⁶⁹ *Burgess v Beavan* [2010] NZCA 625, [2011] NZFLR 609 at [31]. See also *L v H* [2015] NZFC 1426 and *Miramontes v Brennan* [2017] NZFC 4298.

⁷⁰ Property (Relationships) Act 1976, s 14(3).

⁷¹ *Jackman v Clague* [2016] NZCA 463 at [16]–[17].

Dividing other relationship property

- 16.8 Section 14(4) provides that other relationship property (excluding the family home and family chattels) is shared equally unless one spouse's contribution to the marriage has clearly been greater than the other's. If that test is satisfied, each spouse's share in any other relationship property is determined in accordance with his or her contribution to the marriage.⁷²

Issues with sections 14 and 14AA

What is a just division of property at the end of a short-term marriage?

- 16.9 It is not clear what a just division of property at the end of a short-term relationship looks like, and whether that goal is achieved by the existing rules for short-term marriages and civil unions in sections 14 and 14AA.
- 16.10 Section 14 assumes that a just division of property at the end of a short-term marriage generally requires equal division, but that division on a contributions basis may be just in certain circumstances. This incomplete displacement of the general rule of equal sharing may cause perceived unfairness in some circumstances. For example, if one spouse purchased the family home one month before the marriage, the exception under section 14(2)(a) would apply and the general rule of equal sharing would be displaced in relation to that asset. If, however, that partner had waited, and purchased the family home one month into the marriage, section 14(2)(a) would not apply and the property would be shared equally, unless the partner successfully argues that section 14(2)(c) applies.
- 16.11 The exceptions in section 14(2) are said to represent "untidy qualifications" to the simple, alternative proposition that the general rule of equal sharing has no relevance to a short-term marriage.⁷³ It might, however, be considered appropriate that section 14 is weighted in favour of equal sharing of the family

⁷² Property (Relationships) Act 1976, s 14(5).

⁷³ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.78]. Fisher notes "the simple formula that ss 11, 11A, 11B and 12 should not apply to marriages of short duration did not find favour."

home and family chattels because they are central to family life (see further discussion of the “family use” approach in Chapter 9).

The tests in section 14 are unclear and incomplete

- 16.12 Section 14 has been described as an “indirect and incomplete” statutory route to achieving the apparent legislative purpose of deferring equal sharing of some relationship property until a marriage has survived its initial period as a short-term relationship.⁷⁴
- 16.13 Specific issues with the section 14(2) exceptions include:
- (a) The degrees of ownership implied by the concept of substantial ownership in section 14(2)(a) is difficult to reconcile with the PRA’s definition of “owner”.⁷⁵ Under the PRA an “owner” is the person who is the beneficial owner of the property (see Chapter 8). If a person is the beneficial owner of the property it does not matter that the property is heavily mortgaged or otherwise encumbered.⁷⁶
 - (b) Sections 14(2)(a) and 14(2)(b) do not appear to extend to the proceeds of sale of a qualifying asset.⁷⁷ If that is the case, proceeds are subject to the general rule of equal sharing unless section 14(2)(c) applies.⁷⁸ This is different to the way the PRA treats the proceeds of sale and any increase in the value of separate property in sections 9, 9A and 10 (see Chapters 9 and 10).
 - (c) The degree of disparity required by section 14(2)(c) is unclear. The word “disproportionately” has been described as an “unfortunate choice” as its literal meaning assumes the existence of a desirable standard against which any given proportions are to be

⁷⁴ See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.78].

⁷⁵ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.79] identifies tenancy in common and hire purchase as possible objects of the phrase “wholly or substantially” in Property (Relationships) Act 1976, s 14(2)(a).

⁷⁶ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.79].

⁷⁷ See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.79].

⁷⁸ Property (Relationships) Act 1976, ss 11(1)(a) and 11(1)(b), 11A, 11B and 12. These rules will not apply if the test in section 14(2)(c) is satisfied.

measured.⁷⁹ One interpretation is that section 14(2)(c) requires a greater degree of disparity than that required for other relationship property in section 14(4) (“been clearly greater”).⁸⁰ This is said to reflect the special position of the family home and chattels, and means that those assets are more likely to be shared equally.⁸¹

- 16.14 It could also be clearer how debts are to be dealt with when an exception in section 14 applies to an asset over which a relationship debt is secured. Section 14 does not address debts.

Options for reform

Option 1: Amend the tests in sections 14(2) and 14(4)

- 16.15 Option 1 retains the current rules of division for short-term marriages and civil unions but makes some changes to sections 14(2) and 14(4) (and the mirror provisions in section 14AA) to address identified issues.
- 16.16 Options to amend the tests include:
- (a) Deleting the words “wholly or substantially” in section 14(2)(a) to reconcile the concept of ownership with the definition of “owner” in section 2 of the PRA.
 - (b) Amending sections 14(2)(a) and 14(2)(b) to include any increase in value or proceeds of the sale of any qualifying asset. This would mean that property acquired out of a qualifying asset is treated in the same way, enabling a partner to trace his or her assets into other forms of property, as is generally the case with separate property under the PRA.

