CHAPTER 10

Resolution

IN THIS CHAPTER, WE CONSIDER:

the resolution of PRA matters and what reform is required to achieve the principle of inexpensive, simple and speedy resolution as is consistent with justice. We consider reforms to:

- improve the resolution of PRA matters out of court;
- clarify partners' obligations of disclosure; and
- improve the resolution of PRA matters that go to court.

INTRODUCTION

10.1 One of the principles of the PRA is that matters "should be resolved as inexpensively, simply, and speedily as is consistent with justice" (section 1N(d)). This means that division of property at the end of a relationship should be just and the process for arriving at that decision should be efficient.[553]

10.2 A strong theme from consultation was that the PRA does not facilitate inexpensive, simple and speedy resolution. Lengthy delay and unaffordable costs can exacerbate what is already a deeply traumatic time of anxiety, uncertainty and conflict for many.[554] We received 94 submissions that raised issues about resolution of PRA matters, including 70 submissions from members of the public, 14 submissions from dispute resolution service providers and other organisations, two submissions from members of the judiciary and eight submissions from individual practitioner and academic experts. Resolution was also discussed at 16 public meetings, two meetings with members of the judiciary and 18 practitioner and academic expert meetings.

10.3 In this chapter we focus on the issues that prevent just and efficient resolution of PRA matters and our preferred approach to addressing these issues. We have developed our

553 We consider there are four important elements in achieving a just and efficient resolution of PRA matters: understanding of legal entitlements, access to financial information, appropriate support and a timely resolution: see Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [23.14].

554 We note that after the death of a spouse, divorce and separation have the second and third highest assigned values for common stressors on the social readjustment rating scale: Thomas Holmes and Richard Rahe "The Social Readjustment Rating Scale" (1967) 11 Journal of Psychosomatic Research 213.

preferred approach having regard to other ongoing work in the family justice sector, in particular:

(a) In 2019 an interdisciplinary research team led by University of Otago and funded by the Borrin Foundation will investigate how separating couples divide their property and resolve disputes at the end of a relationship. This research will provide evidence that will be invaluable in determining how the State can best support just and efficient outcomes in PRA matters. The results of this research are due to be published in 2020.[555]

(b) In August 2018 the Government appointed an Independent Panel to examine the 2014 family justice reforms. The 2014 reforms resulted in the most significant changes to New Zealand's family justice system since the establishment of the Family Court,[556] and while the review of the 2014 reforms is focused on parenting and guardianship matters, it is likely to have implications for the resolution of PRA matters.[557] For example, findings about common issues, such as access to information, legal advice and dispute resolution processes, availability of legal aid and the efficiency and resourcing of court processes will all be relevant to PRA matters.

(c) The Ministry of Justice is currently reviewing the policy settings for legal aid.[558] The Ministry is due to report to the Minister of Justice in October 2018. As part of that review the Ministry also aims to signal wider access to justice issues which could form the basis of future work.[559]

RESOLVING PRA MATTERS OUT OF COURT

10.4 Partners should be able to resolve PRA matters out of court wherever possible. Out of court resolution is generally quicker and less expensive than court-based resolution, and can result in more enduring and satisfactory outcomes for separating partners and their children (Issues Paper at [23.8]–[23.9]). Although we lack data about how PRA matters

555 Michael and Suzanne Borrin Foundation "Relationship property division research" <www.borrinfoundation.nz>.

556 Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [23]. See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.25]–[24.26].

557 See the Terms of Reference for the rewrite of the 2014 family justice system reforms: Andrew Little "Panel appointed to re-write 2014 Family Court reforms" (press release, 1 August 2018). The review is limited to parenting or guardianship matters and the Independent Panel is due to report to the Minister of Justice by May 2019. The review will be informed by the University of Otago Faculty of Law and Children's Issues Centre's evaluation of the 2014 Family Law Reforms through a Parenting Arrangements after Separation Study. This is a large-scale nationwide research project exploring parents' and professionals' perceptions and experience of post-separation family dispute resolution processes regarding decisions and children's care arrangements: see <www.otago.ac.nz>.

558 Ministry of Justice "Legal Aid Review" (26 July 2018) <www.justice.govt.nz>.

559 We also note research by the Law Council of Australia on effective strategies available to the legal profession to assist the "missing middle" to access legal assistance is currently being undertaken: Law Council of Australia *The Justice Project Final Report: Introduction and Overview* (August 2018) at 38–40. On the same note, valuable lessons may be learned from the University of Otago's investigation into gaps in the provision of civil legal aid and further scope for pro bono and low cost advice services: Kayla Stewart and Bridgette Toy-Cronin *The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services* (University of Otago, May 2018). See also recommendations from the New Zealand Bar Association on legal aid, pro bono initiatives and legal services and fees: New Zealand Bar Association *Access to Justice: Āhei ki te Ture* (September 2018).

are resolved in New Zealand, our research and the submissions we received indicate that the vast majority of separating partners resolve their PRA matters out of court.[560]

Issues

10.5 In the Issues Paper we sought feedback on three questions (Issues Paper at [24.2]–[24.16] and [24.52]–[24.54]):

(a) Do people have access to appropriate information?

(b) Is access to legal advice appropriate?

(c) Is access to dispute resolution services for PRA matters appropriate?

10.6 We explore these issues in light of the results of consultation below.

Access to information on property entitlements and resolution mechanisms

10.7 People need to understand their property entitlements and obligations, and the different options for resolving PRA matters, so that they can make informed decisions. In the Issues Paper we observed that there are currently several sources of publicly available information, including the Ministry of Justice, Community Law Centres, Citizens Advice Bureaux New Zealand (CABNZ), the New Zealand Law Society (NZLS) and the Commission for Financial Capability (Issues Paper at [24.4]).

Results of consultation

10.8 Several submitters commented that there was a lack of easy to understand and accessible information for separating partners. Dispute resolution service providers in particular submitted that there was a lack of timely information about the different options for resolving disputes including likely costs, advantages and disadvantages and time associated with each option. Some submitters, including CABNZ, considered that there was sufficient information about the PRA and its rules. However, they considered there was a need for better guidance and self-help tools so people can apply the law to their own circumstances and navigate the process out of court, as far as they are able.

10.9 Some submitters, including members of community organisations and CABNZ, told us that people often want face-to-face support to understand and navigate written information, and help to make arrangements with banks, creditors and other parties involved in the resolution process.

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560 Citizens Advice Bureaux New Zealand (CABNZ) submitted that in the past financial year CABNZ received 14,759 enquiries about relationship issues, with 2,355 (16 per cent) being categorised as primarily relating to relationship property issues and a further 4,654 (31.5 per cent) recorded as relating to separation and dissolution. Over the past four years the number of relationship property enquiries has increased by 44 per cent. In contrast, applications under the Property (Relationships) Act 1976 to the Family Court have been declining, from 1,217 in 2006 to 785 in 2016: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [23.29]–[23.35]. A survey of New Zealand family lawyers carried out by Grant Thornton and the New Zealand Law Society (NZLS) in October 2017 also found that where lawyers were engaged, out of court settlement methods were still the most commonly used. Lawyer-led negotiation had been used by 95 per cent of practitioners in the previous two years, litigation by 79 per cent of practitioners, mediation by 57 per cent and assisted negotiation by 20 per cent of practitioners: Grant Thornton New Zealand Ltd and NZLS *New Zealand Relationship Property Survey 2017* (October 2017) at 20.

Access to affordable legal advice

10.10 Many people want and need tailored legal advice in order to resolve PRA matters.[561] The PRA recognises the importance of legal advice in ensuring a just division of relationship property, by requiring partners to receive independent legal advice before entering into any settlement agreement in order for that agreement to be enforceable in court (section 21F). But not everyone will be able to afford a lawyer to provide tailored legal advice. In some cases, only one partner may be able to do so. In the Issues Paper we observed that inability to access affordable legal advice is a concern as it may result in partners making agreements without knowing what their legal entitlements are, and may create or enhance an imbalance of power between the partners if only one partner can afford legal advice (Issues Paper at [24.9]).

10.11 There is limited access to free or subsidised legal advice on PRA matters. The Family Legal Advice Service, which provides a limited amount of free legal advice for people who cannot afford a lawyer, is only available for parenting and guardianship matters and not PRA matters. Community providers such as Community Law Centres and CABNZ are generally limited to providing non-individualised advice on PRA matters. While legal aid is available to some people on low incomes, it is not available for legal assistance or representation for dispute resolution processes out of court such as private mediation (Issues Paper at [24.10]–[24.16]).[562]

Results of consultation

10.12 There was a strong message from submitters that resolution is expensive and the need to engage lawyers is seen as a significant cost. Submissions indicate that costs are the key reason why people settle their disputes quickly, even if they feel the terms of the settlement are unfair. Submitters including the National Council of Women of New Zealand (NCWNZ) and the New Zealand Federation of Business and Professional Women highlighted that the inability to access affordable legal advice can have a particularly negative effect on people in reduced positions of power and those who have limited financial resources, and these were often women.

10.13 Some submitters felt strongly that they should not have to engage lawyers at all. As well as concerns about costs, some thought lawyers raised the conflict levels between former partners and hindered simple and speedy resolution. These submitters want more freedom to resolve disputes themselves and according to their own sense of fairness. They felt it should be easier for people to make enforceable contracts without the need to involve lawyers. Some submitters recommended introducing a mechanism that

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561 We note that in a study to understand the causes of the increase in without notice applications following the 2014 changes to the Care of Children Act 2004, one of the key drivers identified was that applicants wanted a lawyer to represent them in the Family Court and to manage the application through the Court process: Nan Wehipeihana, Kellie Spee and Shaun Akroyd *Without Notice Applications in the Family Court* (Ministry of Justice, July 2017) at [45]–[50].

562 Legal aid is considered a loan and may need to be repaid in full. It is only available to people on very low incomes. For example, a single applicant with no dependent children cannot earn more than $23,820, while a single applicant with two dependent children cannot earn more than $54,245 (for applications made after 2 July 2018). A single applicant cannot have more than $3,500 of disposable capital, with a further allowance of $1,500 being added for each dependent child. Disposable capital is a person's total assets after deducting the amount of any debts secured against those assets and after deducting the value of certain other liabilities and assets including household furniture, a principal personal vehicle and tools of trade. See Legal Services Act 2011, sch 1 cl 3; and Legal Services Regulations 2011, regs 5–6.

"signed off" their agreement or enabled them to lodge their agreement with, or obtain a consent order from, the Family Court.

10.14 Several submitters raised concerns regarding the limited availability of legal aid. Some practitioners expressed concern that the eligibility rates were too low and the interest rate, at 8 per cent, was too high, particularly given the low cost of borrowing for the Government. Practitioners also commented that repayment of a legal aid loan was much more certain in PRA matters as relationship property would likely be available when the matter was resolved and a charge can be placed on relationship property as security for the loan.

