

CHAPTER 4

Qualifying relationships

IN THIS CHAPTER, WE CONSIDER:

the eligibility criteria that relationships must satisfy in order to qualify for property sharing under the PRA, and in particular:

- whether the eligibility criteria for de facto relationships require reform; and
- what rules should apply to short-term relationships.

INTRODUCTION

- 4.1 The PRA applies to marriages, civil unions and de facto relationships. But the rules are different depending on the length of the relationship, and, if the relationship is less than three years' duration, whether the relationship is a marriage, civil union or de facto relationship (section 1C).
- 4.2 In this chapter we focus on specific aspects of the eligibility criteria that are causing concern.²¹⁶ As this review is the first comprehensive evaluation of the PRA since de facto relationships were included in 2001,²¹⁷ it is unsurprising that most of the concerns raised through consultation focused on the PRA's application to de facto relationships.
- 4.3 In any property sharing regime, the eligibility criteria must be considered alongside what property is subject to sharing, and how that property is to be shared. The proposals in this chapter have been developed alongside our preferred approach to classification (Chapter 2) and division (Chapter 3), in order to provide a coherent package of reforms.

²¹⁶ We do not consider specific relationship types in this chapter, namely Māori customary marriage, relationships between young people, contemporaneous relationships, relationships between members of the LGBTQI+ community, multi-partner relationships and domestic relationships. Specific relationship types were considered in the Issues Paper and will be addressed in our final report. See Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at ch 7.

²¹⁷ For a discussion on the history of the inclusion of de facto relationships in the Property (Relationships) Act 1976, see Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [5.11]–[5.16].

DE FACTO RELATIONSHIPS

Current law

- 4.4 There are two requirements that must be satisfied in order for a de facto relationship to qualify for equal sharing under the PRA:
- (a) the relationship must meet the definition of de facto relationship in section 2D; and
 - (b) the partners must have lived together as de facto partners for three years or longer (sections 1C(2)(b), 2E(1)(b) and 14A).
- 4.5 Once a de facto relationship qualifies for equal sharing, the PRA applies retrospectively from the date the de facto relationship began, rather than from the date the de facto relationship satisfies the three year qualifying period. De facto relationships that do not satisfy the qualifying period are discussed below, in the section on short-term relationships.

Defining a de facto relationship

- 4.6 A de facto relationship is defined as a relationship between two people, both aged 18 or older, who "live together as a couple", and who are not married to, or in a civil union with each other (section 2D(1)).
- 4.7 In determining whether two people live together as a couple, all the circumstances of the relationship are to be considered, including the following matters, when relevant (section 2D(2)):
- (a) the duration of the relationship;
 - (b) the nature and extent of common residence;
 - (c) whether or not a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
 - (e) the ownership, use and acquisition of property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) the care and support of children;
 - (h) the performance of household duties;
 - (i) the reputation and public aspects of the relationship.
- 4.8 It is not necessary for a court to make a finding in respect of any of these matters when determining whether two people live together as a couple (section 2D(3)(a)). However a court is entitled to have regard to such matters, and to attach such weight to any matter, as it thinks appropriate in the circumstances (section 2D(3)(b)).
- 4.9 The definition of de facto relationship is therefore broad and flexible. It gives a court a high level of discretion that focuses on how a couple's relationship operates in practice, rather than its form. There are no prerequisites for the central concept of two people who "live together as a couple". It is not necessary, for example, for the partners to live in the same household, to share finances or to have a sexual relationship, although all these factors will be relevant to the court's exercise of discretion. The definition of de facto relationship is discussed in further detail in Chapter 6 of the Issues Paper.

The three year qualifying period

4.10 The three year qualifying period for de facto relationships was adopted as it was considered "an appropriate length of time for the duration of de facto relationships before the property-sharing regime takes effect".²¹⁸ A qualifying period is generally regarded as necessary for de facto relationships, because of their informal nature compared to marriages and civil unions.²¹⁹ As Atkin explains:²²⁰

Marriage is a public event, recorded in a public registry, with the participants more or less knowing what they are committing themselves to. While for many, marriage is a social and ceremonial occasion, people are also aware that there are legal ramifications. They go into marriage with their eyes open ... Marriage involves a lifelong, or at least long-term, commitment to the other person. The same is true of those who have entered a civil union ...

