CHAPTER 3

Division

IN THIS CHAPTER, WE CONSIDER:

how relationship property should be divided, including:

- the general rule of equal sharing;
- the exception to equal sharing for extraordinary circumstances in section 13; and
- the role of misconduct in the division of relationship property.

THE GENERAL RULE OF EQUAL SHARING

Current law

3.1 Section 11 provides that on the division of relationship property under the PRA, each partner is entitled to share equally in the family home, the family chattels and any other relationship property. We call this the general rule of equal sharing. It is a cornerstone of the PRA.[129]

3.2 The PRA provides limited exceptions to the general rule of equal sharing.[130] A court can depart from equal sharing if there are extraordinary circumstances that make equal sharing repugnant to justice (section 13), and it can adjust each partner's share of relationship property in order to compensate one partner in certain situations, including:

(a) when each partner owned a home at the date the relationship began, but only one partner's home (or its sale proceeds) is included in the relationship property pool when the relationship ends (section 16);

(b) when one partner's separate property has been sustained by the application of relationship property or the actions of the other partner (section 17);

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129 As Woodhouse J observed in *Martin v Martin* [1979] 1 NZLR 97 (CA) at 99:

> The primary purpose [of the PRA] is to substitute for abstract and individual notions of justice a settled statutory concept which must be taken from the Act itself. That fact will need to be remembered should the temptation arise to bend its language to conform with personal estimates of what some class of case may deserve. The next purpose is associated with the first. It is to substitute, for assessments arrived at by evaluating material contributions to property, a strong statutory bias in favour of the equal entitlement of spouses to matrimonial property of every kind.

130 In addition to the exceptions discussed in this chapter, a court can also depart from equal sharing in relationships of less than three years' duration under ss 14–14A (discussed in Chapter 4: Eligibility Criteria), and in order to redress economic disparities under ss 15–15A (discussed in Chapter 5: Section 15).

(c) when one partner's separate property has been materially diminished in value by the deliberate action or inaction of the other partner (section 17A);

(d) when, after separation but before relationship property is divided,[131] one partner has done anything that would have been a contribution to the relationship had the relationship not ended (section 18B); or

(e) when, after separation but before relationship property is divided,[132] the relationship property has been materially diminished in value by the deliberate action or inaction of one partner (section 18C).

Issues

3.3 In the Issues Paper our preliminary view was that equal sharing remains appropriate in contemporary New Zealand, because it reflects the values we should attribute to relationships, is familiar to the public, is easy to understand and is simple to apply (Issues Paper at [12.6]).

3.4 But equal sharing may not always be seen as achieving a fair outcome in individual cases. This is because there is little scope to take into account case-specific factors, such as the contributions each partner made to the relationship or how long the relationship lasted. While we did not canvas alternatives to equal sharing in the Issues Paper, these would include division on the basis of each partner's contribution to the relationship (currently provided for under sections 13–14A), or division at the court's discretion, which would enable a court to inquire into the individual circumstances of each case and divide relationship property in a way it considers just (currently the approach in Australia and England and Wales, discussed at paragraph 3.14).

Results of consultation

3.5 Most submitters who commented on equal sharing were concerned that the equal sharing of pre-relationship property after three years is unfair.[133] This was a strong theme from consultation, and is explored in Chapter 2: Classification. Under our preferred approach to classification, partners will no longer be required to share property that was acquired before the relationship was contemplated, other than increases in value that occurred during the relationship and were attributable to the relationship, including increases in the value of the family home.[134]

3.6 Some submitters felt that equal sharing was unfair in situations when the partners' contributions to the relationship (both financial and non-financial) were unequal. This

131 In proceedings commenced after the death of one of the partners, s 18B is modified by s 86: Property (Relationships) Act 1976, s 18B(3).

132 In proceedings commenced after the death of one of the partners, s 18C is modified by s 86: : Property (Relationships) Act 1976, s 18C(3).

133 This was evident in submitter responses on the consultation website. We asked whether the law should continue to provide that each partner has a right to share equally in relationship property unless an exception applies. 13 submitters responded no, but eight of these submitters were concerned about equal sharing of pre-relationship property. They felt that partners should retain what they each brought into the relationship. Five submitters thought that the law should give greater recognition to the actual contributions made during the relationship (financial and non-financial), rather than presuming an equal share will be fair. The remaining two submitters supported equal sharing, with 1 submitter noting it recognises the important non-financial contributions made by each partner to the relationship, and is a simple and fair concept to understand and apply.

134 Family chattels will however continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 2: Classification.

issue was raised in 24 submissions, including 19 submissions from members of the public, three submissions from individual practitioner and academic experts, and in submissions from law firm ASCO Legal and the Wellington Women Lawyers' Association. Members of the public pointed to situations where one partner was the primary income earner as well as primary caregiver of the couple's children, or where one partner independently saved for a house deposit and met all financial expenses associated with the home, because the other partner had no interest in buying a house. Negative contributions and misconduct, such as family violence and dissipation of property, were also raised. We discuss these issues below.

3.7 These submitters favoured division on the basis of the partners' contributions to the relationship. Wellington Women Lawyers' Association and several practitioners favoured extending contributions-based sharing to more couples under the PRA, either by extending the rules for short-term relationships (discussed in Chapter 4: Qualifying relationships), or applying contributions-based sharing to all couples without children, older couples, and second and subsequent relationships. ASCO Legal and a few other submitters favoured more staggered rules of division, with a partner's entitlement increasing over time and depending on their age and the presence of children.

3.8 Other submitters thought the equal sharing rule was too inflexible in failing to take into account the often unequal situation of the partners after separation, when one partner has been the primary caregiver of the partners' children during the relationship and, due to ongoing childcare commitments, finds it hard to re-enter the workforce after separation. We address this issue in greater detail in Chapter 5: Section 15.

3.9 The New Zealand Law Society (NZLS) did not specifically comment on the general rule of equal sharing (it was not a specific question in the Issues Paper), but its broad submission was that the framework of the PRA is sound and in general terms achieves a fair and just division of property when partners separate.

Results of the Borrin Survey

3.10 Results of the Borrin Survey provide statistically representative data on New Zealanders' public attitudes and values about equal sharing. It found that awareness of equal sharing was high among New Zealanders, with 79 per cent of all respondents stating that they were aware of equal sharing (and a further four per cent answering "maybe/think so").[135] The Borrin Survey also identified a high level of support for equal sharing. 74 per cent of all respondents either agreed (43 per cent) or strongly agreed (32 per cent) with equal sharing.[136]

3.11 Respondents who had experienced a previous separation where relationship property was divided were less likely to agree with equal sharing (68 per cent, compared to 74 per cent of all respondents), and were also more likely to hold strong views on equal sharing.