10.15 The low level of fees paid to legal aid lawyers for PRA matters was also a common concern raised by practitioners. A few submitters were also concerned that legally-aided clients were getting less of a service than private clients. Practitioners told us that many lawyers do not offer to act on PRA matters under legal aid as it was not economically viable to do so, given the complexity and amount of time needed to undertake the work. We also heard that there are regions in New Zealand where there were few, if any, lawyers who will accept legal aid instructions for PRA matters.

10.16 CABNZ submitted that access to tailored legal advice and ongoing support is limited to those who can afford to instruct a lawyer in private practice and those who are eligible for legal aid. We do not have data on the size of what the Australian Productivity Commission termed the "missing middle";[563] one practitioner told us that the gap between the two groups was "huge".

The Ministry of Justice's legal aid review

10.17 Since the publication of the Issues Paper the Ministry of Justice has commenced a review of the legal aid policy settings (paragraph 10.3(c) above). Many of the concerns raised with us in consultation have also been raised in that review. In particular submitters on the legal aid review noted that cost and other barriers to access to justice generally exist for particular groups including women, Māori, disabled people, refugees and migrants, young people and self-represented litigants.[564] Submissions on the legal aid review also identified that "people who do not qualify to receive legal aid but still lack the financial means to address their legal problems may decide to deal with these issues in a way that minimises costs".[565] Specific problems with the legal aid framework identified by submitters included the low eligibility rates,[566] the fixed fee rates paid to legal aid lawyers for PRA matters,[567] the low number of lawyers providing PRA advice on legal aid[568] and the absence of legal aid for assistance for dispute resolution processes.[569]

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563 Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 1, 5 September 2014) at 20.

564 Ministry of Justice *Broader Access to Justice Issues* (September 2018) at 1–3.

565 Ministry of Justice *Legal aid eligibility and application process* (September 2018) at 2.

566 Ministry of Justice *Legal aid and eligibility and application process* (September 2018) at 2; and Ministry of Justice *Legal aid grants* (September 2018) at 3.

567 Ministry of Justice *Legal aid providers and quality assurance* (September 2018) at 2.

568 Ministry of Justice *Legal aid providers and quality assurance* (September 2018) at 3. The Grant Thornton and New Zealand Law Society (NZLS) survey also found that whilst some 35 per cent of lawyers surveyed had undertaken legally aided relationship property work in the last two years, those using legal aid funding indicated they did so rarely (62 per cent), a finding generally similar between regions: Grant Thornton New Zealand Ltd and NZLS *New Zealand Relationship Property Survey 2017* (October 2017) at 20. The University of Otago has identified similar issues in relation to access to civil legal aid services: Kayla Stewart and Bridgette Toy-Cronin *The New Zealand Legal Services Mapping*

Access to dispute resolution services

10.18 Currently there is no State-funded provision of dispute resolution services for PRA matters, although parents can raise PRA matters during Family Dispute Resolution (FDR) if it will help them resolve parenting disputes (Issues Paper at [24.19]–[24.31]). A range of dispute resolution services are available on a voluntary, user-pays basis, including mediation, collaborative law, arbitration and online dispute resolution (Issues Paper at [24.31]–[24.51]).

10.19 We noted in the Issues Paper that access to dispute resolution services for low value PRA matters had been recognised as a particular problem in Australia, and that our discussions with family lawyers and community groups indicated it may also be a problem in New Zealand (Issues Paper at [24.43]). We identified two possible options for reform, namely extending FDR to all PRA matters, or developing a specific dispute resolution service for PRA matters (Issues Paper at [24.55]–[24.61]). We also asked whether partners should be required to attempt out of court resolution before going to court (Issues Paper at [24.62]–[24.63]).

Results of consultation

10.20 A number of submitters commented on the positive attributes of dispute resolution services, and of mediation in particular. Submitters noted the informality, flexibility and less confrontational nature of mediation, and its ability to promote party self-determination, focus on the best interests of children and the cultural needs of Māori. Some members of the public strongly favoured mediation over using lawyers and the court process. Arbitration and other dispute resolution services were also viewed favourably by some submitters.

10.21 The cost of mediation was raised as a barrier by a number of submitters. Several submitters recognised the particular problem of disproportionate costs of legal advice and dispute resolution for low value, or debt-only, PRA disputes. They considered there should be a speedy, low cost or free service for such disputes.

10.22 There was a strong response from submitters that FDR in its current form would not be appropriate for PRA matters due to the complex legal and factual issues often involved in these disputes.[570] The most common concerns among submitters were the lack of lawyer involvement and legally trained mediators.[571] The New Zealand Family Dispute Resolution Centre (FDR Centre) and the Resolution Institute proposed an extension of the FDR

Project: Finding Free and Low-Cost Legal Services (University of Otago, May 2018). The United Kingdom's Parliamentary Joint Committee on Human Rights has concluded that legal aid "deserts" have made human rights unenforceable: Joint Committee on Human Rights *Enforcing Human Rights: Tenth Report of Session 2017-19* HC 669, HL Paper 171, 19 July 2018.

569 Ministry of Justice *Legal aid eligibility and application process* (September 2018) at 3. The Minister of Justice has commented that the Family Court reform which requires separating partners in parenting disputes to negotiate without the advice or assistance of a lawyer or judge overlooking was too much to expect and unrealistic: "Justice Minister says exes negotiating alone in Family Court over future care of their kids 'unrealistic' and 'too much to expect'" (2 August 2018) TVNZ <www.tvnz.co.nz>.

570 The Family Dispute Resolution Centre's (FDR Centre) submission agreed with the Ministry of Justice's 2011 Review of the Family Court that the majority of relationship property disputes (that FDR Centre administers) involve substantial assets and highly complex factual and legal issues which make these disputes unsuitable for an FDR-type process.

571 We note FairWay Resolution's submission that the concerns identified in the Issues Paper in respect of FDR following the 2015 review should be read with caution and noted the limitations of that review and initial training of FDR mediators: see Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.28].

service, or preferably a similar service modified to better meet the needs of PRA disputes, for disputes involving property valued at under $100,000.[572] The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) supported the proposal to extend a modified FDR service to such small-scale disputes as existing FDR would not be appropriate.

10.23 Several submitters suggested different ways that existing dispute resolution processes could be improved for PRA matters. Some practitioners and representatives from community organisations we spoke to supported a service similar to the Disputes Tribunal for low value claims.[573] One practitioner suggested an arbitration-type service that could be available for all PRA matters (not just low value disputes) and which would give enforceable preliminary determinations on the papers. The preliminary decision could be challenged in court if either party was not happy with the outcome.[574] Another practitioner recommended an online dispute resolution service provided by the Ministry of Justice.

10.24 NZLS submitted there may be scope for alternative dispute resolution/tribunal resolution in "very limited cases" where the claim is of low value or where there is a net debt situation, there are no disputes about the extent of assets or whether the PRA applies, and there are no disclosure issues. NZLS considered that the tribunal procedure would need to include pre-tribunal mandatory disclosure and access to legal advice funded by legal aid, as well as a right of appeal from any tribunal decision. NZLS suggested one option might be for the PRA to provide that the Disputes Tribunal should have jurisdiction where there is a net debt situation or where the total quantum of relationship property equity falls within the Tribunal's jurisdiction under section 10 of the Disputes Tribunal Act 1988.

10.25 Several submitters and practitioners we talked to at meetings supported the State encouraging parties to engage in dispute resolution. Submitters and practitioners considered that dispute resolution worked well when both parties wanted to engage and reach agreement, but that access to lawyers and the courts was necessary where parties could not or would not agree.

10.26 However submitters' views were mixed on whether out of court dispute resolution should be mandatory. AMINZ, FairWay Resolution and three practitioners supported a requirement to attempt mediation unless it is not appropriate in the circumstances, similar to the way FDR currently operates.[575] One member of the public considered that mediation should be compulsory where parties cannot make progress in a determined timeframe. Resolution Institute identified a range of possible approaches and ultimately

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572 In their submission, FDR Centre proposed that the State fund this service for disputes where property is valued under $50,000 (including providing access to legal aid for legal advice) and parties self-fund at a reasonable and set fee for disputes between $50,000 and $100,000.

573 This was also suggested as a potential reform by respondents to the Grant Thornton survey: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 25.

574 A similar fast track adjudication process is available for resolving building and construction disputes under the Construction Contracts Act 2002, pts 3–4. The primary purpose of the process is to improve cash flow and, while the orders are only interim, they are often accepted by the parties without further legal proceedings being required. For further information see "Mediation, arbitration and adjudication" (21 March 2016) Building Performance <www.building.govt.nz>.

575 Parties can be exempt from participating in FDR if one or both parties are unable to participate effectively, if there has been domestic violence, if FDR would be inappropriate (such as if a power imbalance exists between parties) or if there is an urgent application: Family Dispute Resolution Act 2013, s 12; and Care of Children Act 2004, s 46E.

favoured a requirement to meet with a mediator for initial screening. Divorce Partners (an Australian dispute resolution provider) favoured a form of compulsory arbitration in terms of a mandatory financial assessment prior to filing. The independent assessment would create a payment obligation of a discrete dollar sum, with the aim of encouraging parties to pay this amount and avoid court proceedings. One branch of NCWNZ suggested a non-partisan independent financial mediator should be involved in decisions about division of property. NZLS, FDR Centre, one member of the public, and practitioners at two meetings specifically considered that dispute resolution should not be mandatory. The FDR Centre and AMINZ considered that parties should be required to certify that they have obtained information relevant to the various private dispute resolution options available to them, understood the nature of those processes and the relevant costs of each option, and that having informed themselves of those options, they have nevertheless determined to proceed to the courts.

10.27 Other submitters, including the Family Violence Death Review Committee, Community Law Wellington and Hutt Valley, The Backbone Collective and some representatives of community law centres we spoke to, were particularly concerned about victims of family violence in the dispute resolution process. Some raised the need for access to expedited resolution and that processes should not enable abusive behaviour and deprivation from property to continue.[576]

10.28 Some submitters also commented on the benefits of State-funded counselling, which was available prior to the 2014 reforms to the family justice system (Issues Paper at [24.26]). A number of submitters advocated a return to State-funded support to help people reach a point where they can have useful settlement discussions. One meeting attendee said that following separation she was unable to open letters or answer the phone because she was so scared of what she might be told, and was incredulous she was expected to deal with lawyers and the resolution process at that time.

[576] We note that exemption from participating in mandatory dispute resolution processes for Property (Relationship) Act matters on the basis of family violence or other relevant circumstances could be provided in a similar way to the exemptions from participating in FDR under the Family Dispute Resolution Act 2013 and Care of Children Act 2004. Pre-mediation screening processes could also be required to ensure matters not appropriate for mediation are screened out.

Preferred approach

P52 The Ministry of Justice should develop a comprehensive information guide for separating partners that explains the PRA and provides information about the different options for resolving PRA matters.