De facto relationships are very different. There is no public registry ... There is no ceremony. The legal consequences of a de facto relationship are probably obscure to most people. Some may drift into an association not being aware that the law would deem it a "de facto relationship" ... The majority probably begin to live together without thinking too hard about the consequences.

4.11 The qualifying period for de facto relationships has two objectives:²²¹

- (a) First, it uses relationship duration as a measure of commitment. In the absence of a deliberate decision by the partners to formalise their relationship by getting married or entering a civil union, the passage of time is used to indicate when a relationship has reached a sufficient level of commitment that justifies the imposition of property sharing obligations.
- (b) Second, it acts as a safeguard against the retrospective imposition of property sharing obligations on unsuspecting partners.²²² It gives partners an opportunity to live together as a couple, and to recognise that their relationship is changing, before they have to decide whether to accept the property sharing obligations the PRA imposes on them or to opt out of the PRA by way of a contracting out agreement. It also provides a safeguard against strategic or exploitative behaviour by one partner,

²¹⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9–10.

²¹⁹ See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [15.4]–[15.14]. As discussed at paragraph 4.26 below, a qualifying period features in almost all comparable jurisdictions we have reviewed which extend, or recommend the extension of, a property sharing regime to de facto relationships.

²²⁰ Bill Atkin "Family property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Wellington, LexisNexis, 2013) 209 at 216.

²²¹ For further discussion see Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018); and Margaret Briggs "Which Relationships Should be Included in a Property Sharing Scheme?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 37 at 54. For discussion on the qualifying period in comparable jurisdictions see Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.33]–[3.45]; Law Reform Commission of Ireland *Report: Rights and Duties of Cohabitants* (LRC 82, 2006) at [2.13]; Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at 113; and Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [197]–[199] and [246]–[249].

²²² In *M v P* [2012] NZHC 503, [2012] NZFLR 385 Miller J observed at [23] that the effect of the Property (Relationships) Act 1976 is that "the law may impose the legal status of a de facto relationship retrospectively upon parties whose relationship gradually and without conscious election assumed that character".

such as entering into a relationship with the aim of acquiring a share of the other partner's property.²²³

Issues

- 4.12 In the Issues Paper we sought feedback on three questions:
- (a) Is it appropriate that the PRA applies to de facto relationships on an opt-out basis (Issues Paper at [5.22]–[5.25])?
 - (b) Do the eligibility criteria for de facto relationships capture relationships that are not substantively the same as marriages and civil unions? This might be because the definition of de facto relationship is too broad (Issues Paper at [6.29]–[6.47]), or because the qualifying period is too short (Issues Paper at [15.25]–[15.36]).
 - (c) Do the eligibility criteria for de facto relationships strike the right balance between flexibility and certainty (Issues Paper at [6.48]–[6.51])?
- 4.13 We identified several possible options for reform in the event that these questions required legislative amendment (Issues Paper at [6.52]–[6.62] and [15.37]–[15.47]). We have given particular consideration to whether the PRA should give greater priority to some of the section 2D(2) factors when deciding whether a de facto relationship exists, and to increasing the qualifying period to five years.

Results of consultation

- 4.14 We received 96 submissions that commented on various aspects of the eligibility criteria, including 83 submissions from members of the public, seven submissions from individual practitioner and academic experts, and six submissions from organisations. The vast majority of these submissions were concerned with how the PRA applies to de facto relationships.
- 4.15 Submissions reflected a diverse range of views. Some submitters, including the Human Rights Commission (HRC), the National Council of Women of New Zealand (NCWMZ) and the New Zealand Law Society (NZLS), thought that the PRA should apply in the same way to all relationships that are substantively the same. HRC said that the different treatment of relationships that are substantively the same would be discriminatory under human rights law.
- 4.16 A common theme of submissions, however, was that the PRA should not apply to de facto relationships in the same way as marriages and civil unions. These submitters emphasised that de facto relationships were different to marriages and civil unions because de facto partners have not made a formal, legally binding commitment to each other. They thought that if partners do not choose to formalise their relationship, and that relationship ends, they should not be subject to the same legal consequences as married and civil union partners.
- 4.17 Other submitters pointed to the practical difficulties in imposing property consequences on de facto relationships. Professor Nicola Peart observed that a major problem with the way the PRA applies to de facto relationships is that some people will not realise they are in a qualifying de facto relationship, or from what date the PRA applies to them, until after the relationship ends. NZLS agreed that the eligibility criteria are causing issues for