⁷⁹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.84]. See also *Treloar v Treloar* (1988) 5 NZFLR 209 (HC) at 215: “This clumsy phrase with its double adverbs has caused some trouble” referring to s 13(1)(c) of the Matrimonial Property Act 1976, which also contained the phrase “clearly been disproportionately greater”.

⁸⁰ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.84].

⁸¹ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR14.06].

- (c) Amending the threshold tests in sections 14(2)(c) and 14(4) to clarify the required degree of disparity in the contributions of the spouses. Options include:
 - (i) A “bright-line” test, such as a disparity of 60:40 or greater for section 14(2)(c) and a disparity of 55:45 or greater for section 14(4).⁸² This would have the advantages of being clear and accessible. However it might be difficult to apply to non-financial contributions.
 - (ii) Replacing the phrase “clearly been disproportionately greater” in section 14(2)(c) with “significantly greater” to achieve a discretionary standard that is higher than the threshold test in section 14(4) but avoids the issues raised by the current drafting.

Option 2: Adopt contribution-based rules of property division

16.17 This option is to replace the current rules of division for short-term marriages with one rule for all relationship property. A court would determine the share of each spouse in all of the relationship property in accordance with the contribution of each spouse to the marriage. It would effectively eliminate the exceptions in section 14 and extend the property division rules that currently apply when those exceptions are satisfied to all relationship property. It would be consistent with how property is divided when a short-term de facto relationship meets the requirements specified in section 14A(2) (discussed in Chapter 17), and when exceptional circumstances exist that make equal sharing of relationship property repugnant to justice (section 13). There is, therefore, an established body of case law that considers this approach to property division.

16.18 This option would be simpler than the current approach, because one set of rules would apply to all relationship property. It would also end special treatment of the family home and chattels, which may be considered less appropriate in a short-term relationship (see the discussion of the family use approach to classification in Chapter 9). Removing the presumption of equal sharing

⁸² See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.84].

of the family home and chattels could, however, increase the likelihood of unequal division when a short-term marriage ends. This may favour the partner that has made a substantial financial contribution where the marriage has not lasted long enough for the other partner's non-financial contributions to build up.

Option 3: Equal sharing of the fruits of the relationship

- 16.19 In Chapter 9 we considered the option of a different definition of relationship property for shorter relationships based on a “fruits of the relationship” approach.⁸³ Under that approach, the property one partner acquires before the relationship, or receives as a gift or inheritance during the relationship, will generally remain separate property. This applies even if the property is used as the family home or as a family chattel. When the partners separate, they would only divide the property that had been acquired during the relationship.
- 16.20 The fruits of the relationship approach may have particular appeal for short-term relationships as it focuses on the product of the partners' joint and several contributions and excludes property which has not been produced or improved by the relationship. This may better align with the values and norms of relationships in contemporary New Zealand. The rationale for special treatment of the family home and chattels may be weaker in a short-term relationship because the partners have had less time to build a close association with the property and make it “theirs” (see the discussion of the family use approach to classification in Chapter 9). Adopting this option would, however, lead to two definitions of relationship property and associated uncertainty unless this approach is also extended to qualifying relationships. This is considered as an option in Chapter 9.
- 16.21 This option is different to the current rules in section 14. For example, a family home or chattel that was wholly owned by one partner before the marriage began would probably remain that partner's separate property under a fruits of the relationship approach. It would not be divided at the end of the relationship. Under section 14, such assets would probably be divided based

⁸³ See also Robert Fisher “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

on each partner's contribution to the relationship. This option would therefore remove the special status of the family home and chattels and is likely to reduce the property pool available for division at the end of some short-term relationships. In Chapter 9 we discuss in more detail the advantages and disadvantages of the different approaches to defining relationship property.

CONSULTATION QUESTION

E5 Which of these options do you prefer, and why?

Chapter 17 – Short-term de facto relationships

- 17.1 Short-term de facto relationships, unlike short-term marriages and civil unions, generally fall outside the PRA.⁸⁴ A court cannot make a property division order in respect of a short-term de facto relationship unless the test in section 14A(2) is passed. That test does not apply to short-term marriages or civil unions.
- 17.2 If the section 14A(2) test is passed, the rules of division that apply to short-term de facto relationships are different to those that apply to short-term marriages and civil unions. If the test is not passed, partners in short-term de facto relationships do not have property rights under the PRA.

Background to section 14A

- 17.3 Section 14A was carried over from the De Facto Relationships (Property) Bill 1998 (Bill).⁸⁵ That Bill sought to provide a different property division regime for de facto relationships, recognising the view that they should not be equated with marriages.⁸⁶ The Bill did not progress and instead the 2001 amendments extended the PRA to cover de facto relationships. Despite the PRA's equal treatment of qualifying relationships, there remained a view that it would generally be unfair to equate short-term de facto relationships with short-term marriages and civil unions.⁸⁷ This was probably based on the idea that short-term de facto relationships lacked the required degree of commitment and permanence.⁸⁸ Section 14A was likely retained as a safety valve to cater to exceptional circumstances where the general exclusion of short-term de facto relationships would cause injustice.

⁸⁴ Property (Relationships) Act 1976, s 4(5). As discussed in Chapter 16, marriages and civil unions are automatically covered by the Property (Relationships) Act 1976.

⁸⁵ De Facto Relationships (Property) Bill 1998 (108-1), cl 59.