P53 The Ministry of Justice should consider funding community organisations to provide person-to-person support for people who have difficulty accessing, navigating and applying the information guide in order to enable first steps in the resolution process to be identified and taken.

P54 The Ministry of Justice should review the existing provision and funding for legal advice on PRA matters in order to ensure appropriate access to affordable legal advice when resolving PRA matters out of court.

P55 Voluntary out of court dispute resolution for PRA matters should be promoted by:

a. including in the PRA statutory endorsement of voluntary dispute resolution to resolve PRA matters out of court;
b. including new "pre-action procedures" in the Family Court Rules 2002 (proposed under Proposal 59 below), including a requirement to make a genuine effort to resolve PRA matters out of court prior to making an application to court; and
c. requiring applicants to court to acknowledge in court application forms that they have received information about the availability of out of court dispute resolution services.

P56 The Government should consider extending a voluntary, modified Family Dispute Resolution service or other form of State-funded dispute resolution service to PRA matters following the outcome of the review of the 2014 family justice reforms.

10.29 Separating partners should be encouraged to resolve their PRA matters out of court whenever appropriate. In our view, access to affordable services that enable and support separating partners to achieve just and efficient outcomes is a major concern. The ongoing work in the family justice sector presents a significant opportunity to address the issues raised in this chapter.

Improve access to information and support

10.30 We propose that the Ministry of Justice, as the government department responsible for administering the PRA, develop and publish a comprehensive and easy to understand information guide for separating partners. The object of the information guide would be to promote out of court resolution as far as possible, by giving separating partners the information they need in order to participate effectively in the resolution of PRA

matters.[577] The Ministry should consider developing the information guide with community organisations, NZLS and dispute resolution service providers.

10.31 The information guide should:

(a) explain how the property sharing regime operates, including what property is shared, how property is shared and when the regime applies;

(b) provide information about the options for resolving PRA matters (including likely timing and costs for each option);

(c) include checklists, self-help workbooks and financial calculators to enable parties to collate all the information necessary to resolve their PRA matters;[578] and

(d) signpost to support and dispute resolution services for further information, support and advice, including links to online support, dispute resolution service providers and legal aid providers.

10.32 The information guide should be widely available to separating partners at an early point in the dispute resolution process. The Ministry should also consider how to make the information guide available at common trigger points in relationships (such as moving in together, getting married or entering a civil union, approaching the qualifying period for de facto relationships and buying a house).[579]

10.33 The information guide should be available online,[580] and could be provided in a variety of formats, including podcasts and videos, and in different languages.[581] It should also be available in print to those without access to the internet including at CABNZ, Community Law Centres, other relevant community organisations and centres, and the Family Courts.

10.34 We also propose that the Ministry of Justice consider funding community organisations to provide person-to-person support for people who have difficulty accessing, navigating and applying the information guide. This might include contracting with community organisations including CABNZ and Community Law Centres to ensure such support is specifically funded where it is outside legal aid eligibility criteria and/or scope.[582] This

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577 In Chapter 1: Introduction we also recommend that a new statute be drafted so that property entitlements and obligations, and related rules are clear and certain, which will go some way to improving accessibility.

578 See for example the United Kingdom's Divorce and money calculator ("Divorce and money calculator" the Money Advice Service <www.moneyadviceservice.org.uk>); and guidance on DIY divorce or dissolution ("How to sort out your finances on divorce or dissolution" the Money Advice Service <www.moneyadviceservice.org.uk>). Submitters considered the Ministry of Justice's parenting through separation guide to be a useful example of self-help guidance: see Ministry of Justice *Making arrangements for your children: A Parenting Through Separation programme factsheet*.

579 See Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [24.4]–[24.6]; and proposals in Chapters 1: Introduction and 2: Classification of this Paper.

580 Of the 656 parents/caregivers who had completed their parenting arrangements and responded to the University of Otago's initial online survey, 49 per cent had used the Ministry of Justice website whilst 25 per cent were unaware of it: Nicola Taylor "Family Law Reform in New Zealand: Research Insights" (paper presented to New Zealand Law Society The Future of Family Law Conference, Auckland, 20 September 2018) at 145.

581 See for example the videos on Understanding Legal Processes hosted on the University of Otago Legal Issues Centre website: "Understanding Legal Processes" University of Otago <www.otago.ac.nz>.

582 CABNZ submitted that:

> Increasingly people are looking for [person-to-person] support outside of the court system and often through trusted community organisations such as the CAB. If organisations like the CAB are fulfilling this role, it is important that they are appropriately resourced and equipped to do so.

Submitters to the Ministry of Justice's legal aid review suggested that a "greater/more strategic usage of community law centres" would help fill the legal aid "gap". For example, using community law centres to assist with the initial administrative stages of a legal aid case would allow legal aid lawyers to focus on the more substantive legal issues of a case: Ministry of Justice *Broader Access to Justice Issues* (September 2018) at 3. The New Zealand Institute of Economic Research has identified growth potential in the Community Law network, including by increasing the level of

proposal recognises that information guides and other self-help tools will not be appropriate for everyone. The Law Council of Australia notes that self-help tools are often ineffective for people with poor legal knowledge, literacy, language and communication skills, and people with multiple and complex legal and non-legal needs.[583] We note that some support services like this are already available, but on an ad hoc basis. Community Law Canterbury, for example, operates a Family Law Advisory Clinic one night a week at the Family Court and provides legal advice and help completing Family Court forms which can be filed on the night.[584]

Review access to affordable legal advice

10.35 Access to affordable legal advice is essential in ensuring access to justice for PRA matters, especially as the PRA requires partners to obtain legal advice if they want their settlement agreements to be binding.[585] While we acknowledge that some submitters did not agree that legal advice should be necessary in order to make enforceable agreements, we do not propose removing this as a procedural requirement (see Chapter 8: Contracting out and settlement agreements).[586]

10.36 The Ministry of Justice's review of legal aid is ongoing. In light of this we do not make specific proposals on how access to affordable legal advice ought to be ensured for PRA matters. Instead we propose that the Ministry of Justice review the existing provision and funding for legal advice on PRA matters, in order to ensure appropriate access to affordable legal advice when resolving PRA matters out of court. Specific consideration should be given to:

(a) whether the income thresholds for legal aid for PRA matters strike an appropriate balance between access to justice and responsible government spending;

(b) whether the rates of remuneration for legal aid providers for PRA matters adequately meet the cost of the services;

(c) improving access to legal aid lawyers undertaking PRA work; and

(d) providing free or subsidised legal advice to assist separating partners using out of court dispute resolution processes, including through extending the scope of the Family Legal Advice Service and/or legal aid.

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qualifying income eligible for Community Law services, providing in-house mediation services and facilitating pro bono services: New Zealand Institute of Economic Research *The value of investing in Community Law Centres: An economic investigation* (September 2017) at 40. See also the assistance in bankruptcy and employment disputes provided by the Litigants in Person Service developed by the Auckland Community Law Service: Darryn Aitchison "Unlocking potential through the Litigants in Person Service" (2 March 2018) New Zealand Law Society <www.lawsociety.org.nz>.

583 Law Council of Australia *The Justice Project Final Report - People: Building Legal Capability and Awareness* (August 2018) at 10.

584 See "Services: Outreach Services" Community Law Canterbury <www.canlaw.org.nz>.

585 Section 21F of the Property (Relationships) Act 1976 requires a lawyer to witness a partner's signature to an agreement. The lawyer must certify that they explained to the partner the effects and implications of the agreement. If inadequate advice has been given, the agreement is void.

586 We have given consideration to the proposal raised by some submitters that there should be a different mechanism for "signing off" agreements, such as obtaining a consent order from the Family Court. We are not satisfied, however, that a different mechanism to the current procedural protection of obtaining independent legal advice would be more efficient or would ensure just outcomes, given the complex questions of fact and law that often arise and the risk of injustice caused by information asymmetries and imbalances of power among partners. Transferring the procedural protections currently provided through independent legal advice to the Family Court is arguably not the most appropriate or efficient use of State resources. It is also unclear whether the Family Court would issue consent orders in the absence of independent legal advice to each party.

10.37 This work should take into account the findings of the Borrin Foundation research into how separated couples resolve their relationship property disputes due to be published in 2020.

Promote the use of out of court dispute resolution services

10.38 Our preferred approach is to encourage parties to voluntarily participate in out of court dispute resolution processes. We make the following proposals:

(a) The PRA should include statutory endorsement of the use of voluntary dispute resolution to resolve PRA matters out of court.[587] This would also resolve the current uncertainty as to whether PRA matters can be determined through arbitration (Issues Paper at [24.81]–[24.83]).

(b) "Pre-action procedures" should be developed for PRA matters and included in the Family Court Rules 2002. The pre-action procedures should include a requirement to make a genuine effort to resolve matters out of court prior to making an application to court. This would include participating in one or more dispute resolution processes, such as negotiation, counselling, mediation, arbitration, or in other recognised dispute resolution services. Pre-action procedures are discussed further in paragraphs 10.76–10.77.

(c) Applicants under the PRA should be required to acknowledge in court application forms that they have received information about the availability of out of court dispute resolution services.[588]

10.39 We have considered, but do not propose mandatory participation in dispute resolution. In our view dispute resolution should be voluntary, and this was a view shared by several submitters. In the Issues Paper we highlighted that compulsory dispute resolution raises important ethical issues as it conflicts with core dispute resolution principles such as voluntary participation by the parties, their empowerment in and ownership of their dispute and self-determination in its resolution (see Issues Paper at [24.63]). Unwilling participants may also take steps to avoid compulsory dispute resolution, or simply not engage with the process, delaying matters and potentially increasing costs further.[589]

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587 Similar statutory endorsements are found in comparable jurisdictions. See for example the British Columbia Family Law Act SBC 2011 c 25, s 4, which emphasises that out of court dispute resolution is preferred, including encouraging resolution through agreements and appropriate family dispute resolution processes before making an application to a court; and the Ontario Family Law Act RSO 1990 c F-3, s 3, which endorses voluntary mediation as a process for resolving any matter that the court specifies.

588 We also considered whether the current duty on lawyers to advise clients of alternatives to litigation should be strengthened, for example by requiring lawyers to certify that they have provided this information (a requirement to advise on alternatives already exists under Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.4). However we did not receive any feedback that lawyers are not complying with this duty and such measures may therefore be unnecessary.