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135 I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [109]. Respondents were read out the following description of equal sharing (at [108]):

> The law says that the family home, household items (such as furniture or the car), money, debt or property the couple get during the relationship are considered to be relationship property and should be shared equally if the couple separate. This is sometimes known as a 50/50 split or the equal sharing law.

136 Six per cent strongly disagreed, 10 per cent disagreed, seven per cent neither agreed nor disagreed and two per cent didn't know: I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at 31 (Figure Four). Note that the figures in individual categories may not add up to the net figure due to rounding.

37 per cent strongly agreed with equal sharing (compared to 32 per cent of all respondents) and 10 per cent strongly disagreed with equal sharing (compared to six per cent of all respondents).[137]

3.12 Respondents were given specific scenarios that tested their views on equal sharing in different situations, namely where one partner brings property to the relationship, and where one partner finds their post-separation earning potential is impaired because they stopped working to care for children during the relationship. Responses to these scenarios revealed that 88 per cent of those who agreed with equal sharing in principle did not always support equal sharing in practice in these situations.[138] In other parts of this paper we address what this means for considering what property is shared (Chapter 2: Classification), and how to respond to economic disparities following separation (Chapter 5: Section 15). It also raises a more general point about the need for the law to recognise that, in some situations, equal sharing should be departed from.

Rules of division in comparable jurisdictions

3.13 Comparable jurisdictions that adopt a rules-based property sharing regime all adopt a general rule of equal sharing, but reserve some discretion to the court for departing from equal sharing in limited circumstances. We address these circumstances at paragraphs 3.33–3.35 below. This is the case in the Canadian provinces and in Scotland.[139]

3.14 Australia, England and Wales and Ireland adopt a discretionary approach to property division.[140] In these jurisdictions there is no distinction between "relationship property" and "separate property". A court may instead re-allocate property between the partners if it considers it just to do so. The advantage of a discretionary approach is that it provides an individualised form of justice, tailored to the specific circumstances of each case. A court can take into account factors that are generally not relevant under a rules-based regime, including the partners' future needs and post-separation childcare arrangements.[141] The disadvantage of such an approach is that the law is less predictable, which can hinder efficient resolution of property disputes and lead to protracted and expensive litigation. We note there have been recent calls in Australia and in England and Wales for a shift towards an equal sharing presumption.[142]

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137 At [149].

138 At [257].

139 See for example the law in British Columbia where "family property" is generally shared equally, but a court has power to order unequal division where equal division would be "significantly unfair": Family Law Act SBC 2011 c 25, s 95. Scottish law relies on the principle that matrimonial property is "taken to be shared fairly … when it is shared equally": Family Law (Scotland) Act 1985, s 10(1). However, a court has the power to order unequal sharing where there are "special circumstances": s 10(1) and s 10(6).

140 See Family Law Act 1975 (Cth); Matrimonial Causes Act 1973 (UK); and Family Law (Divorce) Act 1996 (Ireland).

141 The Australian Law Reform Commission, when reviewing Australia's discretionary property sharing regime in 1987, explained in their report *Matrimonial Property* (Report No 39, 1987) at xxvii that:

> … the major question is not whether the law of property allocation on divorce should be formally based on judicial discretion or on legislatively prescribed entitlements. It is whether the post-separation circumstances of the spouses and their children should be taken into account in the allocation of property, or whether these circumstances are primarily matters for the law of spousal and child maintenance and social security.

The Commission concluded that the post-separation circumstances of the parties and their children must continue to be a factor in the re-allocation of property. Introduction of a rule of equal sharing without regard to the spouses' post-separation circumstances would, the Commission considered, primarily work to the disadvantage of custodial parents and women whose earning capacity had been impaired by their marriage: at xxvii.

142 In England, the Divorce (Financial Provision) HL Bill (2017-19) 26, a private member's bill, was introduced by Baroness Deech with the object of introducing principles-based division, similar to Scotland, including a presumption of equal

Preferred approach

P11 The PRA should continue to provide that each partner is entitled to share equally in all relationship property, subject to limited exceptions.

3.15 Our preferred approach is to retain equal sharing, subject only to the limited exceptions discussed below.

3.16 We appreciate that equal sharing may not always be seen as achieving a fair outcome in individual cases. This is evident from some of the submissions we received. We are satisfied, however, that the risk of unfair outcomes in individual cases does not warrant reform to the general rule of equal sharing, for the following reasons:

(a) Equal sharing is consistent with public attitudes and values. Results of the Borrin Survey indicate a strong level of support for equal sharing, with just under three quarters of all respondents agreeing or strongly agreeing with the current law. We consider this reflects broad public acceptance that partners can contribute to the relationship or family joint venture in different ways, but that all forms of contribution, financial and non-financial, should be treated as equal. Equal sharing also promotes gender equality, as women historically tended to make non-financial contributions, and while gender roles are changing, the evidence suggests women continue to make more non-financial contributions than men.[143]

(b) Equal sharing is a well understood rule. Results of the Borrin Survey revealed that just under 80 per cent of all respondents were aware of equal sharing. Because the PRA is social legislation and affects so many people, there is a great deal of value in public awareness of the law.

(c) Equal sharing is easy to understand and simple to apply, which in turn makes the law more predictable. It provides a "bright-line" test for determining each partner's share of the relationship property. This helps partners to understand their rights and empowers them to resolve property matters out of court, which is central to the principle that disputes should be resolved as inexpensively, simply and speedily as is consistent with justice.

(d) While some submitters did favour contributions-based sharing, overall this was not a strong theme of consultation (24 submissions raised this as an issue out of a total of 313 submissions received on the Issues Paper).

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sharing: cl 4(2). A second reading took place in the House of Lords on 11 May 2018. The date of the Committee stage is yet to be scheduled. In Australia, the Australian Law Reform Commission is reviewing the family law system, including the property division rules. A 2014 review by the Australian Productivity Commission recommended that the Australian Government review whether presumptions should be introduced, as currently applies in New Zealand, in order to promote greater use of informal dispute resolution mechanisms: see Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Inquiry Report No 72 Vol 2, 5 September 2014) at 874. In its recent review, the Australian Law Reform Commission, following consultation, concluded that the case has not been made out for a shift from a discretionary system to a prescriptive system before further research is undertaken about property adjustment on relationship breakdown. However, it outlined a number of amendments that can be made to improve the clarity of the law: see Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at 59–61.