⁸⁶ (26 March 1998) 567 NZPD 7918.

⁸⁷ See paragraph 15.54 above.

⁸⁸ See Tejal Panchal "Relationship property and de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 208.

- 17.4 The section 14A test has been the subject of considerable judicial debate. Parts of section 14A have been described as “inherently vague.”⁸⁹ This has the potential to undermine the principle that questions arising under the PRA be resolved as inexpensively, simply, and speedily as is consistent with justice.⁹⁰

The section 14A(2) test

- 17.5 A short-term de facto relationship must pass the test in section 14A(2) before a court can order the division of property under the PRA. Section 14A(2) is a two-step test:

- (2) If this section applies, an order cannot be made under this Act for the division of relationship property unless—
- (a) the court is satisfied—
- (i) that there is a child of the de facto relationship;
or
- (ii) that the applicant has made a substantial contribution to the de facto relationship; and
- (b) the court is satisfied that failure to make the order would result in serious injustice.

- 17.6 The meaning of “child of the de facto relationship” in section 14A(2)(a)(i) is wide.⁹¹ It includes two categories of children: any child of both de facto partners; and any other child who was a member of their family at the relevant time. The second category has been construed narrowly,⁹² but may potentially include stepchildren, foster children and some children who are also members of another household, such as where care is shared. The definition is discussed in detail in Part I.

- 17.7 The “substantial contribution” requirement in section 14A(2)(a)(ii) was considered in *S v J*.⁹³ In that case the applicant had carried out the full range of domestic tasks, provided some funds used to buy a car, worked hard in the other partner’s business, and gave

⁸⁹ Bill Atkin “The Legal World of Unmarried Couples: Reflections on ‘De Facto Relationships’ in Recent New Zealand Legislation” (2008) 39 VUWLR 793 at 809.

⁹⁰ Property (Relationships) Act 1976, s 1N(d).

⁹¹ Property (Relationships) Act 1976, s 2 definition of “child of the de facto relationship.”

⁹² *M v L* (2005) 24 FRNZ 835 (FC).

⁹³ *S v J* [2005] NZFLR 932 (FC).

up her life overseas to make a life with the other partner in New Zealand.⁹⁴ The Family Court was satisfied that this amounted to a “substantial contribution.”

- 17.8 Even if one of the criteria in section 14A(1)(a) is met, the applicant must still satisfy the court that a failure to make a property division order would cause “serious injustice.” This test was satisfied in *L v D* because the High Court considered it would have been a serious injustice for the applicant not to share in capital gains that were a result of her substantial contribution to the development and management of the other partner’s vineyard.⁹⁵

The property division rules

- 17.9 If the test in section 14A(2) is satisfied, the property division rules in section 14A(3) apply. That section provides that each partner’s share of relationship property is to be determined in accordance with his or her contribution to the de facto relationship. Contributions are listed in section 18, and include monetary and non-monetary contributions.

Issues with section 14A

The PRA treats short-term de facto relationships differently to short-term marriages and civil unions

- 17.10 The key issue with section 14A is that it treats short-term de facto relationships differently to short-term marriages and civil unions. Short-term de facto relationships must meet additional requirements before a court can make a property division order, and even if those requirements are met, the rules of division that apply to short-term de facto relationships are different. The general rule of equal sharing, which still applies to short-term marriages and civil unions in some circumstances, does not apply at all to short-term de-facto relationships.⁹⁶

⁹⁴ *S v J* [2005] NZFLR 932 (FC) at [68]–[69].

⁹⁵ *L v D* HC Blenheim CIV 2006-406-293, 2 November 2010 per Wild J at [56].

⁹⁶ The general rule of equal sharing will apply to short-term marriages and civil unions when the specified circumstances in ss 14(2) and 14AA(2) of the Property (Relationships) Act 1976 do not apply.

- 17.11 In Chapter 3 we explained 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 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. In Chapter 5 we expressed our preliminary view that the PRA should continue to apply in the same way to all qualifying relationships that are substantively the same, regardless of relationship type. The issue here is whether the PRA should also apply equally to all short-term relationships, regardless of relationship type.
- 17.12 It might be argued that the current approach is appropriate because short-term de facto relationships are different to short-term marriages and civil unions, and as such equal treatment would not lead to a just division of property for short-term de facto relationships. This might be because commitment in a de facto relationship may be ambiguous or low at the beginning due to the way commitment in informal relationships grows over time, and it would be unfair to impose the PRA on unsuspecting persons. It is not as easy to say the same of marriages, which are commonly preceded by a de facto relationship, are registered “opt-in” relationships and generally involve a public ceremony. People who get married can be reasonably expected to appreciate that their change of legal status will carry some property consequences.⁹⁷ Some of the arguments for a longer qualifying period for de facto relationships (see paragraph 15.24) may also support a view that the PRA should treat short-term de facto relationships differently.
- 17.13 We are not, however, convinced that different rules for short-term de facto relationships are justified in contemporary New Zealand. There are few areas of law that still distinguish between relationship types in this way.⁹⁸ More people are living in de facto relationships and social attitudes towards them are likely to have changed.⁹⁹ It may now be considered unfair, unjust and

⁹⁷ See Margaret Briggs “The Formalization of Property Sharing Rights for De Facto Couples in New Zealand” in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Vienna, 2009) 329 at 340. Civil unions are in a similar position to marriages.