589 In a review of the 2014 reforms to the family justice system, the Ministry of Justice found that whilst the average number of applications under the Care of Children Act 2004 filed on notice across 2014/15 and 2015/16 decreased by 63 per cent from the average across 2011/12 and 2012/13, the average number of applications filed without notice for the same years increased by 69 per cent: Ministry of Justice *Family Justice: An Administrative Review of Family Justice System Reforms* (December 2017) at 14. A study to understand the causes of this increase found without notice applications were seen as the quickest way to get in front of a judge and that compulsory FDR for on notice applications was a contributing factor: Nan Wehipeihana, Kellie Spee and Shaun Akroyd *Without Notice Applications in the Family Court* (Ministry of Justice, July 2017) at [44] and [51]–[71]. The Ministry of Justice also examined the reasons why parties did not participate in FDR. Parties can be exempt from participating in FDR if domestic violence has been disclosed, if a power imbalance exists between parties, if one or both parties are unable to effectively participate or where parties would not participate in FDR. The Ministry found that 83 per cent of those who that did not participate between 1 July 2016 and 30 June 2017 did so because one of the parties would not participate. The most common

Dispute resolution works best when both parties want to engage and reach agreement, and are supported to do so.[590] We also note that mandatory dispute resolution is unlikely to significantly reduce the Family Court's workload. This is because the proportion of separating partners who are currently going to court is very small, and make up a very small part of the Family Court's case load.

Consider extending a voluntary, modified FDR service to PRA matters in future

10.40 We do not propose extending FDR in its current form to PRA matters. As we observed in the Issues Paper, PRA matters are different in nature to parenting disputes. They will often involve complex legal and factual issues. A just outcome is dependent on full and frank disclosure and will often require the parties to have received and carefully considered legal advice (Issues Paper at [24.57]). Several submitters raised similar concerns during consultation (paragraph 10.22 above).

10.41 However we propose that this issue be revisited following the review of the 2014 family justice reforms, which will include examination of FDR and the decision to remove State-funded counselling. The outcome of the review may therefore lead to a FDR service (or the introduction of some other dispute resolution service that is more appropriate for PRA matters).[591] This may include the reintroduction of State-funded counselling to assist partners through the emotional and psychological stress of separation.[592]

10.42 Extending a voluntary and modified FDR service may be an efficient and effective way to provide for funded dispute resolution services for PRA matters, with the additional benefit that parenting matters and PRA matters could be resolved at the same time by the same dispute resolution service provider, if preferred.[593] Extending FDR to PRA matters would also enable the development of standard processes for PRA mediation.[594]

10.43 If FDR were extended to PRA matters, safeguards would be necessary to ensure that FDR is appropriate in the parties' individual circumstances and that the parties are properly prepared for the

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reasons for lack of participation were that the 2nd party would not engage (40 per cent), that the 2nd party could not be reached (23 per cent), and because of the cost involved (14 per cent): Ministry of Justice *Exemptions from Family Dispute Resolution where a party did not participate* (September 2017) at 5.

590 Similar views were expressed by applicants interviewed in a study into without notice applications in the Family Court: Nan Wehipeihana, Kellie Spee and Shaun Akroyd *Without Notice Applications in the Family Court* (Ministry of Justice, July 2017) at [72].

591 The Minister of Justice has commented that the Family Court reform which requires separating partners in parenting disputes to negotiate without the advice or assistance of a lawyer or judge overlooking was too much to expect and unrealistic: "Justice Minister says exes negotiating alone in Family Court over future care of their kids 'unrealistic' and 'too much to expect'" (2 August 2018) TVNZ <www.tvnz.co.nz>. In our view, funding lawyers to provide advice and/or representation in the dispute resolution process is a possible reform that could result from the Family Court review.

592 The New Zealand Association of Psychotherapists strongly urged the review of the 2014 family justice reforms to consider the re-establishment of free counselling for couples considering separation, highlighting the negative impact conflict can have on children in particular: New Zealand Association of Psychotherapists "NZAP Press Release: Family Court Counsellors Needed" (press release, 6 August 2018).

593 We note that in Australia the Productivity Commission recommended that family dispute resolution be extended to property and financial matters, although it observed that issues of training and accreditation of family dispute resolution providers would need to be worked through first: Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 2, 5 September 2014) at 875–877.

594 While we have not received any feedback or concerns about the quality or consistency of existing services, we note that just under a third of respondents to the Grant Thornton survey identified formal procedural codes for private and compulsory mediation as being most beneficial in achieving effective resolution of Property (Relationships) Act matters compared to current practice: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 37.

mediation, be aware of their property entitlements and obligations, have sufficient property information and have met the proposed disclosure requirements for dispute resolution processes. Parties must also have access to independent legal advice during the process,[595] and mediators must have sufficient legal training and experience in PRA matters.

10.44 We have also considered, but do not propose, providing a specific dispute resolution service for some or all PRA matters, such as low value claims. This is for several reasons:

(a) There is no "one size fits all" dispute resolution process which is appropriate for or best meets the needs of parties in all PRA matters. Each process has different strengths and weaknesses (Issues Paper at [24.32]–[24.51]). The nature of the dispute and the characteristics of the parties will determine whether out of court resolution is appropriate in any given context and, if so, what dispute resolution service should be used. People should be able to pursue the resolution method that works for their situation.

(b) Mandating a specific dispute resolution service for only some PRA matters (such as low value disputes) raises difficult questions around what the entry criteria should be, and how to mitigate against strategic behaviour, such as minimising the value of relationship property in order to access the service (particularly if it is fully or partially subsidised) or challenging the jurisdiction of the service as a delay tactic.

(c) We are not persuaded that providing a separate dispute resolution service would be more effective or cost efficient than the status quo. Many speed and cost gains accrue in alternative dispute mechanisms because processes are simple and parties must self-represent.[596] But PRA matters are often complex and many people want and need legal advice and assistance. Also, because parenting disputes and PRA matters often overlap, it would be inefficient to require parties to participate in two different dispute resolution services when the issues could be properly resolved in one. It is also unclear whether there would be a sufficiently high volume of PRA matters that would warrant the cost of setting up and running a new dispute resolution service.

10.45 For these reasons, we think that the resources that would be needed to meet the costs of establishing and maintaining a separate dispute resolution service would be better invested in improving access to legal advice and improving efficiencies in the Family Court processes to reduce costs and delay.

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595 In Chapter 8: Contracting out and settlement agreements, we recommend retaining the procedural requirements in s 21F of the Property (Relationships) Act 1976 so each party must still receive independent legal advice before any mediated agreement can be enforced.

596 The Disputes Tribunal, for example, is available to settle many types of civil claims up to a value of $15,000, or $20,000 if parties agree. Parties cannot have legal representation at the hearing and the referee will make a decision which is binding on the parties if they cannot agree between themselves. For more information see Disputes Tribunal Act 1988; and "Disputes" (14 March 2017) Disputes Tribunal of New Zealand <www.disputestribunal.govt.nz>.

DISCLOSURE

10.46 Achieving a just and efficient resolution of PRA matters in and out of court relies on both partners having sufficient information about each other's finances. This includes information about jointly and separately owned property, investments, bank accounts, income streams and any other property interests, including beneficial interests under a trust. Failing to disclose all relevant financial information to the other partner can increase costs, delay resolution and result in unjust outcomes.

Current law

10.47 There is no express duty of disclosure on partners in the PRA. However, the courts have confirmed that, in the context of PRA matters that go to court, the law requires "total disclosure and cooperation" between parties,[597] and have endorsed an approach that recognises that parties "are under an obligation to make full and frank disclosure of all relevant information", in order to ensure that the court is in a position to make appropriate orders under the PRA.[598]

10.48 The Family Court Rules 2002 apply to PRA matters that go to court (PRA proceedings), and provide for initial disclosure by requiring each party to file an affidavit of assets and liabilities in the prescribed P(R)1 form.[599] If the applicant fails to file an affidavit of assets and liabilities with their application, the proceedings can be dismissed or stayed until the affidavit is filed and served.

10.49 If there has been inadequate disclosure of assets and liabilities, there are several orders a court can make to require additional disclosure, including an order for discovery (Issues Paper at [25.9]). Discovery is the process through which each party identifies the documents which are relevant to the proceeding and discloses those documents to the other party (Issues Paper at [25.11]). In this chapter we use the term "disclosure" to refer to the overarching duty to disclose all relevant information, and the term "discovery" to refer to the specific process for identifying and disclosing relevant documents under the Family Court Rules.

10.50 There are several possible consequences for failing to comply with disclosure obligations (Issues Paper at [25.12]):

(a) A court can impose procedural consequences, including staying or dismissing proceedings, imposing restrictions on a party's participation in the proceedings until disclosure obligations are met, and ultimately contempt of court.

(b) When hearing the issues in dispute, a court can draw inferences that are adverse to the non-disclosing party's position. [600]

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597 *M v B* [2006] 3 NZLR 660 (CA) at [49].

598 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

599 Family Court Rules 2002, r 398 and sch 8 form P(R) 1. Parties must set out full details of all of their assets, including all legal and beneficial interests, and liabilities, as well as details of any income, capital payments, and dealings in assets since the parties separated. The prescribed form provides for supporting documents such as valuations, proof of deposits and financial statements to be attached to the affidavit.

600 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186]. In British Columbia the court may draw an adverse inference and penalise non-disclosure directly from the pool of relationship property. In *Cunha v Cunha* [1994] BCJ No 2573 (SC) the Supreme Court of British Columbia held at [13] that if non-disclosure is established at any stage, there is an onus on the non-disclosing party to satisfy the court that full disclosure has been made. If the court is satisfied of this, costs might be the appropriate penalty. Where a non-disclosing party has not satisfied the court that full disclosure of assets has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the

(c) Non-disclosure can be taken into account in an award of costs under section 40 of the PRA.

10.51 There is limited provision for disclosure when resolving PRA matters out of court. The Family Court Rules enable a party to apply to the Family Court for discovery before proceedings are filed, but only if it is impossible or impractical for the intending applicant to formulate their application to the court without reference to a document or class of documents.[601] The provisions in the PRA relating to contracting out and settlement agreements do not expressly refer to disclosure obligations. However an agreement can be set aside if giving effect to the agreement would cause serious injustice, having regard to "whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made" (section 21J(4)(c)).

10.52 Lawyers have professional responsibilities to the court and their client in relation to disclosure (see Issues Paper at [25.59]). Lawyers who breach these requirements can face disciplinary action and can be found in contempt of court for failing to comply with an order or direction of the court.

Issues

10.53 PRA matters have unique characteristics which can make disclosure challenging (Issues Paper at [25.30]–[25.34]). They are different from most other Family Court matters because they "are not so much about personal relationships as they are about property".[602] PRA matters often involve complex legal and factual issues, such as valuation issues, disputes over the classification of property and issues to do with trust property. But PRA matters also have an emotional component that is often not present in other civil cases, and "all too often one [party] is intent on causing financial or psychological harm to the other".[603] Disclosure can be even more challenging if one partner has greater knowledge of the couple's financial affairs. This can put the other partner at a distinct disadvantage on separation.

10.54 These unique characteristics emphasise the need for effective disclosure obligations and penalties for non-compliance. However the current law and processes are inadequate. This is evident from the Grant Thornton survey of practitioners which indicated that non-disclosure is the most problematic issue that PRA lawyers face.[604] Specific issues include:

(a) There is no express disclosure obligation on partners resolving PRA matters out of court, and no prescribed process for making disclosure, including when partners enter into contracting out agreements under section 21, or settlement agreements under section 21A.