143 See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at ch 6.

(e) Repeal of equal sharing would be a radical shift in policy. The alternatives to equal sharing involve a greater degree of discretion, and would therefore undermine the important benefits of certainty and clarity in the existing regime.[144] This would hinder the simple, speedy and inexpensive resolution of PRA matters.

3.17 Our proposals must be seen as a package of reforms. The key issues identified with equal sharing are addressed by our preferred approach in Chapter 2: Classification and Chapter 5: Section 15. In light of those proposals, we consider that the benefits of a simple, well understood and certain rule outweigh the benefits of adopting a more individualised and discretionary approach to division.

EXCEPTION TO EQUAL SHARING FOR EXTRAORDINARY CIRCUMSTANCES

Current law

3.18 Section 13 provides that, "if the court considers that there are extraordinary circumstances that make equal sharing … repugnant to justice", the share of each partner in the relationship property is to be determined in accordance with the contribution of each partner to the relationship.

3.19 The operation of section 13 was settled by a string of Court of Appeal cases decided shortly after the Matrimonial Property Act 1976 was enacted.[145] In 2016, the High Court described the approach to be taken under section 13 as "uncontroversial and beyond doubt".[146]

3.20 Section 13 sets a high threshold for departing from equal sharing. In *Martin v Martin* the Court of Appeal said:[147]

> It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare.

3.21 Section 13 is not, however, an impossible threshold.[148] In determining whether the section 13 threshold is met, all the circumstances of the case must be considered.[149] This requires a comparison of the relevant relationship against the whole range of different qualifying relationships, rather than against some kind of relationship "norm".[150]

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144 Another alternative might be another bright line rule, for example an entitlement of 60 per cent of the relationship property pool to the primary caregiver if there are children. ASCO Legal submitted that the Property (Relationships) Act 1976 should provide a sliding scale of entitlements that would take into account the partners' age, the length of the relationship and the presence of children or grandchildren. We are not satisfied, however, that either option would be workable in practice, or would reduce unfair outcomes.

145 See *Martin v Martin* [1979] 1 NZLR 97 (CA); *Dalton v Dalton* [1979] 1 NZLR 113 (CA); *Williams v Williams* [1979] 1 NZLR 122 (CA); and *P v P* [1980] 2 NZLR 278 (CA). These early cases remain authority despite the 2001 amendments to what is now the Property (Relationships) Act 1976: *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC).

146 *B v B* [2016] NZHC 1201, [2017] NZFLR 56 at [26].

147 *Martin v Martin* [1979] 1 NZLR 97 (CA) at 102.

148 *Jones v Ballantine* (1984) 1 FRNZ 140 (HC) at 141.

149 *Simon v Wright* [2013] NZHC 1809 at [68] affirming *J v J* (1993) 10 FRNZ 302 (CA).

150 *J v Jn* (1993) 10 FRNZ 302 (CA) at 307.

3.22 The fact that one partner brought the family home to the relationship,[151] earned significantly more than the other partner,[152] is significantly younger or older than the other partner,[153] or is nearing retirement on separation[154] would not in itself constitute an extraordinary circumstance, as it not so unusual or outside the whole range of "ordinary" qualifying relationships. However these factors, taken in combination with other circumstances, may amount to extraordinary circumstances.[155]

3.23 There are two broad categories of cases where section 13 applies:[156]

(a) Where the technical criteria for equal sharing are only marginally satisfied. This might include where a relationship only just reaches the three year qualifying period, where the family home or family chattels have been used as such for a very short period of time,[157] or where an inheritance was applied to the family home or family chattels shortly before the parties separated.[158]

(b) Where there is a gross disparity in contributions to the relationship.[159] This might apply where one partner contributed significantly more to the relationship, in terms of monetary and non-monetary contributions, or where one partner made negative contributions to the relationship, due to misconduct.[160]

Issues

3.24 In the Issues Paper we expressed the view that a court must be able to depart from equal sharing in appropriate cases (Issues Paper at [12.16]). We also considered that there should be a high threshold for departing from equal sharing, in order to preserve the principles of the PRA (Issues Paper [12.17]).

3.25 However we noted the need to revisit the section 13 test in light of our proposals to reform other key rules in the PRA, and to consider whether the section 13 test and its focus on "extraordinary circumstances" remains appropriate in light of the increasing diversity of relationships (Issues Paper at [12.18]–[12.19]).

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151 See *Martin v Martin* [1979] 1 NZLR 97 (CA) at 110; *Dalton v Dalton* [1979] 1 NZLR 113 (CA) at 118; and *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 698.

152 See *Simon v Wright* [2013] NZHC 1809 at [78].

153 *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [134].

154 At [134].

155 For example see *B v S* [2016] NZFC 7132. In that case there was a finding of extraordinary circumstances where Ms Starke brought the assets available for division to the relationship, the marriage was of only three years and six months duration, there were no children, both parties were mature when they met and married, Ms Starke was 22 years older than Mr Brown and, realistically, her opportunities to re-establish herself following on from the breakdown of the marriage were limited as she was aged 74 years and in receipt of a benefit.

156 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.28]–[12.30].

157 At [12.29] citing *Finny v Finny* [1979] NZ Recent Law 211 (SC); *Beuker v Beuker* (1977) 1 MPC 20 (SC); *Jerome v Jerome* (1977) 1 MPC 113 (SC); *Castle v Castle* [1977] 2 NZLR 97 (SC); and *Castle v Castle* [1980] 1 NZLR 14 (CA).

158 See *A v C* (1997) 16 FRNZ 29 (HC).

159 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.30] citing *Castle v Castle* [1977] 2 NZLR 97 (SC); *Castle v Castle* [1980] 1 NZLR 14 (CA); *J v J* (1979) 2 MPC 100 (SC); *Martin v Martin* [1979] 1 NZLR (CA); *Dalton v Dalton* [1979] 1 NZLR 113 (CA); *O'Keefe v O'Keefe* (1980) 3 MPC 128 (HC); *P v P* [1980] 2 NZLR 278 (CA); *SJB v IRM* [2011] NZCA 435, [2011] NZFLR 1087.

160 *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 per Gendall J at [28]. However s 13 calls for a broader approach to contributions than the detailed consideration under s 18: *J v J* (1993) 10 FRNZ 302 (CA) at 309 per McKay J and at 306 per Richardson J.

3.26 We noted two options for reform (Issues Paper at [12.20]):

(a) Option 1: Prescribing in greater detail the matters a court should take into account when deciding whether section 13 should apply; and

(b) Option 2: Setting out examples in the PRA of how the exception is intended to operate, or replacing the current section 13 test with a new formula.