⁹⁸ Note the Relationships (Statutory References) Act 2005 which amended statutes and regulations that contained unjustified discrimination on the grounds of marital status or sexual orientation.

⁹⁹ 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.

inconsistent with anti-discrimination laws to deny legal rights to people on the basis of their marital status.¹⁰⁰

- 17.14 Equal treatment of short-term relationships in the PRA would not necessarily mean equal division, because the PRA's special property division rules for short-term relationships can dilute or displace the general rule of equal sharing. Nor would this necessarily "open the floodgates", because a relationship must still qualify as a de facto relationship in the first place, and this qualification should restrict the PRA's application to relationships that are substantively the same.
- 17.15 Whether different rules for short-term de facto relationships should continue needs to be evaluated in the light of what we know about the similarities and differences between different relationship types.

Similarities and differences between how relationships function

- 17.16 Some overseas experts see relationships between partners that live together as very similar to marriage, "...just a modern, private, 'do it yourself' form of marriage, in which couples are 'as good as' married."¹⁰¹ Others see these relationships as very different to marriage, or as a "try and see" strategy only part way to the full mutual commitment of marriage.¹⁰² Another view again is that these relationships are preferable to marriage, "...part of a liberating shift towards more egalitarian gender roles ...in which couples only stay together if the relationship continues to meet their individual needs."¹⁰³
- 17.17 There is little New Zealand research on the similarities and differences (if any) between relationship types. Many still see

¹⁰⁰ The New Zealand Bill of Rights Act 1990, s 19 and the Human Rights Act 1993, s 21 prohibit unjustified discrimination on the grounds of marital status and family status.

¹⁰¹ Carolyn Vogler, Michaela Brockmann and Richard D Wiggins "Managing money in new heterosexual forms of intimate relationships" (2008) 37(2) *Journal of Socio-Economics* 552 at 554, citing Anne Barlow and others *Cohabitation, Marriage and the Law* (Hart, Oxford, 2005); Simon Duncan, Anne Barlow and Grace James "Why don't they marry? Cohabitation, commitment and DIY marriage" (2005) 17(3) *CFLQ* 383; and J Lewis *The End of Marriage* (Edward Elgar, Cheltenham, 2001).

¹⁰² Carolyn Vogler, Michaela Brockmann and Richard D Wiggins "Managing money in new heterosexual forms of intimate relationships" (2008) 37(2) *Journal of Socio-Economics* 552 at 554 referring to C Smart and P Stevens *Cohabitation Breakdown* (Family Policy Studies Centre, London, 2000); and J Ermisch and M Francesconi "Patterns of household and family formation" in Richard Berthoud and Jonathan Gershuny (eds) *Seven Years in the Lives of British Families* (Policy Press, Bristol, 2000) 21.

¹⁰³ Carolyn Vogler, Michaela Brockmann and Richard D Wiggins "Managing money in new heterosexual forms of intimate relationships" (2008) 37(2) *Journal of Socio-Economics* 552 at 554, referring to A Giddens *The Transformation of Intimacy* (Polity Press, Cambridge, 1992); and U Beck and E Beck-Gernsheim *The Normal Chaos of Love* (Polity, Cambridge, 1995).

marriage as the “gold standard” of commitment.¹⁰⁴ Commitment for couples that live together is more often seen as a private matter and something that grows over time,¹⁰⁵ emerging at some point prior to marriage if the relationship takes that path. Some New Zealand research has found that married and unmarried couples who have children describe commitment, and what it means to them, in similar ways.¹⁰⁶ We know very little about civil unions in New Zealand as this relationship type is relatively new and few people enter into civil unions.¹⁰⁷ Literature on money management within New Zealand relationships is sparse and based on older data. A small New Zealand study of unmarried couples calls into question the strength of the association between relationship type and money management style.¹⁰⁸ Money management in relationships is discussed in Chapter 6.

17.18 These different views on the similarities and differences between relationship types are likely due to a number of factors, including different religious and social values, the diversity of couples that live together and the changes that occur as these relationships progress. Baker and Elizabeth identified four types of unmarried couples that live together:¹⁰⁹

- (a) **Co-residential dating:** These relationships are said to be very much about the here and now, without any particular thought to the future.¹¹⁰ This is said to be a

¹⁰⁴ 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 184.

¹⁰⁵ Vivienne Elizabeth and Maureen Baker “Transiting through cohabitation to marriage: emerging commitment and diminishing ambiguity” (2015) 4(1) *Families, Relationships and Societies* 53 at 67.