²²³ Bill Atkin "Property division: Lessons from New Zealand" in Panagiotis I Kanellopoulos, Elini Nina-Pazarzi and Cornelia Delouka-Inglessi (eds) *Essays in Honor of Penelope Agallopoulou* (Ant N Sakkoulas, Athens, 2011) 129 at 138.

some de facto relationships. It suggested that the commencement date may be the main reason. That is, the definition in section 2D can leave partners unsure as to when their relationship became a de facto relationship under the PRA. NZLS also pointed to a concern that contracting out agreements may be too readily set aside. A similar concern was also raised by Jan McCartney QC. We discuss contracting out in Chapter 8: Contracting out and settlement agreements.

- 4.18 Submitters' views on the preferred option for reform were mixed. Some submitters thought that the PRA should only apply to de facto relationships when partners deliberately opt-in to the regime. Others thought that the eligibility criteria should be more restrictive.
- 4.19 Some submitters thought that the definition of de facto relationship should make certain factors more important or even mandatory, although there was no consensus among submitters as to which factors should be prioritised. Submitters variously prioritised living together in the same household, having children together, mutual commitment to a shared life, sharing finances or making other substantial contributions to the relationship.
- 4.20 NZLS thought there was merit in giving priority to whether the partners shared a common residence.²²⁴ It noted that most people can easily relate to the concept of a de facto relationship when two people live together in the same household. People often judge it a major step in their relationship to "move in" together. But other submitters, including Nicola Peart and Community Law Wellington and Hutt Valley, noted that prioritising common residence would risk excluding some relationships that ought to be captured, and including other relationships that should not be captured (such as where two older people decide to move in together to save costs and share expenses). NZLS also thought that there may be merit in expanding the section 2D(2) factors to include consideration of whether the relationship is a second qualifying relationship, and in limiting the reference to care and support of children to biological or adopted children of both partners.
- 4.21 Some submitters, including NZLS, HRC and NCWNZ, favoured the existing qualifying period. But a longer qualifying period, of five or even 10 years, was a common submission from members of the public,²²⁵ as well as from some individual practitioner and academic experts. Many submitters felt that three years was too short, especially for second and subsequent relationships later in life, when partners are more likely to have accumulated assets before entering into a new relationship and to keep their finances separate during the relationship. But often the underlying concern was about what property was shared after three years. We discussed this concern in Chapter 2: Classification.
- 4.22 A small number of submitters raised concerns that touched on the objectives of the qualifying period (see paragraph 4.11). Some submitters thought that it can take longer than three years to build a genuine and committed relationship. NCWNZ noted that some

²²⁴ NZLS noted, however, that there were diverging views within the profession as to whether common residence should give rise to a rebuttable presumption that the partners are in a de facto relationship.

²²⁵ Submissions received through the consultation website indicated a preference for a five year qualifying period. We asked: "How long do you think a de facto relationship should last before the partners must share their relationship property equally if they separate?". Five people selected three years or less, 12 people selected five years and 9 people thought it should be more than five years. Some submissions received by email and post also preferred a longer qualifying period, although it was not always clear whether this was in relation to de facto relationships only or all relationship types.

of its members also thought that people might enter into de facto relationships for three to five years and never intend to make a longer term commitment. The Wellington Women Lawyers' Association suggested a longer qualifying period for partners over a certain age, on the basis that three years "does not fit the situation of many older adults". Other submitters thought that three years was not long enough to provide a robust safeguard. Some said three years does not give people enough time to realise that the PRA could apply to their relationship and to contract out, while others said that people could maintain a relationship for three years for pecuniary gain.

- 4.23 A clear theme from consultation was that aspects of the eligibility criteria for de facto relationships are not well understood by some members of the public. NZLS observed that many people are unaware that common residence is not a requirement for a de facto relationship under the PRA, and that people are often surprised to discover that their relationship may have started sooner than they thought. NZLS said "there appears to be an information lacuna in respect of rights under the PRA relating to de facto relationships". Submissions from members of the public also highlighted concerns that the definition of de facto relationship was broad enough to capture couples dating but not living together, or flatmates and boarders. NZLS noted the need for significant education to better inform the public about the PRA, which it said should assist in creating more certainty for the public about when the PRA applies.