Results of consultation

3.27 Seven submitters commented on section 13 specifically. Submitters generally agreed that there remains a need for a provision that permits a court to depart from equal sharing in appropriate cases. NZLS commented that section 13 prevents partners falling prey to strict equal sharing within a narrow probationary period.

3.28 There were differing views as to whether the wording of section 13 is satisfactory. NZLS said that it was unaware of any general discontent with the working of section 13, that it was now well-understood, and that it was operating fairly. It submitted that section 13 should be retained in its present form. While there is the occasional hard case, NZLS felt that this was a necessary trade-off for a simple, universal rule.

3.29 Jan McCartney QC submitted that section 13 has real limitations, because even if the high threshold is satisfied, the court must then direct sharing in accordance with the partners' contributions to the relationship. She supported an amendment that allowed a court to "make an order that reflects the justice of the particular case, rather than the contributions to the relationship".

3.30 Professor Nicola Peart questioned whether cultural diversity ought to play a role in section 13.

3.31 Two members of the public commented that the section 13 test was set too high. Other submitters commented generally that equal sharing was unfair in situations when the partners' contributions to the relationship (both financial and non-financial) were unequal (see paragraph 3.6). These submitters may well consider that the section 13 test, which generally requires a gross disparity in contributions (see paragraph 3.23(b)), sets the threshold too high.

3.32 Practitioners and Family Court judges we talked to during consultation meetings also raised the concern that, while the operation of section 13 might be uncontroversial and beyond doubt in the courts, it is inaccessible and easily misunderstood by the public. Unrepresented litigants in particular may find it difficult to understand how section 13 operates, and apply it to their own circumstances.

Exceptions to equal sharing in comparable jurisdictions

3.33 As noted at paragraph 3.13 above, comparable rules-based jurisdictions adopt a general rule of equal sharing but reserve some discretion to the court for departing from equal sharing in limited circumstances.[161] There is however no consistency in the test for departing from equal sharing.

[161] Jurisdictions that adopt a discretionary approach to property division do not have a general rule of equal sharing nor exceptions to equal sharing. See paragraph 3.14 above.

3.34 In Canada, the provinces adopt different tests for departing from equal sharing, including where equal sharing would be "unconscionable",[162] "inequitable",[163] "significantly unfair",[164] "grossly unfair or unconscionable",[165] "unfair or unconscionable",[166] or "unfair and inequitable".[167] A court is often required to apply the test having regard to a range of statutory considerations. These considerations vary across provinces, but often include the duration of the relationship, whether the parties had an agreement about the division of property, whether one partner dissipated property during the relationship, and the circumstances related to the acquisition, disposition or preservation of property.[168]

3.35 In Scotland, matrimonial property is shared equally, "or in such other proportions as are justified by special circumstances".[169] Special circumstances may include the terms of any agreement between the partners, the source of funds used to acquire matrimonial property, dissipation of property by one partner and the nature and use of matrimonial property.[170] The lower threshold of "special circumstances", and the provision of additional principles of division,[171] means that, overall, the threshold for departing from equal sharing in Scotland is much lower than in New Zealand or the Canadian jurisdictions.[172]

Preferred approach

3.36 We propose no change to section 13. We are satisfied that the section 13 test continues to set the appropriate threshold for departing from equal sharing in light of our other proposals for reform outlined in this paper, and is flexible enough to respond to the many different variations in relationships today and into the future.

3.37 We do, however, recognise the need for greater information to be available to the public on how the section 13 test operates in practice. In Chapter 10: Resolution we recommend the publication of an information guide for separating partners, and that guide should include information about when a court might apply the section 13 test and depart from

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162 In Ontario, see Family Law Act RSO 1990 c F-3, s5(6); and Prince Edward Island, see Family Law Act RSPEI 1988 c F-2.1, s 6(5).

163 In New Brunswick, see Marital Property Act RSNB 2012 c 107, s 7.

164 In British Columbia, see Family Law Act SBC 2011 c 25, s 95.

165 In Manitoba, see Family Property Act CCSM 2017 c F25, s 14. In Newfoundland and Labrador a similar formulation is used, where equal sharing "would be grossly unjust or unconscionable": Family Law Act RSNL 1990 c F-2, s 22.

166 In Nova Scotia, see Matrimonial Property Act RSNS 1989 c 275, s 13.

167 In Saskatchewan, see Family Property Act SS 1997 c F-6.3, s 21(2). In Alberta a similar formulation is used, where equal sharing "would not be just and equitable": Matrimonial Property Act RSA 2000 c M-8, s 7.

168 Family Law Act RSO 1990 c F-3, s 5(6); Family Law Act SBC 2011 c 25, s 95; Matrimonial Property Act RSA 2000 c M-8, s 8; Family Property Act SS 1997 c F-6.3, s 21(4); Matrimonial Property Act RSNS 1989 c 275, s 13; Family Law Act RSN 1990 c F-2, s 22; Family Law Act RSPEI 1988 c F-2.1, s 6(5); Family Law Act SNWT (Nu) 1997 c 18, s 18(6); Marital Property Act RSNB 2012 c 107, s 7; and Family Property and Support Act RSY 2002 c 83, s 13.

169 Family Law (Scotland) Act 1985, s 10(1).

170 Section 10(6).

171 Four other principles of division in s 9 can affect property division in Scotland. These principles cover economic advantage or disadvantage suffered by either party, childcare responsibilities on separation, rehabilitation of an economically dependent former spouse, and the possibility of creating financial hardship.

172 This is evident in the results of a recent review of 200 cases decided under the Scottish regime, which found that a departure from equal sharing was sought in about 40 per cent of all cases, and was granted in just over 20 per cent of all cases: Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2016) at 50.

equal sharing, and what it means to divide relationship property on the basis of each partner's contributions to the relationship.

The relationship between section 13 and our other proposals for reform

3.38 In Chapter 2: Classification we propose that partners should only share property that was acquired during the relationship, or before the relationship began if it was acquired for the partners' common use and common benefit.[173] In Chapter 4: Qualifying relationships we propose abolishing the separate regimes for short-term relationships. In Chapter 5: Section 15 we propose that partners should share future income in some situations, in order to ensure the economic advantages and disadvantages arising from a relationship or its end are shared.

3.39 The combined effect of these proposals will be that more relationships will be subject to equal sharing (in particular, marriages and civil unions of less than three years' duration). But the pool of resources to be divided on separation will be smaller, or larger, depending on the circumstances of the relationship. In particular, in shorter relationships, and relationships entered into later in life, the relationship property pool for division may be smaller, because property acquired before the relationship was contemplated will no longer be shared. In longer relationships, and other relationships where the partners have arranged their lives in such a way that one partner is economically advantaged or disadvantaged on separation, the pool of resources may extend to include future income for a limited period. In effect, our proposals intend to move away from a "one size fits all" approach, and provide a more tailored response to the increasing diversity of relationships in contemporary New Zealand.