¹⁰⁶ Jan Pryor and Josie Roberts “What is Commitment? How married and cohabiting parents talk about their relationships” (2005) 71 *Family Matters* 24 at 31. The 2003 New Zealand Relationship Commitment Study examined the accounts of 30 married and 20 cohabiting couples with children in Wellington. There was no difference in the time they had been in their current relationships (12.5 years). Researchers in the United Kingdom also say that “[e]mpirical studies, including our own, routinely record expressions of commitment by cohabitants that are little different from those of married spouses”: Simon Duncan, Anne Barlow and Grace James “Why don’t they marry? Cohabitation, commitment and DIY marriage” (2005) 17(3) *CFLQ* 383 at 388 citing J Ekelaar and M Maclean “Marriage and the moral bases of personal relationships” (2004) 31(4) *Journal of Law and Society* 510. See also L Jamieson et al “Cohabitation and commitment: partnership plans of young men and women” (2002) 52(3) *Sociological Review* 354; C Lewis, A Papacosta and J Warin *Cohabitation, Separation and Fatherhood* (Joseph Rowntree Foundation, 2002); and J Lewis *The End of Marriage? Individualism and Intimate Relationships* (Edward Elgar, 2001).

¹⁰⁷ Partners have been able to enter into a registered civil union in New Zealand since 2005: Civil Union Act 2004, s 2. See n 38 above and 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 for statistics on the number of people entering into civil unions.

¹⁰⁸ See Vivienne Elizabeth “Managing money, managing coupledness: a critical examination of cohabitants’ money management practices” (2001) 49 *Sociological Review* 389.

¹⁰⁹ 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 8–9.

¹¹⁰ 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 9. Co-residential dating can be seen as an initial phase of a relationship where partners live in the same house.

common pattern, especially among young people.¹¹¹ It is unlikely that many of these early-stage relationships are de facto relationships under the PRA.

- (b) **Trial marriage:** Living together is thought to take the form of a trial marriage for the majority of opposite-sex couples.¹¹² It allows couples to see if they are suitably matched and can “justify the next step.” As we discuss in our Study Paper, living together has become the normal precursor to marriage for the vast majority of couples.¹¹³
- (c) **An alternative to marriage:** These couples may reject the patriarchal, heterosexual or religious overtones associated with marriage.¹¹⁴
- (d) **The same as marriage:** This group includes long-term, opposite-sex couples that live together, often with children.

17.19 The available research suggests that the reasons couples live together will vary, as will their level of commitment, the degree of relationship fragility and their intentions to enter a marriage or civil union. Couples will also vary in why they married or entered into a civil union, how their marriage or civil union functions, and their level of commitment to the marriage or civil union.

¹¹¹ 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 9.

¹¹² 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 8 citing Gordon A Carmichael and Andrea Whittaker “Living Together in Australia: Qualitative Insights into a Complex Phenomenon” (2007) 13(2) *Journal of Family Studies* 202; Ernestina Coast “Currently Cohabiting: Relationship Attitudes, Expectations and Outcomes” in John Stillwell, Ernestina Coast and Dylan Kneale (eds) *Fertility, Living Arrangements Care and Mobility: Understanding Population Trends and Processes* (Springer, Dordrecht, 2009) 105; Wendy Manning, Jessica A Cohen and Pamela J Smock “The Role of Romantic Partners, Family, and Peer Networks in Dating Couples’ Views About Cohabitation” (2011) 26(1) *Journal of Adolescent Research* 115; and Lixia Qu “Expectations of Marriage Among Cohabiting Couples” (2003) 64 *Family Matters* 36.

¹¹³ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 1.

¹¹⁴ 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 9 referring to Vivienne Elizabeth “Something Old. Something Borrowed. Something New. Heterosexual Cohabitation as Marriage Resistance? A Feminist Deconstruction.” (PhD thesis, University of Canterbury, 1997).

The section 14A(2) test is unclear

It is unclear what constitutes a “substantial contribution to the de facto relationship”

17.20 The PRA does not define or provide any guidance on what constitutes a “substantial contribution” to the de facto relationship.¹¹⁵ The courts have developed different and sometimes conflicting approaches.¹¹⁶

17.21 Early Family Court decisions assessed whether the contribution was a departure of some degree from “the norm.”¹¹⁷ However in *L v P* the High Court considered it was difficult to assume a supposed norm of contributions or even a “norm” of a de facto relationship.¹¹⁸ The Court considered it more helpful to focus on the natural meaning of the word, noting that the dictionary definition of “substantial” was something of “real importance or value”, and that therefore there was no need to refine the meaning further.¹¹⁹ The High Court in *L v D* however said that “substantial” was a well understood word and did not see the need to resort to dictionary definitions.¹²⁰ In *H v H* the High Court was attracted to the “departure from the norm” approach originally taken by the Family Court, but thought that attempts to define the precise degree of departure from the norm required were not of particular assistance.¹²¹ The Court said that a “substantial contribution” is a contribution of real importance or value over and above what would usually be expected from the partners in the normal course of their relationship.¹²² More recently, the High Court in *Picton v Uxbridge* was not convinced that it is necessary to limit the natural meaning of “substantial contribution” as it

¹¹⁵ Property (Relationships) Act 1976, s 14A(2)(a)(ii). Contributions to the marriage, civil union or de facto relationships are however defined in s 18.

¹¹⁶ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR14A.05] referring to *Schmidt v Jawad* (2003) 23 FRNZ 101 (FC) and *S v J* [2005] NZFLR 932 (FC).

¹¹⁷ For example, in *Schmidt v Jawad* [2003] NZFLR 1050 (FC) at [15] the Family Court held that a substantial contribution to a de facto relationship is one which goes far beyond the norm. In *S v J* [2005] NZFLR 932 (FC) at [66] the Family Court disagreed, saying that a substantial contribution may need to be beyond the norm, but not far beyond the norm.