Results of the Borrin Survey

- 4.24 The Borrin Survey made several key findings:

- (a) **Just under half of all respondents (48 per cent) knew that equal sharing applies to couples who have lived together for three years or longer.**²²⁶ Respondents who lived with a partner tended to have higher awareness than those who did not have a partner (55 per cent),²²⁷ but awareness did not vary between those who had lived with their partner for more than three years and those who had lived with their partner for less than three years.²²⁸ A higher proportion of respondents (68 per cent) knew that equal sharing applies to married and unmarried couples in the same way.²²⁹
- (b) **A range of factors are considered important in deciding whether equal sharing should apply to a couple.** Around nine in 10 respondents said that having children together, living together as a couple, buying a house together and sharing finances were all important factors in deciding if equal sharing should apply to a couple.²³⁰ On average, respondents thought that of eight factors described to them, six were important.²³¹

²²⁶ 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 [112].

²²⁷ At [115].

²²⁸ At [119]. However the small sample size of respondents who had lived with their partner for less than three years (44 respondents) means this finding should be treated with caution.

²²⁹ At [113].

²³⁰ At [124].

²³¹ At [124]. The factors respondents were asked about were whether a couple have bought a house or property together, have children together, live together as a couple, share finances, are strongly committed to each other or love each other, are married, are in a civil union, or have a sexual/intimate relationship.

- (c) **There was no consensus as to what was the single most important factor in deciding whether equal sharing should apply.** The most common responses were whether the couple had children together (22 per cent), whether they were married (11 per cent), whether they lived together as a couple (eight per cent) or had been together for a certain period of time (eight per cent).²³²
- (d) **There was no consensus as to how long couples should live together before equal sharing should apply, but most were happy with three years.** When asked how long they thought couples should have to live together, 32 per cent of respondents favoured a length of time less than three years, 38 per cent said it should be three years, and 29 per cent favoured a length of time greater than three years.²³³ The average length of time preferred was three years and three months.²³⁴ When respondents were prompted with what the law actually says, six in 10 agreed with the current law.²³⁵ Among those respondents who did not agree that the law should apply after three years, some thought the length of time should be shorter and some thought it should be longer, with five years being the most common preference (30 per cent of respondents who did not agree with the current law).²³⁶
- (e) **Many respondents viewed marriage differently to other relationship types.** 70 per cent of all respondents thought that whether a couple was married was an important factor in deciding if equal sharing should apply.²³⁷ These respondents tended to think that the law should apply to married couples much sooner, with 47 per cent saying that equal sharing should apply as soon as a couple get married.²³⁸ These respondents often drew a clear distinction between marriage and living together, with over half saying that unmarried couples should live together for a period of time (typically three years) before equal sharing applies.²³⁹

De facto relationships in comparable jurisdictions

- 4.25 There is considerable variation in how de facto couples are accommodated in property sharing regimes in other jurisdictions. In England and Wales, the property sharing regime applies to married couples only.²⁴⁰ Scotland²⁴¹ and Ireland²⁴² have introduced separate property sharing regimes for de facto couples, which provide more limited property rights compared to married couples. In contrast, de facto partners have the same

²³² At [125].

²³³ At 29 (Figure Three).

²³⁴ At [135].

²³⁵ At [146].

²³⁶ At 32 (Figure Five).

²³⁷ At 26 (Figure One).

²³⁸ At [140]–[141].

²³⁹ At [141].

²⁴⁰ A separate property sharing regime for cohabitants was recommended by the Law Commission of England and Wales in 2007, but this has not yet resulted in reform: Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007).

²⁴¹ In Scotland cohabitants have property rights in relation to household goods and money allocated to household expenses, and a court may make orders for financial provision for economic advantages and disadvantages resulting from the relationship: Family Law (Scotland) Act 2006, ss 25–28.