3.40 In light of these proposals, we consider that the proper role of section 13 remains to address truly exceptional cases that cannot be envisaged by the legislation, and that would make equal sharing, in the broader context of the PRA framework (as amended under our proposed reforms) repugnant to justice.

The section 13 test does not require reform

3.41 We do not propose amending the section 13 test, for the following reasons:

(a) We are satisfied that the section 13 test is flexible enough to respond to the many different variations in relationships today and into the future. While relationships are more diverse, our review of the cases has not identified a concern that the current formulation of section 13 is preventing the courts from considering the diverse circumstances of any given case and reaching an appropriate view on all of the evidence.

(b) We consider that the result of a successful section 13 claim, the division of relationship property on the basis of each partner's contribution to the relationship, is appropriate. It permits a court to consider all the relevant circumstances of the relationship and arrive at an individualised result, without compromising the principles

[173] Family chattels will however continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 2: Classification.

of the PRA, for example by permitting a court to focus only on monetary contributions to the relationship.[174]

(c) Any amendment to the section 13 test, either to modernise the wording used or to adopt a lower threshold, has significant disadvantages. It would change what is a well-established test, and would likely result in significant uncertainty, at least in the short-to-medium term.[175] A lower threshold would also likely result in more applications and awards for unequal sharing. Given our proposals in other parts of this paper, discussed above, we do not think a lower threshold is justified in the New Zealand context.

3.42 We have also considered, but do not prefer, including a list of relevant factors for the purposes of the section 13 test. This is for several reasons:

(a) First, we do not consider that the operation of section 13 is amenable to a simple list of relevant considerations. In determining whether the section 13 threshold is met, all the circumstances of the case must be considered. Circumstances taken individually, such as one partner owning the family home before the relationship began, may not amount to an extraordinary circumstance in and of itself. Attempts to come up with a list of relevant considerations may misrepresent the current approach, and create uncertainty, particularly for unrepresented litigants.

(b) Second, relationships are of infinite variety, and extraordinary circumstances "can involve an infinite variety of situations".[176] Section 13, as currently worded, imposes no limits on the range of circumstances the courts can take into account.[177] Coming up with a list of relevant considerations would be difficult.

(c) Third, the absence of a list of relevant factors in section 13 provides the courts with greater flexibility to respond to a changing social context. The Court of Appeal in *J v J* confirmed that section 13 involves a consideration of whether "in the New Zealand society of the times the circumstances advanced can truly be characterised as extraordinary".[178] Priestley J in a subsequent decision said this "constituted a permission to adapt the law to changing social norms".[179] We are concerned that attempts to further define what may amount to extraordinary circumstances would risk unduly limiting the circumstances that can be taken into account, now and in the future.

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174 We note that contributions-based sharing can result in awards close to 100 per cent of the relationship property pool in extreme cases: for example see *Miramontes v Brennan* [2017] NZFC 4298, [2017] NZFLR 623 where the court ordered a 90:10 division on the basis of the partners' respective contributions to the relationship.

175 We note that when s 13 was first introduced, a series of Court of Appeal decisions leading into the 1980s were necessary to clarify the operation of the provision (see paragraph 3.19 above).

176 *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 at [28].

177 *J v J* (1993) 10 FRNZ 302 (CA) at 304.

178 At 307.

179 *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [129].

THE ROLE OF MISCONDUCT IN THE DIVISION OF RELATIONSHIP PROPERTY

Current law

3.43 Section 18A addresses the relevance of misconduct in PRA matters. It provides that a court may not take misconduct into account in proceedings under the PRA, except when determining:

(a) the contribution of a partner to the relationship; or

(b) what order it should make under sections 26, 26A, 27, 28, 28B, 28C and 33.[180]

3.44 In order for misconduct to be taken into account, it "must have been gross and palpable and must have significantly affected the extent or value of the relationship property" (section 18A(3)). For convenience we refer to this as "gross and palpable misconduct".

3.45 The effect of section 18A is that the partners' conduct during the relationship is generally irrelevant to the division of relationship property. This reflects the implicit "no-fault" principle underpinning the PRA.

The relationship between sections 13 and 18A

3.46 The relationship between sections 13 and 18A is unclear. Section 18A does not expressly permit gross and palpable misconduct to be taken into account in determining whether there are extraordinary circumstances that justify a departure from equal sharing under section 13. But section 18A does allow a court to take into account gross and palpable misconduct when determining the contribution of a partner to the relationship. This is relevant to how property is divided under section 13, if a court is satisfied that extraordinary circumstances exist.

3.47 This lack of clarity has resulted in differing interpretations on the question of whether gross and palpable misconduct can justify a departure from equal sharing under section 13.[181]

3.48 It is also unclear whether the *effect* of misconduct falling short of the gross and palpable threshold is relevant under section 13. In *J v J*, the Court of Appeal held that while the fact of misconduct that was not gross and palpable had to be disregarded for the purposes of section 13, a court could take into account the disparity of contribution between the partners which resulted from that misconduct.[182] But in a later case, the Court of Appeal took a more restrictive approach, observing that "misconduct is

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180 In this chapter we are concerned primarily with the impact of misconduct on the division of relationship property. Further consideration is required in relation to the impact of misconduct on the exercise of the court's discretion on other relationship property matters, including under these sections (listed in s 18A(2)(b)).

181 Authors of Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR13.06] say that the current law:

> … is that conduct is not a basis for a finding of extraordinary circumstances rendering equal sharing repugnant. However, if subs 18A(2) and (3) are satisfied, conduct can be a factor in determining contributions.

By contrast, the authors of RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.34] say:

> The comparison of contributions central to the discretion under s 13(1) clearly imports misconduct, which in terms of s 18A(3) has been "gross and palpable and has significantly affected the extent or value of the relationship property.

Compare, for example, the decision in *J v J* (2005) 25 FRNZ 1 (CA) at [11] with the decisions in *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 at [28]; and *Simon v Wright* [2013] NZHC 1809 at [79].

182 *J v J* (1993) 10 FRNZ 302 (CA) at 311–312 per McKay J. See also the decisions of Cooke P at 305 and Richardson J at 306. This case was decided under previous s 18(3) of the Matrimonial Property Act 1976.

irrelevant except to the extent provided for by s 18A(2) and (3)".[183] Subsequent cases have taken different approaches, some favouring the earlier approach in *J v J*,[184] others favouring the later approach.[185]

The role of family violence

3.49 It is rare for family violence to have any impact on the division of property under the PRA. This is for two reasons.