¹¹⁸ *L v P* [2008] NZFLR 401 (HC) at [70].

¹¹⁹ *L v P* [2008] NZFLR 401 (HC) at [70].

¹²⁰ *L v D* HC Blenheim CIV-2006-406-293, 2 November 2010 at [47].

¹²¹ *H v H* [2013] NZHC 443, [2013] NZFLR 387 at [55].

¹²² *H v H* [2013] NZHC 443, [2013] NZFLR 387 at [56].

was in *H v H*.¹²³ The Court said that the applicant’s contribution need not be out of the ordinary or far beyond the norm, and that it is sufficient if it is substantial in the sense of being of real importance or value.¹²⁴ As a result of these differing approaches there is said to be a lack of consistency and predictability in how the courts apply this requirement.¹²⁵

The threshold for “serious injustice” is unclear

17.22 The phrase “serious injustice” is not defined in the PRA.¹²⁶ It has been described as “inherently vague”¹²⁷ and is said to provide “fertile ground for legal argument and judicial interpretation.”¹²⁸

17.23 In *Gibbons v Vowles* the Family Court said that a comparison is needed between the consequences for the partners if an order is made and if it is not.¹²⁹ The High Court took a similar approach in *L v P*.¹³⁰

In assessing “serious injustice” it is legitimate to apply the concept of a party getting a just return for “contributions”... It is also relevant to consider the concepts that have been developed in constructive trust cases relating to de facto relationships, referred to in Lankow v Rose [1995] 1 NZLR 277, (1994) 12 FRNZ 682 (CA). The concept of a return for contributions and the notion of a constructive trust can be seen as a benchmark of entitlement, against which the position of the applicant if a Court does not interfere can be measured. If the status quo after separation without the intervention of the Court results in a return that is less than the entitlement under s 14A(3) and Lankow v Rose, there will be a serious injustice.

17.24 The meaning of the phrase “serious injustice” has been considered in several cases.¹³¹ In *Schmidt v Jawad* the High Court said that

¹²³ *Picton v Uxbridge* [2015] NZHC 1050, [2015] NZFLR 935 at [41].

¹²⁴ *Picton v Uxbridge* [2015] NZHC 1050, [2015] NZFLR 935 at [41]-[42].

¹²⁵ Tejal Panchal “Relationship property and de facto relationships of short duration: how can we fix the law?” (2016) 8 NZFLJ 206 at 208.

¹²⁶ Property (Relationships) Act 1976, s 14A(2)(b).

¹²⁷ Bill Atkin “The Legal World of Unmarried Couples: Reflections on ‘De Facto Relationships’ in Recent New Zealand Legislation” (2008) 39 VUWLR 793 at 809.

¹²⁸ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR14A.06].

¹²⁹ *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [9]. The Family Court also said at [6] that “serious injustice” is a higher threshold than merely “unjust” as used in s 21(8) of the Matrimonial Property Act 1976 and a lower threshold than “repugnant to justice” as used in the exception to equal sharing in s 13 of the Property (Relationships) Act 1976.

¹³⁰ *L v P* (2007) [2008] NZFLR 401 (HC) at [75]. See also *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [8]-[12].

¹³¹ For example, *S v J* [2005] NZFLR 932 (FC) at [73].

“serious injustice” means what it says: it is more than an injustice – it is a serious injustice.¹³² It warned that using other words instead of “serious” risks changing the test.¹³³

- 17.25 The issue is further complicated because a “serious injustice” test is used in other sections of the PRA. For example, a court may set aside an agreement under section 21J if giving effect to it would cause “serious injustice.”¹³⁴ There are different views as to whether the phrase “serious injustice” should be interpreted in a similar fashion throughout the PRA.¹³⁵
- 17.26 The PRA does not expressly indicate who must experience “serious injustice” if an order is not made.¹³⁶ The focus is usually on the applicant. Arguably serious injustice for children of the de facto relationship if an order is not made should be considered in a more direct way.¹³⁷ This would be consistent with the existing requirement to have regard to the interests of any minor or dependent children of the relationship in PRA proceedings.¹³⁸ It would also be consistent with the focus on children in section 14A(2)(a)(i).

The test sets a high bar for relationships with children

- 17.27 Short-term de facto relationships with children pass the test in section 14A(2) if a court is satisfied that failure to make an order would cause “serious injustice.” The requirement for serious injustice sets a high bar. It means that a court will not be able to make a property division order for some short-term de facto relationships with children.¹³⁹ Yet an increasing number of

¹³² *Schmidt v Jawad* [2006] NZFLR 410 (HC) at [34]. See also *Public Trust v W* [2005] 2 NZLR 696 (CA) in the context of an application for leave to apply for an order under section 88(2) of the Property (Relationships) Act 1976. In that case the Court of Appeal said that the “serious injustice” test can be applied directly, and there is no need to put a gloss on the words used by Parliament.

¹³³ *Schmidt v Jawad* [2006] NZFLR 410 (HC) at [34].

¹³⁴ Property (Relationships) Act 1976, s 21J.