²⁴² In Ireland cohabitants can apply for a property adjustment order or compensatory maintenance order if they are financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), ss 173–175.

property entitlements as married partners in Australia and in some Canadian provinces.²⁴³ Other Canadian provinces do not accommodate de facto couples in their property sharing regimes,²⁴⁴ or only accommodate de facto couples on an opt-in basis.²⁴⁵ However experience in Canada has shown that opt-in regimes are ineffective in reducing the number of people who must rely on the law of equity,²⁴⁶ and two recent Canadian reviews have recommended that de facto partners be granted the same property entitlements as married partners.²⁴⁷

- 4.26 Most jurisdictions that include de facto relationships in a property sharing regime impose eligibility criteria in the form of a statutory definition that must be met, as well as a qualifying period.²⁴⁸ The statutory definitions in Australia and Ireland are similar to the PRA definition of de facto relationship, as they focus on a central concept of two people who live together as a couple, and include a statutory list of relevant factors.²⁴⁹ Scotland and several Canadian provinces adopt definitions that focus on a marriage analogy, applying to "marriage-like" or conjugal relationships.²⁵⁰ Most recently the Alberta Law Reform Institute recommended adopting a broader definition of "adult interdependent partners", capturing two people that live in a relationship of interdependence, defined as a relationship outside marriage in which any two persons share one another's lives, are emotionally committed to one another and function as an economic and domestic unit.²⁵¹
- 4.27 The qualifying period for de facto relationships tends to be either two or three years, although Ireland adopts a qualifying period of five years.²⁵²

²⁴³ British Columbia, Manitoba, Saskatchewan, Nunavut and the Northwest Territories.

²⁴⁴ Ontario, Quebec, Alberta and New Brunswick.

²⁴⁵ Nova Scotia, Newfoundland and Labrador, Prince Edward Island and Yukon.

²⁴⁶ See Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [148]–[168]. The Institute observes that Nova Scotia and Manitoba allow common law partners to opt-in to the property sharing regime by registering their relationship with a government agency. But although registration regimes have been in place for over 10 years, both provinces have experienced very low rates of registration. In Manitoba, only 416 couples registered in the first 10 years, out of an estimated 45,100 common law couples living in that province, according to the 2016 census. There were 68 registrations in Nova Scotia in 2013, 51 in 2012 and 76 in 2011.

²⁴⁷ Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018); and Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at 14. See also Ontario Law Reform Commission *Report on The Rights and Responsibilities of Cohabitants under the Family Law Act* (1993).

²⁴⁸ We are aware of only one jurisdiction – Scotland – where there is no qualifying period for de facto relationships: Family Law (Scotland) Act 2006, s 25. However the property entitlements of cohabitants are limited in Scotland.

²⁴⁹ Family Law Act 1975 (Cth), s 4AA; Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), s 172. The Law Commission of England and Wales also recommended a definition based on the concept of "living as a couple in a joint household": Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.13].

²⁵⁰ Family Law Act (Scotland) 2006, s 25; Family Law Act SBC 2011 c 25, s 3; Family Property Act CCSM c F25, s 1(1); The Family Property Act SS 1997 c F-6.3, s 2(1); and Family Law Act SNWT (Nu) 1997 c 18, s 1(1). See also Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at 115.

²⁵¹ Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [233]–[245]. See also the definition of "adult interdependent partners" in the Adult Interdependent Relationships Act SA 2002 c A-4.5, s 1.

²⁵² The qualifying period is 2 years in Australia and the Canadian provinces of British Columbia, Saskatchewan, Nunavut and the Northwest Territories. In 2017 a 2 year qualifying period was also recommended by the Nova Scotia Law Reform Commission: Law Reform Commission of Nova Scotia *Division of Family Property – Final Report* (September 2017) at [4.5.2]. Manitoba has a qualifying period of 3 years. A 3 year qualifying period has also been recommended by the Ontario Law Reform Commission and the Alberta Law Reform Institute: Ontario Law Reform Commission *Report on The Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, 1993) at 63; and Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at

Preferred approach

P14

The PRA should apply in the same way to all marriages, civil unions and qualifying de facto relationships.

P15

The eligibility criteria for de facto relationships should retain the existing definition of de facto relationship and the existing three year qualifying period.