3.50 First, it is often difficult for family violence to satisfy the threshold of gross and palpable misconduct. In *W v G* the District Court considered that, in order for family violence to be "gross and palpable" it "must be readily perceived or evident".[186] Family violence must also have "significantly affected the extent or value of the relationship property" in order to satisfy the section 18A(3) threshold. This requirement "has caused Judges difficulty in recognising in any real way the economic consequences of domestic violence".[187]

3.51 Second, family violence may not be considered an extraordinary circumstance justifying a departure from equal sharing under section 13. In *S v S* the District Court noted that it was "an unfortunate indictment on our society that the occasional assault during a marriage is not so uncommon as to be extraordinary".[188] In H v D violence occurred throughout the relationship, exposing the children to physical, emotional and psychological abuse.[189] However the High Court agreed with the Family Court that the circumstances of this relationship were "ordinary rather than extra-ordinary – they are typical of many current de facto or marriage relationships".[190] Further, if a partner was violent but contributed in other ways, the circumstances are unlikely to be extraordinary.[191]

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183 *J v J* (2005) 25 FRNZ 1 (CA) at [11]. In that case the Court was asked, in an application for leave to appeal, whether the husband's misconduct (deceit about his affair), which fell short of gross and palpable misconduct, was "of at least contextual significance" for the purposes of determining whether there were extraordinary circumstances under s 13 (at [10]).

184 In *M v P* HC Wellington CIV-2005-485-1559, 18 September 2006 Gendall J said at [36]:

> It is clear that even if misconduct does not meet the s 18A test it does not follow that it has a reverse influence by requiring the Court to ignore the resulting imbalance of contributions: [*J v J*] (supra) per McKay J (at 312).

See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.40]; *Maxfield v Maxfield* HC Hamilton AP 106/02, 22 June 2004; and *E v W* (2006) 26 FRNZ 38 (FC) at [10]–[11].

185 In *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 Faire J, after referring to *J v J* (2005) 25 FRNZ 1 (CA), held at [55]:

> [Conduct] will only be relevant if it is gross and palpable and in other respects complies with s 18A. The words "or otherwise" in s 18A(1) make it clear that not only is conduct not able to be taken into account to diminish one partner's contributions, it is not able to be used in any other way.

However in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 Glazebrook J said at [61]:

> The fundamental point to be made regarding conduct is that it cannot be used to affect one party's share in relationship property unless the conditions in s 18A are met. This is not to say that the consideration of conduct is not allowed where it is otherwise relevant. For example, in a decision relating to vesting, conduct could be relevant to assessing the parties' relative attachment to a property.

186 *W v G* DC Wellington FP558/92, 16 August 1995 at 12.

187 *Watson v Watson (No 2)* (1999) 19 FRNZ 24 (DC) at 25 citing *W v G* DC Wellington FP558/92, 16 August 1995.

188 *S v S* DC Whangarei FP 888/218/82, 22 April 1991 at 10.

189 *H v D* HC Wellington CIV-2008-485-950, 3 August 2008 at [29].

190 At [31].

191 See for example *S v S* DC Whangarei FP 888/218/82, 22 April 1991, where Judge Robinson found the husband's assaults on the wife were serious, but having regard to the number of assaults (4), the time elapsing since the last assaults, and the fact that "in all other respects the husband has been a good provider, a hard worker and a good father" he was "satisfied that such evidence does not create a situation where there are extraordinary circumstances" (at 10).

3.52 We are only aware of one case where family violence was found to be gross and palpable, to have significantly reduced the value of relationship property and, along with the husband's other negative financial contributions, justified a departure from equal sharing.[192]

Issues

3.53 In the Issues Paper we observed that there have been calls for a partner's misconduct to have a greater bearing on the division of relationship property, particularly in cases of family violence (Issues Paper at [12.28]). A further issue is the current uncertainty around the relationship between sections 13 and 18A, discussed above.

Results of consultation

3.54 We received 32 submissions that commented whether misconduct should have a greater bearing on the division of property under the PRA. Most submitters focused on family violence, although a few members of the public submitted that other forms of misconduct, in particular adultery, should be considered when dividing property under the PRA.

3.55 Submitters were divided on the relevance of family violence to property division. Among members of the public, 13 submitters thought that family violence should be an exception to equal sharing. These submitters pointed to the significant toll family violence has on its victims, the negative economic impacts on the partner who was the victim of family violence and their likely greater future needs, as well as physical damage to relationship property resulting from family violence. They felt that in failing to address family violence in the division of relationship property, the PRA is in effect rewarding violent partners for their behaviour throughout the relationship. They advocated for the PRA to play a greater role in condemning family violence by reducing the perpetrator's relationship property entitlement. Eight submitters did not support family violence as an exception to equal sharing. These submitters gave reasons including that restitution for family violence should be addressed under other areas of family and criminal law, that an exception for family violence might increase the risk of further abuse for victims who seek to rely on it, and that as family violence is often hidden, it will be difficult to prove the nature and extent of past family violence.

3.56 The Ministry for Women, the National Council of Women of New Zealand and The Backbone Collective were all in favour of giving greater weight to family violence when dividing relationship property. The Ministry for Women considered that a larger share of relationship property might be appropriate where a victim of family violence has suffered a serious physical injury inflicted by their partner, or psychological harm from the abuse, preventing them from working or decreasing their earning capacity.

3.57 The Family Violence Death Review Committee (FVDRC), however, considered it best not to have a specific exception to equal sharing for family violence. Its concern was that any specific exception will likely be used equally (or more so) by predominant aggressors, particularly if they have financial means. FVDRC cautioned against enabling the legal

[192] *B v H* (1998) 17 FRNZ 667 (FC) at 675–676. In that case the wife provided the family home and made most of the financial contributions, the husband worked occasionally and used those earnings for his own purposes, and physical violence and control of the wife by the husband featured throughout the relationship, resulting in the parties' separation.

system to be used by perpetrators to continue their abuse tactics post-separation. It therefore "reluctantly recommend[s] no change to the current misconduct exception".

3.58 NZLS was also opposed to reintroducing fault as a factor in property division beyond the current ambit of section 18A. It suggested that a wider exception could have the unintended consequence of encouraging fractious affidavits and incentivising meritless applications in relation to family violence. Remedies for family violence, it said, should be addressed elsewhere. Jan McCartney made a similar submission, commenting that "family violence is a topic for serious examination all on its own", and that if there are to be amendments, they should follow "a full and proper examination of the causes of family violence in New Zealand, consultation, a discussion paper and across-the-board solutions", rather than "one-offs in largely unrelated legislation".