¹³⁵ See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [5], the discussion in *S v W* [2006] 2 NZLR 669 (HC) at [132] and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR14A.06].

¹³⁶ Property (Relationships) Act 1976, s 14A(2)(b).

¹³⁷ There is an argument that the interests of children are indirectly recognised if serious injustice exists due to the resulting economic disparity created because one partner assumed primary care of the child after the relationship ended: see *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [10].

¹³⁸ Property (Relationships) Act 1976, s 26(1).

¹³⁹ Compare Family Law Act 1975 (Cth) (Australia), s 90SB.

children are born outside marriage.¹⁴⁰ In 2016, 46 per cent of all births in New Zealand were ex-nuptial, up from 17 per cent in 1976.¹⁴¹ There is also some evidence about commitment and the management of money in relationships that questions the basis for distinguishing between parents based on relationship type (see paragraph 17.17). It might also be argued that a child is a sufficient marker of commitment in a short-term de facto relationship and that all such relationships should be subject to the PRA due to the change in the partners' relationship and obligations wrought by parenthood.

Options for reform

Options for reforming section 14A(2)

17.28 It is important that options for reforming the section 14A(2) test are considered in the light of the property division rules that would apply when the test is satisfied or if it no longer applies. For example, if equal sharing of the fruits of the relationship (as explained in option 3 of Chapter 16) applies, option 1 (repeal section 14A(2)) may be considered appropriate because a fruit of the relationship approach may achieve a just division of property without the need for an additional test.

Option 1: Repeal section 14A(2)

17.29 Our preliminary view is that in contemporary New Zealand it is difficult to justify a provision like section 14A(2) that treats short-term de facto relationships so differently to short-term marriages and civil unions. It follows that our preliminary view is that section 14A(2) should be repealed. This would remove a significant hurdle for short-term de facto relationships and bring the PRA's treatment of short-term de facto relationships more in line with the treatment of short-term marriages and civil unions. It would also reduce complexity of the law and, in doing so, promote the resolution of property matters out of court.

¹⁴⁰ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 2.

¹⁴¹ Statistics New Zealand "Live births by nuptiality (Māori and total population) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

17.30 This option would likely increase the number of short-term de facto relationships covered by the PRA. Short-term relationships would, however, still need to satisfy the definition of de facto relationship in section 2D in order to be covered by the PRA. That definition is designed to capture relationships that are substantially the same as marriages and civil unions. The definition of de facto relationship is discussed in detail in Chapter 5. A de facto relationship would still need to satisfy the minimum duration requirement before the general rule of equal sharing applied.

Option 2: Retain section 14A(2) but clarify its application

17.31 If there is a need to retain section 14A(2), then another option is to clarify its application. This option has two elements. The first is to clarify the threshold in section 14A(2)(a)(ii) of a “substantial contribution to the de facto relationship.” This could be achieved by adopting either:

- (a) A threshold guided by the plain meaning and dictionary definition of “substantial” in the sense of being of real importance or value. Panchal considers this approach would be most in line with the policy behind the 2001 amendments and the principle of inexpensive, simple and speedy resolution of property matters as is consistent with justice.¹⁴² It would also follow more recent cases like *Picton v Uxbridge*, where the High Court said that a substantial contribution may not be an unusual feature of a short-term relationship.¹⁴³ This approach would also avoid comparisons with other relationships, which can be unhelpful given the variety of relationships the PRA covers.¹⁴⁴
- (b) A threshold that asks whether the contribution is beyond, or far beyond, “the norm.” As already noted, there is no such thing as “normal” in relationships given the range and variety that exist. It is even difficult to say what is “normal” in a specific relationship given that

¹⁴² Tejal Panchal “Relationship property and de facto relationships of short duration: how can we fix the law?” (2016) 8 NZFLJ 206 at 212–213.

¹⁴³ *Picton v Uxbridge* [2015] NZHC 1050, [2015] NZFLR 935 at [41].

¹⁴⁴ See Tejal Panchal “Relationship property de facto relationships of short duration: how can we fix the law?” (2016) 8 NZFLJ 206 at 212–213.

a substantial contribution is likely to reflect the wider context.¹⁴⁵

17.32 Our preliminary view is that, of these two alternatives, we prefer the first.

17.33 The second element of option 2 is to provide the courts with guidance on what constitutes “serious injustice” for the purposes of section 14A(2)(b). The PRA could be amended to include a list of relevant factors. This could include matters such as:¹⁴⁶

- (a) the PRA’s policy of a just division of property at the end of a relationship;¹⁴⁷
- (b) a comparison between the likely consequences for the parties and any children if an order is made, and if an order is not made;¹⁴⁸
- (c) whether the ongoing daily care of children may create a serious degree of economic disparity between the partners on separation;¹⁴⁹
- (d) whether there has been such a disparity of contributions that a refusal to address it could amount to serious injustice;¹⁵⁰
- (e) the availability and ease of obtaining alternative remedies under any other enactment or rule of law or of equity;¹⁵¹
- (f) any other matters that a court considers relevant.

¹⁴⁵ Tejal Panchal “Relationship property and de facto relationships of short duration: how can we fix the law?” (2016) 8 NZFLJ 206 at 209.