- 4.28 We propose no change to the way the PRA applies to de facto relationships that qualify for equal sharing (qualifying de facto relationships), or to the existing eligibility criteria for de facto relationships.
- 4.29 We acknowledge that many submitters felt that property sharing obligations should be a matter of choice, and in the absence of a deliberate decision to formalise a relationship by getting married or entering a civil union, should only be imposed on de facto relationships if they opt-in to the regime. However, we do not prefer an opt-in approach, for the following reasons:
- (a) The role of the eligibility criteria for de facto relationships is to ensure that only those de facto relationships that are *substantively the same* as marriages and civil unions are captured. Having different rules for relationships that are substantively the same risks being discriminatory on the basis of marital status under human rights law.²⁵³ It is also out of step with social trends, such as the increasing prevalence of de facto relationships and changing attitudes on issues such as living together before marriage, or not marrying at all.²⁵⁴
 - (b) Applying the same rules to marriages, civil unions and de facto relationships is consistent with public attitudes and values. The Borrin Survey identified that six in 10 agreed with the current law (that equal sharing should apply to *all* couples who live together for three years).²⁵⁵ While 70 per cent of respondents thought whether a couple were married was an important factor, a higher proportion of respondents (around nine in 10) said that living together was an important factor.²⁵⁶ Only 11 per cent of respondents thought that whether a couple were married was the most important factor.²⁵⁷
 - (c) Experience in jurisdictions that do have opt-in regimes for de facto relationships demonstrates that opt-in rules fail to reduce the number of people who must rely on

[246]–[249]. The Law Commission of England and Wales recommended a qualifying period of between two and five years, rather than a specific qualifying period: Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.45].

²⁵³ Section 19(1) of the New Zealand Bill of Rights Act 1990 and s 21 of the Human Rights Act 1993 together affirm the right to be free from discrimination on the grounds of marital status, including being married, in a civil union or in a de facto relationship.

²⁵⁴ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at ch 1.

²⁵⁵ 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 [146].

²⁵⁶ At 26 (Figure One).

²⁵⁷ At [125].

the law of equity (see paragraph 4.25). In New Zealand, de facto relationships were brought into the PRA partly in order to avoid the need for de facto partners to rely on the law of constructive trust.²⁵⁸ In our view it would be a backwards step to return to that unsatisfactory state of affairs. Imposing the same property sharing obligations on all qualifying relationships, with the ability to contract out, ensures more people, especially vulnerable people, are subject to the protections under the PRA (Issues Paper at [5.25]).

(d) De facto partners have been included in the PRA on an opt-out basis since 2001. Introducing such a significant change would likely lead to public confusion and uncertainty.

4.30 In our view, concerns with the eligibility criteria for de facto relationships are best addressed through a public education campaign that raises awareness about when and how the property sharing regime applies to de facto relationships. This will better equip people to understand their legal rights and obligations. Greater education would also address awareness of key aspects of the eligibility criteria, such as the three year qualifying period.

4.31 We do not propose changing the definition of de facto relationship for the following reasons:

(a) A flexible definition of de facto relationship is appropriate given the diverse nature of de facto relationships²⁵⁹ and the range of public attitudes and values about what are important factors in determining whether a de facto relationship exists. This was affirmed through consultation and the results of the Borrin Survey, which identified no clear consensus on what should be the determining factor(s). While a more rigid definition that prioritises certain factors would provide greater certainty, it would also unduly risk excluding relationships that ought to be covered, and including relationships that ought not to be covered.

(b) A review of the case law does not reveal widespread problems with the way the definition of de facto relationship is interpreted and applied by the courts.²⁶⁰ In our view, the real issue is around the lack of guidance these individual cases can provide to the general public. We consider that these concerns are best addressed through greater public education and the publication of an information guide for members of the public that will address when the regime might or not might not apply to them (proposed in Chapter 10: Resolution).

²⁵⁸ For a discussion of the law applying to de facto relationships prior to the 2001 amendments see Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 22–23.

²⁵⁹ See discussion in Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the TwentyFirst Century* (Oxford University Press, Canada, 2014) at 8–11. See also Patrick Parkinson "Reconsidering Family Property Law in the Post-Marital Age" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 15 at 32.

²⁶⁰ A study of reported cases under the Property (Relationships) Act from 2002 to 2009 found that in 43 per cent of cases involving de facto relationships the partners disputed the length of the de facto relationship, but only 12 per cent involved a dispute about whether the relationship satisfied the s 2D definition of de facto relationship. See Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [6.50]; and Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012).