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disclosed assets. The court may then vest all disclosed assets in the other party on the basis of equal division between the parties. See also *Laxton v Coglon* 2008 BCSC 42, [2008] BCJ No 45. An adverse inference attributing income to a non-disclosing party has since been incorporated in legislation through s 213 of the Family Law Act SBC 2011, c 25.

601 Family Court Rules 2002, r 140.

602 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 25.

603 *Brown v Sinclair* [2016] NZHC 3196 at [3].

604 Participants were asked to "select the top three problematic issues that you most commonly encounter in your relationship property cases". Non-disclosure of information was the most common answer, being selected by 67 per cent of respondents: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 36. The survey also found that the second most common instruction to forensic accountants (17 per cent) is the identification of undisclosed assets and income (at 27).

(b) If disclosure obligations are not met in PRA proceedings, the court process places the onus on the partner without the information to take further action, incurring additional cost and delay. Often this will be the partner in a more vulnerable financial position. Lawyers may therefore be reluctant to use options for seeking further disclosure except as a last resort.[605]

(c) The lack of a structured case management process for PRA proceedings, with prescribed timeframes for disclosure and other procedural steps, means that it is too easy for one party to slow the process down, for example by filing incomplete information.

Results of consultation

10.55 A clear theme of consultation was that the current disclosure obligations and penalties for non-compliance do not facilitate inexpensive, simple, and speedy resolution as is consistent with justice, contrary to section 1N(d) of the PRA. NZLS submitted that:

> [T]he lack of disclosure and absence of clear rules around disclosure for out of court resolution is the single largest impediment to speedy and fair resolution of relationship property matters.

10.56 NZLS said that, while "all section 21 agreements currently contain clauses that each party certifies their full and frank disclosure to the other party", the difficulty is that without a statutory obligation behind disclosure, it may take months of correspondence to secure full disclosure in order to finally reach agreement.

10.57 Several submitters also commented on the imbalance of power and cost implications resulting from information asymmetries between partners. The Judges of the Family Court noted that:

> Ultimately, the party who complies with their obligations of disclosure suffers financially from the failures and inaction of the other party who withholds information to cause intentional delay and put pressure on the other party.

10.58 Some practitioners noted a common experience where one partner simply does not respond to the other partner's attempts to resolve PRA matters and does not engage a lawyer. The partner seeking to resolve PRA matters is then left with no option but to file in court. Practitioners considered this particularly problematic as the filing fees are prohibitive for many and costs are rarely ordered for refusal to engage in pre-court negotiations.

Options for reform

10.59 In the Issues Paper we expressed our preliminary view that out of court resolution should be supported by clear rules about what information separating partners need to share with each other. We thought that a prescribed process, like the pre-action procedures in

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605 The Grant Thornton survey found that whilst participants considered non-disclosure of information by the parties as the most problematic area (67 per cent of respondents), only two in five participants reported they had made application for disclosure under rr 140–141 of the Family Court Rules 2002: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 24. Grant Thornton suggested that there may be real benefit in further education for family lawyers of the tools and consequences available. They also noted at 24 that the responses suggest that "practitioners may be seeking additional tools with more severe and enforced outcomes for parties who fail to disclose information".

Australia, would be a good model for New Zealand (see Issues Paper at [24.69]–[24.73]).[606]

10.60 We also identified the following options for reform to improve disclosure when PRA matters go to court (Issues Paper at [25.52]–[25.61]):

(a) confirming the duty of disclosure in the PRA or Family Court Rules;

(b) amending the Family Court Rules to improve the quality of initial disclosure;

(c) imposing stricter consequences for party non-disclosure, by providing better guidance about when a court should award costs, imposing a financial penalty, such as a fine or civil pecuniary penalty, or penalising non-disclosure directly from the relationship property pool; and

(d) introducing sanctions for lawyers in connection with client non-disclosure.

Results of consultation

Improving disclosure obligations

10.61 There was broad support from a number of organisations, members of the judiciary and practitioner and academic experts for clearer and stronger disclosure obligations applying both in and out of court.

10.62 A number of submitters supported an express statutory duty of disclosure. NZLS submitted that such a duty should require full and ongoing disclosure, should clearly apply to resolution out of court as well as in court, and should be expressly provided for in the principles of the PRA. The Judges of the Family Court also supported codifying the common law obligation of disclosure in a statutory duty. Their Honours also considered that the duty should be binding on third parties, including trusts. Divorce Partners supported the imposition of "an explicit primary statutory obligation to their relationship partner, and to the State, to promptly disclose financial information with the upmost good faith".

10.63 A prescribed pre-action procedure was also supported by NZLS. It submitted that such a procedure, similar to that in Australia, would promote consistent and uniform procedures and ensure that disclosure is provided. It would also assist to prevent delay by one party stonewalling settlement through failure to provide full and timely disclosure. NZLS did not consider that providing a general disclosure bundle before court proceedings are issued would be onerous, as such documents already have to be collated and provided so that the advising lawyers can complete due diligence. NZLS considered tailored disclosure could then be sought for items outside the scope of this general disclosure, where parties dispute a specific issue or the sufficiency of general disclosure.

10.64 The Judges of the Family Court agreed that improving disclosure obligations will simplify the court process and help reduce delay. However their Honours submitted that a general obligation of discovery of all documents at the outset of proceedings could add significant cost to parties and create further delay, by inundating the other party with large quantities of information. Their Honours supported a more tailored and sophisticated approach to disclosure, and submitted that the Family Court Rules should

606 A pre-application protocol also applies in family courts in England and Wales and outlines the steps parties should take to seek and provide information from and to each other prior to going to court. See United Kingdom Ministry of Justice "Practice Direction 9A – Application for a Financial Remedy", which supplements pt 9 of the Family Procedure Rules 2010 (UK).

establish a clear procedure for initial disclosure tailored to the needs of PRA proceedings. One judge of the Family Court submitted separately that the High Court rules relating to discovery be incorporated into the Family Court Rules.

10.65 Some practitioners also thought that the disclosure requirements should be clearer, and applicants should not be able to file the PR(1) affidavit unless all supporting information was attached. Other practitioners highlighted concerns around the burden of excessive disclosure. One practitioner considered that judges need to use their powers more to stop overuse of discovery applications.

Stricter consequences for non-disclosure

10.66 Stricter consequences for non-disclosure received support from many submitters and practitioners we spoke with at consultation meetings. The Judges of the Family Court noted, however, the need to be alive to the issue of fairness with respect to unrepresented litigants, who may not be aware of their procedural obligations.

10.67 NZLS and several practitioners supported stricter consequences through costs awards, with some practitioners supporting the automatic imposition of costs. But there were a range of views on the efficacy of current costs awards. One practitioner submitted that awards have been significant and are a good deterrent particularly in the High Court. However another practitioner submitted that the prospect of an adverse costs award was not a sufficient deterrent. Other practitioners told us that existing sanctions for behaviour causing delay, including non-disclosure, are not used appropriately and that Family Court judges "put up" with more than High Court judges in this regard. Some practitioners told us that interim costs orders were difficult to get. A judge of the Family Court supported costs being awarded on an escalating basis, so that if non-compliance was ongoing the costs award would increase.

10.68 Some submitters supported the adoption of financial penalties for non-disclosure, including NZLS and Divorce Partners. NZLS considered civil pecuniary penalties to be appropriate, or criminal sanctions for the most egregious cases.[607] The Judges of the Family Court submitted that, if financial penalties are proposed, they should contain a discretionary element and be coupled with the need to give a prior specific warning before imposing a penalty, in order to avoid unduly harsh penalties on unrepresented litigants. One attendee at a public meeting considered non-compliance should be a crime and not left up to the applicant to incur further costs in applying for costs orders.

10.69 NZLS, practitioners at one consultation meeting and three members of the public supported penalising non-disclosure directly from the relationship property pool, particularly where one party has concealed property through non-disclosure.

Sanctions for lawyers

10.70 Submitters had mixed views on whether there should be stronger sanctions for lawyers in connection to party non-disclosure. NZLS said it was not aware of concerns regarding widespread non-compliance by lawyers relating to non-disclosure, and submitted that existing avenues (disciplinary processes and court sanctions, such as contempt of court) are sufficient to address this issue.

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[607] NZLS's submission noted that it was uncertain whether the criminal sanctions for disposing of family chattels (the only current criminal sanction) has ever been actioned as a criminal offence by the police.

10.71 The Judges of the Family Court noted that the Family Court does not have the power to award costs against a party's lawyer, but has, on occasion, awarded costs against a party, coupled with the recommendation that the lawyer pays the costs. Their Honours submitted that lawyers who are seen as complicit in tactics that cause intentional delay and put pressure on the other party should not be immune to reproach. However, they considered that introducing the power to award costs against lawyers could lead to an increase in "sideshow litigation" to dispute those orders, which would conflict with the principle of inexpensive, simple and speedy resolution of PRA matters. One judge of the Family Court submitted separately that additional sanctions for lawyers are unnecessary, because parties soon become unhappy with their lawyers if a judge has coupled a costs award with the recommendation that the lawyer pays.

10.72 Practitioners we spoke with had mixed views. Some supported the imposition of costs orders against lawyers, while others told us they did not generally encounter problems with disclosure as they had a collegial and supportive local bar of family lawyers. Divorce Partners supported judges having explicit powers to "habitually and by default make costs orders against recalcitrant solicitors", as part of a broader move to "shift the burden of litigation to solicitors".

Preferred approach

P57 The PRA should include an express duty of disclosure.

P58 A Family Court Rules Committee should be established for the purpose of developing specific procedural rules and guidance for PRA matters.

P59 The Family Court Rules should be amended to include:

a. pre-action procedures that set out dispute resolution and disclosure requirements prior to making an application to the court; and

b. a clear procedure for initial and subsequent disclosure tailored to the needs of PRA proceedings.

P60 Clearer and stricter consequences for non-disclosure should be provided. We propose that:

a. the consequences for non-compliance with disclosure obligations should be clearly set out in the Family Court Rules;

b. guidance should be provided on the imposition of costs and other consequences for non-disclosure; and

c. case management processes that facilitate application for, and imposition of, costs for non-disclosure should be considered.

P61 The Ministry of Justice should:

a. provide clearer guidance to parties about how to complete key court documentation, including information about the potential consequences of non-compliance; and

b. develop process guides to better prepare self-represented litigants for court processes.

10.73 Our proposals are designed to better encourage a culture of compliance with disclosure obligations when resolving PRA matters in and out of court. They should facilitate more focused and structured negotiations, because lawyers and dispute resolution providers will have a baseline of documents to refer clients to, which will in turn help narrow any issues in dispute.