The role of misconduct in comparable jurisdictions

3.59 Property division regimes in comparable jurisdictions are all underpinned by a no-fault philosophy. Misconduct is typically of limited relevance to property matters, unless it has a direct financial impact on the partners or their property.[193]

3.60 In Australia, the relevance of misconduct to property division is currently under review. While Australian legislation is silent on the issue, case law has established that misconduct, and in particular family violence, is relevant to property division if it has a "significant adverse impact upon [the other] party's contributions to the marriage".[194] In practice, however, family violence is rarely relied on, which has raised concerns about access to justice for victims of family violence.[195] Several problems have been identified with the Australian approach, including the difficulty in proving family violence and its impact on the victim's contributions to the relationship, and the difficulty in quantifying the impact of family violence.[196]

3.61 There have been calls for reform in Australia, but commentators disagree on what form change should take. Some argue that family violence should be dealt with purely through a financial needs adjustment, which is a feature of Australia's discretionary property

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193 In Canada, misconduct is typically irrelevant unless it amounts to dissipation or has some other direct financial impact: see for example Family Property Act CCSM 2017 c F25, s 14(3); Family Property Act SS 1997 c F-6.3, s 25; and Family Law Act RSN 1990 c F-2, s 23. In Scotland, a court is not able to take account of the conduct of either party, unless it has adversely affected the partners' relevant financial resources, or if it would be "manifestly inequitable" to leave the conduct out of account when considering the need to rehabilitate an economically dependent former spouse, or the possibility of creating financial hardship: Family Law (Scotland) Act 1985, s 11(7). In England and Wales the court shall, when making property adjustment orders, have regard to the conduct of each of the parties, "if that conduct is such that it would in the opinion of the court be inequitable to disregard it": Matrimonial Causes Act 1973 (UK), s 25(2)(g). The courts have interpreted this as setting a very high standard before conduct can be considered relevant to property orders: see *Wachtel v Wachtel* [1973] 2 WLR 366 (CA); *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618; and *AAZ v BBZ* [2016] EWHC 3234 (Fam), [2018] 1 FLR 153.

194 *In the Marriage of Kennon* (1997) 22 Fam LR 1 (FC) at 3.

195 See Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at [3.113] citing Patricia Easteal, Catherine Warden and Lisa Young "The Kennon 'Factor': Issues of Indeterminacy and Floodgates" (2014) 28 AJFL 1 at 9–12.

196 See Sarah Middleton "The verdict on *Kennon*: failings of a contribution-based approach to domestic violence in Family Court property proceedings" (2005) 30 Alt LJ 237; Angela Lauman "Factoring in the Cost of Violence: the Relevance of Family Violence in Determining Property Settlements under the Family Law Act" (Honours Thesis, Australian National University, 2014); and Quijun Jia "Can domestic violence affect property settlement?" *The Bulletin* 39(4) (South Australia, May 2017) at 40.

regime.[197] Others suggest that family violence should be considered a negative contribution to the relationship property,[198] or that a separate statutory compensation regime should be introduced, which would enable the court to award compensation for pain and suffering and economic loss as a result of a history of family violence during the relationship.[199]

3.62 In October 2018 the Australian Law Reform Commission (ALRC) released a discussion paper on its review of the family law system.[200] It proposes legislative amendments to require a court to take into account the effect of family violence on a party's contributions to the relationship, and in determining the future needs of the parties.[201] The ALRC considers its proposals will clarify the relevance of family violence to property settlements, particularly for unrepresented litigants.[202]

Preferred approach

P12 The PRA should be amended to clarify that a court can take into account a partner's misconduct that satisfies the threshold in section 18A(3) when deciding whether there are extraordinary circumstances which make equal sharing repugnant to justice under section 13.

P13 The Government should consider the division of property at the end of a relationship under the PRA, in the context of its wider response to family violence.

3.63 To date Parliament has resisted calls to give misconduct greater weight in the division of property.[203] While we recognise the risk of an unjust outcome in cases where one partner's misconduct does not meet the high threshold in section 18A(3), or does not amount to extraordinary circumstances under section 13, we are not persuaded that it is appropriate or desirable that general misconduct should play a greater role in property division under the PRA.

3.64 In our view, providing for greater recognition of misconduct would incentivise partners to focus on fault and lay blame, which would in turn "impose an impossible burden on the courts to require them to apportion blame for the breakdown of the [relationship] in each individual case".[204] It would also introduce an undesirable level of discretion into what is a

197 Sarah Middleton "The verdict on *Kennon*: failings of a contribution-based approach to domestic violence in Family Court property proceedings" (2005) 30 Alt LJ 237 at 241.

198 Quijun Jia "Can domestic violence affect property settlement?" *The Bulletin* 39(4) (South Australia, May 2017) at 41.

199 Patrick Parkinson "Reforming the Law of Family Property" (1999) 13(2) AJFL 117.

200 Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018).

201 At 56 (Proposal 3–11).

202 At [3.116]–[3.122].

203 In 2001 the Select Committee considering the amendments to the then Matrimonial Property Act 1976 considered that it would be undesirable to introduce fault or misconduct as a basis for property division, and would represent a significant departure from the current scheme: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

204 Law Commission of England and Wales *Family Law – The Financial Consequences of Divorce* (LAW COM No 112, 1981) at [36].

rules-based regime, making the law less certain and predictable, thereby undermining the principle of inexpensive, simple and speedy resolution of PRA matters.[205]

3.65 We are, however, concerned about the current uncertainty around the relationship between sections 13 and 18A, and make proposals to clarify the law below.

Clarifying the relationship between sections 13 and 18A

3.66 We propose that the PRA should be amended to clarify the relationship between sections 13 and 18A. We do not think Parliament could have intended a restrictive interpretation that requires a court to ignore gross and palpable misconduct for the purposes of determining whether extraordinary circumstances exist, but then take it into account for the purposes of determining how the relationship property should be divided, if the extraordinary circumstances threshold is met for other reasons.[206] Nevertheless the current uncertainty in the law is undesirable. We propose that the PRA should be amended to clarify that gross and palpable misconduct is relevant to a court's consideration of whether there are extraordinary circumstances that make equal sharing repugnant to justice. We propose that section 18A(2) should be amended to specifically refer to determinations under section 13.