- (c) The degree of flexibility in the definition of de facto relationship is consistent with comparable jurisdictions, including in particular Australia and those Canadian provinces that extend property regimes to de facto relationships.

4.32 Nor do we propose increasing the qualifying period. The diverse nature of de facto relationships means that choosing a qualifying period is a difficult, arbitrary exercise.²⁶¹ But we are satisfied that three years is appropriate, for the following reasons:

- (a) Results of the Borrin Survey identify that three years is broadly consistent with public attitudes and values as to when a de facto relationship reaches a point of commitment that justifies the imposition of property sharing obligations.²⁶²
- (b) While many submitters were concerned that three years is too short, often the underlying concern was about what property is shared after three years. This concern will be addressed by our proposals in Chapter 2: Classification to limit equal sharing to property acquired during the relationship, or for the partners' common use or common benefit (see paragraph 4.39). This will reduce the risk of unfair outcomes for de facto relationships that only just satisfy the qualifying period.
- (c) The risk of unfair outcomes in de facto relationships that only just satisfy the three year qualifying period is further mitigated in two respects. First, the relationship must satisfy the definition of de facto relationship. Second, the continued availability of section 13 (discussed in Chapter 3: Division), provides an exception to equal sharing if a court considers that there are extraordinary circumstances that make equal sharing repugnant to justice.²⁶³
- (d) A three year qualifying period is now a well settled feature of the PRA. It has been in place since 2001, and results of the Borrin Survey indicate that many people are aware of it, although there is still a need for greater public education, as discussed in Chapter 1. Preserving the status quo has the important benefit of minimising the risk of public confusion that might arise if the qualifying period is changed.
- (e) Extending the qualifying period would be out of step with trends in comparable jurisdictions, which generally adopt a qualifying period of two or three years.

²⁶¹ The diversity of de facto relationships means it is difficult to make generalisations about when de facto relationships reach a level of commitment that justifies the imposition of property sharing obligations. In the Issues Paper we explored the available evidence about the nature and duration of de facto relationships, which suggests most de facto relationships end (either as a result of the partners marrying each other or separating) within five years, but that de facto relationships may now be more enduring than in the past: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [15.27]–[15.33]. However this evidence is of limited assistance in determining the appropriate qualifying period, as it does not tell us when partners consider themselves to be in a de facto relationship that should have property sharing consequences.

²⁶² A similar public values survey was undertaken in Alberta in 2016 as part of a review of the property entitlements of common law partners by the Alberta Law Reform Institute. Results of that survey suggested that most people who had lived in a common law relationship considered it to be a common law relationship by the end of the first year: Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [219].

²⁶³ Brevity of relationship coupled with a gross disparity in contributions is a recognised ground for departing from equal sharing under s 13 of the Property (Relationships) Act 1976. Often a party will argue s 13 in the alternative, should a claim under s 14 fail. See for example *B v B* [2016] NZHC 1201, [2017] NZFLR 56; *Brown v Starke* [2016] NZFC 7132; *S v S* [2012] NZFC 2685; *RSQ v BQ* [2012] NZFC 7272; *BRL v NAR FC* Christchurch FAM-2008-009-1355, 17 November 2011; and *VK v FK FC* Porirua FAM-2009-091-717, 1 February 2011.