An express duty of disclosure

10.74 The PRA should provide that parties have a continuing duty to give timely, full and frank disclosure of all relevant information. Including the duty in the PRA, rather than the Family Court Rules, is more accessible and sends a clear message that the duty applies to the resolution of all PRA matters.[608] It should also apply whenever partners enter into a contracting out agreement under section 21 of the PRA, or resolve PRA matters out of court by entering into a settlement agreement under section 21A of the PRA. The duty of disclosure will work in conjunction with the disclosure rules in the Family Court Rules (see discussion below). We are considering whether the duty of disclosure ought to extend to third parties, such as trustees, and will address this in our final report.

Separate procedural rules for PRA matters

10.75 We propose that separate procedural rules for PRA matters should be developed and included as a sub-part of the Family Court Rules. In our view, the unique characteristics of PRA matters (see paragraph 10.53) mean that they are sufficiently different to other family or civil matters so as to justify the development of rules that are tailored to the particular needs of parties in PRA matters. We propose that a Family Court Rules committee be established to develop and supervise these rules.[609]

New pre-action procedures for PRA matters

10.76 We propose establishing new pre-action procedures for PRA matters. The pre-action procedures should sit within the Family Court Rules.[610] This will keep all rules relating to the Family Court's jurisdiction and PRA matters in one place, ensure currency and consistency with the rules governing practice in court, and ensure ongoing supervision and development by the Family Court Rules Committee. The pre-action procedures will apply to negotiation and other dispute resolution practices undertaken prior to a partner

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608 We have considered but do not prefer the suggestion by NZLS that the duty of disclosure should be included as a principle in the Property (Relationships) Act 1976 (PRA). In our view, a duty of disclosure operates at a subordinate level to the principles. It facilitates the principle that PRA matters should be resolved as inexpensively, simply, and speedily as is consistent with justice (s 1N(d)). We note that the Australian Law Reform Commission has recently proposed including disclosure obligations in the Family Law Act 1975 (Cth) rather than in the court rules, as is currently the case: Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP86, October 2018) at [5.40].

609 A Family Court Rules committee could be convened as a sub-committee of the Rules Committee established by s 51B of the Judicature Act 1908 and continued by s 155 of the Senior Courts Act 2016. Consequential amendments to the Senior Courts Act 2016 and the Family Court Act 1980 would be necessary. Consequential amendments to the High Court Rules 2016 would also be necessary for proceedings transferred to the High Court under s 38A of the Property (Relationships) Act 1976.

610 The Family Court Act 1980 may need to be amended to expressly enable regulation of practices outside the court through the pre-action procedures. This is because the Family Court Rules 2002 are made pursuant to s 16A of the Family Court Act, which permits the Governor-General, by Order in Council, to make rules "regulating the practice and procedure of the Family Court in proceedings that the Family Court has jurisdiction to hear and determine" (s 16A(1)).

applying to court.[611] The procedures must be complied with unless there are good reasons for not doing so.[612]

10.77 The pre-action procedures should set out disclosure requirements that must be met in order to give effect to the general duty of disclosure in the PRA. We consider the disclosure requirements in the Australian pre-action procedures for financial cases provide a good model for PRA proceedings in New Zealand (see Issues Paper at [24.71]–[24.72]).[613] When developing the pre-action procedures specific consideration should also be given to:

(a) whether the pre-action procedures should specify timeframes for completing disclosure requirements;[614] and

(b) how the pre-action procedures can facilitate easy access to a court in order to enforce disclosure requirements.

New rules of disclosure for PRA proceedings

10.78 We propose that the Family Court Rules be amended to include a clear procedure for initial and subsequent disclosure, tailored to the needs of parties in PRA proceedings. The rules should:

(a) include initial disclosure requirements, such as a non-exhaustive list of documents to be provided, subject to agreement between the parties that particular documents are not required;

(b) provide for tailored discovery beyond those initial disclosure requirements; and

(c) include timetabled disclosure requirements in conjunction with improved case management processes (see paragraphs 10.108–10.112 below).

10.79 In developing the new rules of disclosure, consideration should be given to whether the current requirements in the High Court Rules and District Court Rules provide a helpful model for PRA proceedings.[615]

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611 We note that respondents to the Grant Thornton survey suggested a uniform procedural code for s 21 agreements (including process and information disclosure) as an area of relationship property reform: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 25. While not a mandatory procedural code, the pre-action procedures will likely inform the development of contracting out agreements. We discuss contracting out agreements in Chapter 8: Contracting out and settlement agreements.

612 Under the Australian model, circumstances in which a court may accept that it was not possible or appropriate for a party to follow the pre-action procedures include cases that involve urgency, allegations of family violence or where there is a genuinely intractable dispute: Family Law Rules 2004 (Cth), sch 1 pt 1 cl 1(4). See also existing exemptions from participating in Family Dispute Resolution in s 12 of the Family Dispute Resolution Act 2013 and s 46E of the Care of Children Act 2004.

613 Family Law Rules 2004 (Cth), sch 1. We note that some submissions to the Australian Law Reform Commission's Review of the Family Law System indicated that compliance with pre-action procedures is very limited: Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at [5.28]. It is not clear whether compliance issues relate to disclosure obligations or other aspects of the pre-action procedures. We will however give further consideration to options for promoting compliance with pre-action procedures for PRA matters prior to completing our final report.

614 Minimum timeframes for exchanging a notice of intention to claim are provided in the Australian procedures but there are no specific timeframes for completing other elements in the procedures: Family Law Rules 2004 (Cth), sch 1 pt 1 cls 3(5) and (6). This recognises that, in addition to disclosure requirements, those procedures provide a framework for out of court negotiation and resolution and strict timeframes are not appropriate in those circumstances.

615 High Court Rules 2016 rr 8.8–8.10 and sch 9 pt 1 cl 3; and District Court Rules 2014, rr 8.8–8.10.

Clearer and stricter consequences for party non-disclosure

10.80 We propose that there should be stricter consequences for non-compliance with disclosure obligations, and that these consequences should be clearly set out in the Family Court Rules.[616]

10.81 In our view, stricter consequences for non-disclosure should be imposed through penalty costs orders, rather than through a separate criminal or civil pecuniary penalty regime, or by penalising non-compliance directly from the relationship property pool. We consider that an improved costs regime appropriately addresses the nature and impact of non-disclosure, as it both penalises non-compliance and provides relief to the other party for escalated costs resulting from non-compliance. We also think that the court is the most appropriate body to impose a penalty, and that it should be able to do so at its discretion. We do not, therefore, consider that a separate penalty regime is necessary or desirable.[617] Nor do we think it would be the most cost-efficient or effective mechanism to address non-disclosure.[618] As costs orders provide financial relief to the other party, additional powers to penalise non-compliance directly from the relationship property pool are unnecessary.

10.82 We acknowledge the concerns of some submitters about the efficacy of costs orders as a consequence of non-compliance. We propose that the Family Law Rules Committee provide guidance through a Practice Note about when costs and other consequences for non-disclosure should be imposed to ensure they are a meaningful deterrent and applied consistently. We also propose that consideration be given to improving the court's ability to impose penalty costs during proceedings. This could include the escalation of costs as non-compliance continues. Consideration should also be given to providing a mechanism for the application for, and imposition of, costs for non-compliance with disclosure in the pre-action procedures.

10.83 To assist parties to comply with their disclosure requirements, we propose that the Ministry of Justice provide clearer guidance about how to complete key court documentation, such as the PR(1) and supporting affidavit, and about the potential consequences of non-compliance in that court documentation. The Ministry should also develop process guides to better prepare self-represented litigants for court processes.[619]

No additional sanctions for lawyers

10.84 We do not propose introducing of additional sanctions for lawyers in connection with non-disclosure, for the reasons outlined in the Issues Paper (Issues Paper at [25.61]). We

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616 Stronger penalties and enforcement for parties' failure to disclose information was viewed by practitioners in the Grant Thornton survey as the third most beneficial area of relationship property reform, after speedier resolution in the Family Court and specialist relationship property judges and relationship property tracks in Family Court: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 37. We make proposals to address delay in the Family Court, and consider specialist PRA judges, in the following section of this chapter on resolving PRA matters in court.

617 We are not aware of any criminal or civil pecuniary penalties in New Zealand that apply to breaches of rules or court orders regarding disclosure.

618 Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* at ch 22–27.

619 See for example the "How to run your family law case kit" from Victoria Legal Aid available at <www.legalaid.vic.gov.au>. Assisting self-represented litigants by developing self-help tools may go some way to addressing concerns raised with us by some practitioners that such litigants inappropriately receive extra help from the court.

also agree with the Judges of the Family Court that introducing a power to make an order for parties' lawyers to pay costs could increase litigation and this would not facilitate inexpensive, simple and speedy resolution of PRA matters as is consistent with justice.

RESOLVING PRA MATTERS IN COURT

10.85 When separating partners cannot resolve PRA matters themselves, they can apply to the Family Court for orders dividing their property. Below we address practical issues with the Family Court process that can hinder the just and efficient resolution of PRA matters.

10.86 In Chapter 26 of the Issues Paper we also identified issues with the jurisdiction of the Family Court and High Court in PRA proceedings. These issues will be addressed in our final report.[620]

Issues

Delays in the Family Court

10.87 PRA proceedings take a long time to resolve (Issues Paper at [25.24]–[25.29]).[621] This can have significant financial and emotional implications for the parties. For many, the costs and delays associated with going to court "remain at least as daunting as the bewildering complexity of the law itself".[622]

10.88 As noted at paragraph 10.53, PRA matters have unique characteristics which are likely to contribute to delays. Tactics aimed at delaying the court process and forcing the other party to incur added expense are evident in some PRA proceedings. As the Ministry of Justice has previously observed, when one party fails to comply with the court process, the onus is on the other party to take action, often placing that party in a vulnerable position.[623]

10.89 Because of the unique characteristics of PRA proceedings, Family Court processes must facilitate timely progression of PRA proceedings and disincentivise tactics aimed at delaying the court process and incurring added expense. In the Issues Paper we observed that some aspects of the current court process may be contributing to unreasonable delay in PRA proceedings (Issues Paper at [25.36]):

(a) First, relying on affidavit evidence in the PR(1) form to identify matters in issue is problematic as affidavits are often inadequate or incomplete and can stray into inappropriate areas. There is also no obligation to disclose defences and no clear

620 This will include consideration of the Trusts Bill 2017 (290-1). A report of the select committee was due on 31 October 2018. Clause 136 of the Trusts Bill would amend the jurisdiction of the Family Court to give the Court the tools necessary to deal with trust matters closely related to proceedings properly before it, such as Property (Relationships) Act 1976 matters.

621 Respondents to the Grant Thornton survey ranked systemic delay in the Family Court as the third most problematic area in relationship property cases (57 per cent of respondents) and speedier resolution in the Family Court as the most beneficial reform in achieving effective resolution of PRA matters compared to current practice (73 per cent of respondents): Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 36–37.

622 Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive Seminar, Wellington, September 2016) 151 at 152.

623 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23, discussed in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.34].

process for responding to claims or defences. These and other problems highlighted in the Issues Paper can lead to ongoing interlocutory applications for further evidence, which is sometimes used as a litigation tactic to add cost and delay to the court process (Issues Paper at [25.38]).