¹⁴⁶ There is precedent for this approach in s 21J(4) of the Property (Relationships) Act 1976 which lists factors the court must have regard to when deciding whether giving effect to a contracting out or settlement agreement would cause serious injustice: see Tejal Panchal “Relationship property and de facto relationships of short duration: how can we fix the law?” (2016) 8 NZFLJ 206 at 213.

¹⁴⁷ *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [7]. The policy of the Property (Relationships) Act 1976 is discussed in Chapter 3.

¹⁴⁸ See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [8].

¹⁴⁹ See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [10]; and Property (Relationships) Act 1976, s 15.

¹⁵⁰ See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [10]. An approach that requires the balancing of each party’s contribution to the relationship was also taken in *L v P* (2007) 26 FRNZ 946 (HC) and *L v D* HC Blenheim CIV 2006-406-293, 2 November 2010..

¹⁵¹ Tejal Panchal “Relationship property and de facto relationships of short duration: how can we fix the law?” (2016) 8 NZFLJ 206 at 214.

Option 3: Introduce a different test for short-term de facto relationships with children and give the courts greater discretion

- 17.34 This option would introduce different eligibility criteria for de facto relationships with children. As with options 1 and 2, a relationship would still need to qualify as a “de facto relationship.” This option could work together with option 2.
- 17.35 One approach would be to remove the requirement to satisfy the “serious injustice” limb of the section 14A(2) test and treat short-term de facto relationships with children the same as short-term marriages and civil unions. This would mean that all short-term de facto relationships with children would be covered by the PRA, regardless of whether failure to make an order would cause serious injustice.¹⁵²
- 17.36 An alternative approach would be to lower the threshold in section 14A(2)(b) from “serious injustice” to “injustice” for short-term de facto relationships with children.
- 17.37 In each case the court should have discretion to treat a short-term de facto relationship without children the same as a short-term de facto relationship with children, if it is just to do so having regard to all the circumstances of the relationship. This is important to help mitigate injustice or disadvantage that may result from the distinction drawn between short-term de facto relationships with and without children.
- 17.38 This option may indirectly benefit some children through their parent’s claim, but it also has the potential to disadvantage other children where the applicant is not the primary caregiver.¹⁵³ For example, it could disadvantage children of the de facto relationship that are the applicant’s stepchildren and who, going forwards, will be living with the other partner. This option must also be considered in light of the definition of “child of the de

¹⁵² This would broadly follow a recommendation made by the Law Commission of England and Wales in its review of aspects of the law relating to unmarried couples that live together. It recommended that couples with a child together ought to be eligible to apply for financial relief on separation without having to satisfy any minimum duration requirement. See Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.26]–[3.31]. See also Family Law Act 1975 (Cth) (Australia), s 90SB, which provides that a court can make certain orders in relation to a de facto relationship if there is a child of the de facto relationship: no additional “serious injustice” test applies.

¹⁵³ See the discussion in *H v C FC Christchurch FAM-2007-057-000337*, 30 August 2011 at [44]–[47].

facto relationship” and the option considered in Part I of a broader definition of “member of the family.”¹⁵⁴

- 17.39 Because this option treats relationships differently based on family status, it may raise issues under human rights law.¹⁵⁵ Different treatment may also devalue de facto relationships without children and stigmatise this group as less worthy of statutory protection than couples with children.

Options for reforming section 14A(3)

- 17.40 We are not convinced that different rules for short-term de facto relationships are justified in contemporary New Zealand. It follows that our preliminary view is that the same property division rules should apply to all short-term marriages, civil unions and de facto relationships. This could be achieved by adopting, for all short-term relationships, either:
- (a) the rules for short-term marriages and civil unions in sections 14 and 14AA, with amendments to the tests in sections 14(2) and (4) as explained in option 1 of Chapter 16;
 - (b) the rule for short-term de facto relationships in section 14A(3), which provides for the division of relationship property on a contributions basis, identified as option 2 of Chapter 16; or
 - (c) equal sharing of the fruits of the relationship as explained in option 3 of Chapter 16.

- 17.41 Adopting the same property division rules for all short-term relationships would address the issue we have with the way the PRA treats short-term de facto relationships differently to short-term marriages and civil unions. It recognises the implicit principle that the PRA should apply equally to all relationships that are substantively the same. It would be a simple, clear and consistent approach to property division at the end of a short-term relationship. This option is not, however, consistent with the view that different relationship types tend to form, function and endure in different ways, and that treating all relationships in the same way does not always lead to a just result. As noted

¹⁵⁴ Property (Relationships) Act 1976, s 2 definition of “child of the de facto relationship”

¹⁵⁵ Human Rights Act 1993, s 21(1)(l). See the discussion of human rights law issues in Chapter 16.

at paragraphs 17.16 to 17.19, the available research does not, however, necessarily support that view.

- 17.42 The property division rules for de facto relationships could be changed independently of the rules for marriages and civil unions, for example by adopting a fruits of the relationship approach for de facto relationships only. However we do not favour this option as it would still treat short-term de facto relationships differently to other short-term relationships.

CONSULTATION QUESTIONS

- E6 Which option for the reform of section 14A(2) (options 1 – 3) do you prefer, and why?
- E7 Should there be one set of property division rules for all short-term relationships? If so, what rules should apply and why?