3.67 We are also considering whether further clarification is required to ensure that, consistent with the decision in *J v J* (see paragraph 3.48 above), a court can take into account the effect of one partner's misconduct on the other partner's contributions to the relationship. We agree that a partner guilty of misconduct should not be able to obtain a double benefit from characterising their behaviour as misconduct, thereby preventing a court from taking into account any effect of that misconduct on the disparity in contributions of the partners.[207] This might be achieved by removing the words "or otherwise" from section 18A(1). However this would have wider consequences, as it may affect the relevance of misconduct to PRA matters other than the division of relationship property. We will therefore consider this issue further in the final report.

Should there be a specific exception for family violence?

3.68 We recognise the concern that sections 13 and 18A, even with the amendment proposed above, are an inadequate response to family violence, for the reasons discussed at paragraphs 3.50–3.51. We do not, however, propose introducing a specific exception to equal sharing for family violence. We find force in Jan McCartney's submission that any amendments to the PRA that respond to family violence should follow a full and proper

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205 Similar concerns were identified by the Australian Law Reform Commission in its consideration of whether to require a court to have regard to family violence in property division matters. It concluded, however, that these concerns were outweighed by the need for a clear statement in the law of the relevance of family violence to property settlement outcomes. This, it considered, may encourage settlement and better outcomes for people affected by family violence. See Australian Law Reform Commission *Review of the Family Law System: Discussion Paper* (DP 86, October 2018) at [3.120].

206 Section 18A was inserted on 1 February 2002 by s 17 of the Property (Relationships) Amendment Act 2001, replacing what was s 18(3) of the Matrimonial Property Act 1976. The introduction of s 18A did not appear to have the intention of altering the effect of that provision. The explanatory note to Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (SOP) stated at 76 that the SOP repeats the rules of division "in a more modern drafting style", and that "[t]his SOP does not seek to alter the effect of those provisions". The Select Committee report on the SOP also states that "[p]roposed new section 18A retains current section 18(3)": Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 14.

207 *J v J* (1993) 10 FRNZ 302 (CA) at 311–312. See also the comments of William Young J in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [402].

examination of the causes of family violence in New Zealand and "across-the-board solutions rather than one-offs in largely unrelated legislation". We therefore propose that any reform to the PRA that has the effect of penalising perpetrators of family violence should be considered within the context of the Government's broader efforts to address the impacts of family violence in the community, and alongside wider issues including access to justice and appropriate support for victims of family violence.

3.69 Any future consideration of this issue should take into account the strong arguments for giving family violence greater weight in property division. Specifically:

(a) The PRA is built on the theory that a qualifying relationship is a family joint venture, to which partners are presumed to contribute in different but equal ways. Family violence disrupts that presumption. By not penalising violence in property division the law "effectively transmits the message that the behaviour has no impact on the contributions to the marriage partnership of either spouse".[208]

(b) The PRA is social legislation and it should reflect the increasing awareness of the damaging effects of family violence, and be consistent with other Government initiatives to curtail violent behaviour.[209] As former Principal Family Court Judge Boshier wrote in 1998, "[f]rom a policy point of view, it is anomalous that matrimonial property law protects men from the consequences of conduct that is prohibited in other areas of law".[210]

(c) It is inconsistent for the PRA to take into account the consequences of some criminal behaviour, such as fraud, but not violence.[211] While property-based crimes have been considered as rightly coming within the ambit of the PRA because they are directly related to the property of the couple, there is growing awareness that family violence also has ongoing economic consequences for the victim of family violence.[212] By not penalising violence in property division the law "ignores the economic effect of the violence on the property of the parties".[213]

3.70 It is also important that any future consideration of this issue take into account the arguments against giving family violence greater weight in property division (see also our general concerns at paragraph 3.64). In particular:

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208 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

209 At 153. Current action and innovations being undertaken by Government includes the Integrated Safety Response/ Whangaia Ngā Pa Harakeke/ E Tu Whānau/ and Pasefika Proud, and the Family and Whānau Violence Legislation Bill (247-2) which seeks to enable a collaborative government response to people experiencing family violence by increasing access to risk and needs assessments and services, more accurately recording family violence offending in the criminal justice system, enabling the introduction of codes of practice and improving information sharing. In addition, in September 2018 the Government announced a joint venture to address family violence to be formally launched by the end of 2018. The objective of the joint venture is to ensure an effective whole-of-government response to family violence and sexual violence. Its role is to lead, integrate, and provide support for agencies and the at least 10 government departments currently working in this area. See Andrew Little, Carmel Sepuloni and Jan Logie "Doing things differently to end family and sexual violence" (press release, 28 September 2018).

210 Peter Boshier "Developments in Matrimonial Property" (paper presented to the New Zealand Law Society Family Law Conference, August–September 1998) at 53. See also the comments of Judge Inglis QC in *G v G* (1998) 17 FRNZ 166 at 171–172.

211 See Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 153; and Peter Boshier "Developments in Matrimonial Property" (paper presented to the New Zealand Law Society Family Law Conference, August–September 1998) at 53.

212 Geraldine Callister "Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration" (LLB (Hons) Dissertation, University of Waikato, 2003) at 19.

213 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

(a) A specific exception for family violence raises safety concerns, as it would encourage partners to focus on fault and misconduct at a time that may be of particular danger for victims of family violence.[214]

(b) A specific exception carries with it a serious risk of abuse by the predominant aggressor, as identified by the FVDRC.

(c) There are practical issues with how such an exception would operate. The Australian experience detailed above demonstrates the evidential difficulties in attempting to recognise and respond to family violence within the narrow context of property division.

(d) Imposing a financial penalty for family violence in the form of a reduced property entitlement cannot provide a comprehensive response to the problem of family violence. It would be ineffective where there is little or no property to be divided, where the threat of further violence prevents a victim from pursuing their legal rights, or where affordable legal advice is unavailable.[215]

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214 The Law Commission noted evidence that women are most likely to be killed by an abusive partner in the context of an attempted separation: Law Commission *Understanding Family Violence: reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 31 citing Walter S DeKeseredy, McKenzie Rogness and Martin D Schwartz "Separation/divorce sexual assault: The current state of social scientific knowledge" (2004) 9 Aggression and Violent Behaviour 675 at 677.

215 Angela Lauman "Factoring in the Cost of Violence: the Relevance of Family Violence in Determining Property Settlements under the Family Law Act" (Honours Thesis, Australian National University, 2014) at 46–47. These problems might indicate that a more effective response would be a compensatory regime, as has been suggested in Australia: see Patrick Parkinson "Reforming the Law of Family Property" (1999) 13(2) AJFL 117. However, that goes beyond the scope of the Property (Relationships) Act 1976 and our review.