(b) Second, there is no structured case management process with prescribed timeframes that all PRA proceedings must follow. This means that it is too easy for one party to slow the process down, for example by filing incomplete information, making multiple interlocutory applications or seeking multiple adjournments. As the Ministry of Justice has previously observed, "[t]he lack of clear processes [in the Family Court] has compromised the Court's efficiency and cost effectiveness and has contributed to delay".[624]

(c) Third, current practice is not to allocate a hearing date early in the process, which means that parties are not incentivised to enter into settlement negotiations early on or to arrange their case in an efficient manner.

10.90 Since publication of the Issues Paper, two measures have been commenced to address delay in the Family Court.

(a) In May 2018 the Chief District Court Judge announced that up to 100 judge days a month would be diverted to the Family Court from the criminal jurisdiction. Her Honour observed that the combination of several factors were "placing unsustainable pressure on workloads", and that "[i]n the Family Court especially, the unrelenting pressure is now creating unacceptable delay".[625]

(b) The Judges of the Family Court have introduced a new "Docket System" for PRA proceedings in a number of the larger Family Courts around the country. The system is designed to address delay in PRA proceedings through closer case management of PRA cases.[626]

Other issues with the Family Court process

10.91 We have also identified several other issues with the Family Court process that may be preventing the just and efficient resolution of PRA matters:

(a) **The specific procedural tool for PRA proceedings in section 38 of the PRA is underutilised**. Section 38 enables a court to appoint a person to inquire into and report on facts in issue between the parties. In the Issues Paper we identified a number of reasons why this power may be underutilised, including the lack of procedural powers for the person appointed to carry out the inquiry, the limitation of

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624 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 54. As a result of that review a new standard case management process was introduced, but was limited to applications under the Care of Children Act 2004. As noted at paragraph 10.3(b), in August 2018 the Government appointed an Independent Panel to examine these and other reforms.

625 Chief District Court Judge Jan-Marie Doogue "Pressures spell redeployment of judicial workforce" (24 May 2018) New Zealand Law Society <www.lawsociety.org.nz>.

626 NZLS submitted:

> The intention of the new docket system is to give these cases better focus and achieve consistency in how they are managed. The judges have been placed into teams of two. Each judicial team is allocated a number of files and deals with all interlocutory matters on those files. The narrative affidavits are filed and counsel are prepared to address discovery issues at the first conference. The new system is in its early stages but it intends to make discovery orders at that initial conference where appropriate, aligned to the kind of disclosure required in the High Court Rules, and to introduce standard directions for relationship property cases.

inquiries in practice to discrete topics such as valuation issues, and the potential delay and expense resulting from undertaking an inquiry (Issues Paper at [25.63]).

(b) **Fees for PRA proceedings may be a barrier to accessing justice for some vulnerable parties**. In the Issues Paper we observed that the number of PRA matters going to court has declined significantly in the period from 2004 to 2016, and that the decrease was steeper following changes to the Family Court fee structure in 2012, resulting in a noticeable reduction in the proportion of female applicants (Issues Paper at [23.28]).[627]

(c) **The unique characteristics of PRA matters may justify a different approach to costs**. The PRA gives the Family Court the power to make orders as to costs for any proceeding, step in a proceeding or any matter incidental to a proceeding as it thinks fit (section 40). Outside of imposing penalty costs, traditionally the Court took the view that PRA proceedings were a "mutual approach to the court for assistance in dividing property" and therefore each party should bear their own costs (Issues Paper at [25.21]–[25.23]). More recently, however, the growing trend is for the Court to apply the civil costs regime in the District Court Rules 2014 to PRA proceedings, and the guiding principle of this regime is for the party who fails to pay costs to the party who succeeds.[628] The unique characteristics of PRA proceedings (see paragraph 10.53) may, however, justify a different approach.

Results of consultation

10.92 Unreasonable delay in the Family Court and its impact on PRA proceedings was raised as a significant concern by a number of submitters. Submitters told us of cases taking several years to resolve, with some taking more than 10 years. One member of the public whose case still had not been heard 6 years following separation submitted that the experience had been "long, unnecessarily complicated, prohibitively expensive, punishing and cruel". A number of members of the public felt that lawyers contributed to delays by "dragging out the process" and "unnecessarily complicating matters" because they have a "vested interest".

10.93 The Judges of the Family Court, NZLS and almost all practitioners who raised delay as an issue identified the resourcing of the Family Court as a key cause of delay. NZLS said that lack of judicial resourcing and court time meant that the timeframes prescribed in the current Family Court Case Management Practice Note could not be met.[629] NZLS submitted that this is exacerbated in PRA proceedings due to the triage system which

627 We note the Chief Justice's recent comments concerning the "barriers to access to the court provided by fees which seek to recover from litigants the costs of the provision of the courts": Sian Elias, Chief Justice of New Zealand "Towards Justice: Reflections on the system and society" (2018 Sir John Graham Lecture, Auckland, 10 August 2018). Fees to apply for an order about relationship property are $700 and fees for a hearing about relationship property in the Family Court are $906 per half day or part of a half day. In contrast, the fee to apply for a Dissolution Order is $211.50, for a Parenting Order (or to vary or discharge a Parenting Order) is $220 and other applications to the Family Court do not have a fee. An applicant can ask for the court to waive the fee if they are experiencing financial hardship (including if the applicant receives legal aid).

628 However we note that in the Grant Thornton survey, over half of respondents (55 per cent) indicated they rarely obtained costs, with a further 34 per cent saying they had never obtained costs at the conclusion of a Family Court hearing. Of those practitioners who said they had obtained costs at the conclusion of a hearing (66 per cent of practitioners), a majority (56 per cent) indicated scale costs were ordered, with the remainder (44 per cent) indicating that costs awarded were at the court's discretion: Grant Thornton New Zealand Ltd and New Zealand Law Society *New Zealand Relationship Property Survey 2017* (October 2017) at 29.

629 NZLS noted, however, that causes of delay can differ from registry to registry.

prioritises Care of Children Act, Hague Convention and Domestic Violence Act cases (and the significant number of without notice cases filed in these proceedings) ahead of PRA matters. Practitioners also noted the impact of the triage system on PRA cases. One practitioner told us that a case had taken 18 months to get to a judicial settlement conference when litigation usually takes 18 months in total. Another practitioner said it can be six months between judicial conferences "which is exhausting". Some practitioners observed that resourcing and getting court time were particular problems in smaller centres. One practitioner said they were "ashamed" of the Family Court delays in their regional court, and that there "was nothing the judges can do as they are hugely overworked".

10.94 There was broad agreement that the lack of a prescribed case management process with specific timetabling for PRA proceedings was problematic, and that the Family Court Rules are out of date and require reform in a number of areas. The Judges of the Family Court said that the Family Court Rules are "long overdue for an update". A Family Court judge submitting separately observed that the Rules had not received satisfactory consideration for well over 25 years. NZLS also submitted that the Family Court Rules have needed updating for many years.

10.95 Several submitters thought that the fees for filing PRA proceedings, and the risk of costs being awarded against the "unsuccessful" party, created significant access to justice issues, especially for vulnerable parties. NZLS observed that fees for PRA proceedings are significantly higher than filing fees for parenting orders and submitted that this creates unreasonable impediments for clients trying to resolve issues when they have reached an impasse. One practitioner considered that the growing trend to apply the civil costs regime had "serious and scary consequences" for applicants, particularly applicants for maintenance.

10.96 Submitters' views on specific improvements to the Family Court process are considered under options for reform below.

Options for reform

10.97 In the Issues Paper we identified several options for reform to improve the Family Court process for PRA proceedings and reduce delay:

(a) introducing pleadings for PRA proceedings, or requiring parties to file a memorandum of issues before the first judicial conference, in order to better define the matters in issue between the parties (Issues Paper at [25.37]–[25.41]);

(b) introducing a more structured case management process (Issues Paper at [25.42]–[25.48]; and

(c) encouraging better use of section 38 inquiries (Issues Paper at [25.62]–[25.65]).

Results of consultation

Mixed response to introducing pleadings for PRA proceedings

10.98 There was a mixed response as to whether pleadings should be introduced for PRA proceedings. Practitioners at three meetings and one member of the public supported pleadings, potentially in conjunction with improvements to the PR(1) affidavit. One judge of the Family Court supported pleadings provided the Court could remove the statement of claim or response if inappropriately drafted.

10.99 NZLS, the Judges of the Family Court and one practitioner preferred requiring parties to identify the matters in issue in a memorandum of issues to be filed before the first judicial conference. NZLS submitted that a requirement to file formal pleadings in PRA proceedings was neither necessary nor desirable, and that the current documents are useful and appropriate provided they are properly completed. It also submitted that the list of issues should be able to be amended if required as the case progresses.[630] The Judges of the Family Court did not favour requiring formal pleadings in PRA proceedings, observing that issues and entitlements cannot always be identified until parties have received full disclosure. Their Honours recommended amending the Family Court Rules to prescribe exactly what information should be included in the memorandum and provided a suggested list of information. One practitioner also supported a memorandum of issues, noting this was part of the PRA "Docket System" trial, and considered that introducing pleadings would be "too hard" on lay litigants.

More prescriptive case management is necessary

10.100 The introduction of more prescriptive case management processes and timetabling was broadly supported by submitters on this issue, including the Judges of the Family Court, one judge of the Family Court submitting separately, NZLS and practitioners. The Judges of the Family Court submitted, however, that the large volume of cases dealt with in the Family Court means the Court would not be able to adhere to the strict timeframes in the High Court Rules case management process. In addition, the variability of the Family Court Judges' roster would create practical limitations to implementing a similar scheduling regime in PRA proceedings in the Family Court.

10.101 NZLS and the Judges of the Family Court supported adapting aspects of the District Court Rules tailored to PRA proceedings. Both submitters also referred to the PRA "Docket System" trial. The Judges of the Family Court submitted that while the docket system has been a novel initiative in metropolitan courts, it is predicted to be of less benefit to small satellite courts. Their Honours submitted that any case management tool introduced for the purposes of managing PRA cases needs to take into account the practical differences of each court.

10.102 Other suggestions for improved case management procedures included:

(a) improving access to judicial settlement conferences;[631]

(b) making specific provision for single issue hearings in the Family Court Rules;

(c) having an associate judge, master or highly qualified registrar to deal with case management and/or interlocutory matters;

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630 NZLS further submitted that:

> Provided the court identifies issues before the first judicial conference, evidential issues (such as portions of affidavits that stray into inappropriate areas) can be dealt with by way of judicial rulings. The Evidence Act 2006 should be the primary law for any decisions about evidence and consideration should be given to revoking section 12A of the Family Court Act 1980 (although that inquiry is outside the ambit of this review).

631 Some practitioners supported easier access to a judicial settlement conference (JSC), even if it were only for a half day. Practitioners at one meeting considered that parties should pay for JSCs and the court could then contract private mediators to conduct the JSC if needed. One practitioner referred to a settlement conference model in the England and Wales Family Courts at which indicative findings on contentious issues are given to enable the parties to settle. See Family Procedure Rules 2010 (UK), r 9.17; United Kingdom Ministry of Justice "Practice Direction 9A – Application for a Financial Remedy" at [6.1]–[6.5]; and Family Justice Council *Financial Dispute Resolution Appointments: Best Practice Guidance* (December 2012) at [29(iv)].

(d) placing cases on different tracks depending on their complexity or the value of the relationship property pool;

(e) providing for the same judge to stay with a case or a complex case if there were different tracks;

(f) having specialist PRA judges;

(g) setting early hearing dates; and

(h) better use of teleconferencing and videoconferencing.

Clarifying the scope of section 38 inquiries

10.103 The Judges of the Family Court submitted that the PRA or the Family Court Rules should be amended to clarify the powers the court will have to authorise a section 38 appointee to address specific issues.[632] Their Honours also proposed that section 38 be amended to allow the court to inquire into other, non-pecuniary or value-based matters, such as to enable a court to inquire into matters of tikanga by obtaining a cultural report. One practitioner favoured the court generally taking a more inquisitorial approach in proceedings.

10.104 The Judges of the Family Court also submitted that the cost regime of section 38 should be revised to reflect the fact that such inquiries are typically the result of intentionally inadequate disclosure by one party. Their Honours proposed that costs be paid up front by one or both parties in an advance payment to the court. If a party is not compliant with this obligation, the full costs could be borne by one party, with half reimbursement drawn from the non-paying party's final property division, or other such amount determined by the court. One Family Court judge submitted separately that it is not justified that the New Zealand taxpayer has to pay for these inquiries and noted that he has often required both parties to make payment into court. His Honour noted the issue can be avoided by appropriate case management directions and timetables, including instructing forensic accountants. His Honour did not consider that amendment of section 38 was necessary. NZLS did not consider that enabling the court to direct parties to pay the costs of any inquiry would encourage better use of section 38.[633]

Better penalties and enforcement for non-compliance needed

10.105 Several practitioners and members of the public considered that there should be stricter penalties for non-compliance with court directions and causing intentional delay, and better enforcement of court directions and timetabling requirements by the court. One Family Court judge submitted that there are little or no consequences for intentional delay tactics, such as holding off on discovery and bringing interlocutory applications as tactical manoeuvres. His Honour said that costs are sometimes awarded but these are "usually small change compared to the gains". NZLS submitted that the use of sanctions such as monetary penalties for failure to comply with timetabled directions would be a helpful and appropriate way to encourage compliance. One practitioner told us that the court should be more willing to impose costs for interlocutory matters.

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632 Their Honours recommended that powers of inquiry similar to those in pt 16 of the District Court Rules 2014 be explicitly adopted into the Family Court Rules 2002.

633 We are also considering submissions that proposed reform to court procedures in relation to expert evidence.

Clarifying the proper basis for costs and reconsidering Family Court fees

10.106 NZLS submitted that costs available in PRA proceedings should have their own particular scale to recognise the different nature of PRA proceedings. It considered retaining court discretion as often each party will succeed on different points and this context justifies a different approach to that taken in determining civil costs. One practitioner submitted that the policy that costs should lie where they fall is correct in PRA cases. The practitioner also considered that the court should be specifically directed to take into account the principles of the PRA when considering costs. A member of the public submitted that legal fees should be shared between the partners as an incentive for both parties to "get on and get a resolution". Alternatively, a judge should consider whether sharing the legal fees would be equitable.

10.107 NZLS submitted that reform options should be investigated to address the "unreasonable impediments" that filing and hearing fees in PRA proceedings create. Practitioners suggested reducing the fees, sharing the fees equally between the parties, paying by instalments or recovery of fees through costs if these are ordered.

Preferred approach

P62 The Family Court Rules should be amended to include case management procedures tailored to the needs of PRA proceedings.

P63 The PRA and Family Court Rules should be amended to:

a. clarify the powers of a person appointed by the Family Court under section 38; and

b. enable the Court to inquire into such matters it considers may assist it to deal effectively with the matters before it.

P64 Guidance should be provided on the imposition of costs and other consequences for non-compliance with procedural requirements and for the exercise of the Court's discretion to make costs orders that are not for the purpose of penalising non-compliance.

P65 A separate scale of costs for PRA cases should be established.

P66 The Ministry of Justice should consider reducing the application and hearing fees for PRA proceedings.

10.108 Our preferred approach is that new case management procedures, tailored to the unique characteristics of PRA proceedings, be established in the Family Court Rules. We consider that this would provide greater certainty for parties, and more efficient resolution of PRA proceedings, both in terms of reducing costs to the parties and freeing up court resources. Our proposals will also allow sufficient flexibility for each court to respond to the individual needs and circumstances of PRA proceedings on a case-by-

case basis. As proposed under Proposal P58 above, these procedures should be developed by a Family Court Rules Committee.

10.109 We note that wider resourcing issues with the Family Court, which was identified as a key cause of delay in PRA proceedings during consultation, will be considered in the independent review of the 2014 family justice reforms.[634]

New prescribed case management procedures for PRA proceedings

10.110 When developing new case management procedures, consideration should be given to experiences under the "Docket System" recently introduced for PRA proceedings in some of the larger courts, the extent to which the procedures in the District Court Rules 2014 provide an appropriate model for PRA proceedings, and the outcome of the independent review of the 2014 family justice reforms (see paragraph 10.3(b)). While that independent review is focused on parenting disputes, it may result in reforms to court process which could be relevant to PRA proceedings.

10.111 We do not propose that formal pleadings for PRA proceedings should be introduced. We do not consider that this would be the most effective way to respond to delay in the Family Court, given the unique characteristics of PRA proceedings and the need for adequate disclosure before matters in issue can be fully identified. Rather, we propose that new case management procedures include an obligation to file a Memorandum of Issues ahead of the first judicial conference. Ideally this would be an agreed memorandum, or separate memoranda with an opportunity to respond to the other party's memorandum if agreement is not possible.[635] The case management procedures should also include a non-exhaustive list of information to be included in the memorandum. This could include:[636]

(a) an agreed statement of facts;

(b) the discovery sought by each party;

(c) identification of the property that each party believes to be relationship property and separate property, and why;[637]

(d) identification of the issues in dispute, including any legal issues in dispute;

(e) the proposed method and date of valuation of property;

(f) whether expert evidence is required and how that evidence will be produced; and

(g) the identity and control of information possessed by each party.

10.112 The new case management procedures should include express provision for single issue hearings, clear deadlines for disclosure and other procedural steps, and consequences for non-compliance with procedural requirements. Consistent with our approach to disclosure requirements, the court's power to impose consequences and costs for non-compliance with procedural requirements should continue to be discretionary. Guidance

634 Ministry of Justice "Terms of Reference for rewrite of the 2014 family justice reforms" (1 August 2018) <www.justice.govt.nz>.

635 See for example the process set out in the High Court Rules 2016, r 7.3.

636 This list is based on the submission of the Judges of the Family Court. Their Honours also suggested that parties could be required to formulate the issue of identification of property in question form as this requires parties to foreshadow the substance of their claim, but without limiting the claim to the form of pleadings.

637 This requirement would need to be consistent with our proposal in Chapter 2: Classification, that the burden of proof of establishing whether property is separate property should be on the owning partner.

should be provided through a Practice Note about the imposition of costs and other consequences to ensure they are applied consistently and act as a meaningful deterrent.

10.113 Consideration should also be given to submitters' suggestions for improved case management procedures outlined at paragraph 10.102. We see particular merit in case management procedures that can facilitate early access to judicial settlement conferences in appropriate cases and the use of associate judges or experienced judicial officers to progress case management processes.[638]

Amend provision for section 38 inquiries

10.114 We propose that section 38 of the PRA be amended and that the Family Court Rules be developed to clarify the powers of a person appointed by the Family Court under section 38. The powers of inquiry in Part 16 of the District Court Rules 2014 should be used as a guide.

10.115 We also propose that section 38 be broadened beyond inquiries into "the matters of fact in issue" in order to enable the Family Court to inquire into such matters it considers may assist it to deal effectively with the matters before it. We consider a broader power of inquiry than currently provided in the PRA is consistent with the Family Court's semi-inquisitorial approach in PRA proceedings (Issues Paper at [25.17]–[25.19]). It will enable the Court to undertake inquiries into matters that are not matters of fact, such as values-based matters of tikanga. It will also signal that the power is not confined to discrete or pecuniary issues, nor is it a "remedy of last resort". The Court should have the discretion to define the scope and nature of any particular inquiry and associated powers necessary to conduct that inquiry. Consideration should be given to whether guidance should be developed through a Practice Note to assist the Court in this regard.

10.116 In view of these proposals, we do not propose to amend section 38 with respect to who pays the cost of the inquiry. The Court will retain the discretion to direct either or both of the parties to make such payments into the Court as it considers appropriate, taking into account the reason for the inquiry and circumstances of the case.

Develop guidance for costs and other procedural consequences and a separate scale of costs for PRA proceedings

10.117 Guidance should be provided on the imposition of penalty costs and other consequences for non-compliance with procedural requirements, such as the possibility of the Family Court ordering a section 38 inquiry at the non-compliant party's cost.

10.118 Guidance should also be provided on the imposition of non-penalty costs. In our view, the approach that such costs should "lie where they fall" is generally appropriate for PRA proceedings due to their unique characteristics. This approach reflects the semi-inquisitorial approach taken by the Family Court in PRA proceedings. It also recognises that parties may succeed on different points and that what constitutes "success" is not

638 We note the Australian Law Reform Commission has proposed that a streamlined court process with simplified procedural and evidential procedures should be provided for matters involving small property pools: Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) Proposals 6-4–6-6. However in our view, given the low number of Property (Relationships) Act 1976 cases in the court in New Zealand, there is unlikely to be a significant enough number of simple cases with low value relationship property pools to warrant developing streamlined processes for such cases. We consider that other case management processes, such as early access to judicial settlement conferences, together with improved access to legal advice and dispute resolution out of court will better provide for resolution of cases with low value relationship property pools.

always clear or relevant in PRA proceedings. However, we propose that the Court should retain the discretion to award non-penalty costs if it considers it appropriate in the circumstances to do so.

10.119 We also agree with NZLS that the unique characteristics of PRA proceedings justify a separate scale of costs and propose this be developed by the Family Court Rules Committee.

Consider reducing application and hearing fees for PRA proceedings

10.120 We propose that the Ministry of Justice consider reducing the application and hearing fees for PRA proceedings, in recognition of the fact that changes to the Family Court fee structure have resulted in a reduction of PRA applications to the Family Court. We consider that the level of fees are a potential barrier to access to justice and are likely to disproportionately affect the financially weaker partner.