SHORT-TERM RELATIONSHIPS

Current law

- 4.33 If a marriage, civil union or de facto relationship lasts for less than three years, it is a short-term relationship and special property sharing rules apply.²⁶⁴ These rules differ significantly depending on the type of relationship.
- 4.34 Short-term marriages and civil unions are subject to the PRA's ordinary rules of division from the date of marriage or civil union, but a limited exception to equal sharing is available if one of the special situations outlined in sections 14 or 14AA applies (Issues Paper at [16.3]–[16.8]). Specifically:
- (a) Where one partner's contribution to the relationship "has clearly been disproportionately greater" than the contribution of the other partner, all relationship property is divided on the basis of the contribution of each partner to the relationship.
 - (b) Where the family home or family chattels were owned by one partner before the relationship, or were received by one partner by way of gift or inheritance from a third party, those items of property are divided based on the contributions of each partner to the relationship.
 - (c) Where one partner's contribution to the relationship "has been clearly greater" than that of the other partner, relationship property other than the family home and family chattels are divided based on the contributions of each partner to the relationship.
- 4.35 These rules recognise that applying the PRA's ordinary rules of division to short-term marriages and civil unions may lead to unfair outcomes in some situations (for example, where the family home was owned by one partner before the relationship began), and may encourage strategic or exploitative behaviour by one partner. The objective of the rules is therefore to prevent one partner obtaining a windfall gain if the marriage or civil union ends after a short period of time.
- 4.36 The rules for short-term de facto relationships fulfil a different objective. A short-term de facto relationship normally falls outside the PRA, unless it meets the additional eligibility criteria specified in section 14A(2), namely:
- (a) there is a child of the de facto relationship,²⁶⁵ and the court is satisfied that failure to make an order dividing relationship property would result in serious injustice; or
 - (b) the applicant has made a substantial contribution to the de facto relationship, and the court is satisfied that failure to make an order dividing relationship property would result in serious injustice.
- 4.37 The objective of section 14A is therefore to recognise that excluding all short-term de facto relationships from the PRA may lead to unfair outcomes in some situations. If the additional eligibility criteria are satisfied, each partner's share in the relationship property is to be determined on a contributions basis (section 14A(3)).

²⁶⁴ A court can also treat a relationship of longer than three years as a short-term relationship if it considers it just, but there is no corresponding discretion to treat a short-term relationship as a relationship longer than three years' duration: Property (Relationships) Act 1976, s 2E.

²⁶⁵ See Chapter 7: Children's Interests for a discussion on the definition of child of the relationship.

Issues

- 4.38 In the Issues Paper we highlighted a number of issues with the way the rules for short-term relationships operate in practice. In particular:
- (a) The rules for short-term marriages and civil unions are unclear and incomplete, and may not always achieve a just division of property (Issues Paper at [16.9]–[16.16]).
 - (b) The PRA treats short-term de facto relationships differently to short-term marriages and civil unions, which may be inconsistent with the implicit principle of the PRA that the law should apply equally to all relationships that are substantively the same, and may be discriminatory under human rights law (Issues Paper at [17.10]–[17.19]).
 - (c) The additional eligibility criteria for short-term de facto relationships in section 14A(2) are unclear, and set a high bar for relationships with children (Issues Paper at [17.20]–[17.27]).
- 4.39 In light of our preferred approach to classification outlined in Chapter 2, a more fundamental issue is whether it is necessary to retain the special rules for short-term relationships. Under our classification proposals, partners will no longer be required to share property that was acquired before the relationship was contemplated. Although increases in value that occurred during the relationship and were attributable to the relationship, including increases in the value of the family home, would continue to be shared.²⁶⁶ This reflects a significant change in policy, and directly addresses the risk of windfall gains in short relationships, which is the objective of the rules for short-term marriages and civil unions.
- 4.40 If the rules for short-term marriages and civil unions are no longer necessary and should be removed, the effect would be that the PRA's ordinary rules of division would apply to all marriages and civil unions regardless of length. A separate question then arises as to how the PRA should treat short-term de facto relationships. Simply removing the rules for short-term de facto relationships would exclude all de facto relationships that do not satisfy the three year qualifying period (which would have the opposite effect of removing the rules for short-term marriages and civil unions).

Results of consultation

- 4.41 We received few submissions that commented specifically on the rules that should apply to short-term relationships.²⁶⁷ Submitters who did comment on short-term relationships had mixed views.
- 4.42 Submissions from members of the public tended to focus on short-term de facto relationships. Some submitters strongly felt that the PRA should not apply to short-term de facto relationships under any circumstances. Often these submitters were also in favour of increasing the qualifying period for de facto relationships. However, other submitters thought that the PRA should capture short-term de facto relationships in some circumstances. A common submission was that de facto couples who have children together should be captured, or that a shorter qualifying period should apply to these

²⁶⁶ Family chattels will however continue to be shared equally regardless of when they were acquired, for the reasons discussed in Chapter 2.

²⁶⁷ Submitters were asked for their views on the operational issues with the special rules for short-term relationships, but were not asked directly about whether the rules should remain, as this issue has arisen only through the development of our preferred approach to classification.

couples.²⁶⁸ One member of the public submitted that a rigid qualifying period with no flexibility was unfair, as it allows a person to walk out of a relationship just before the qualifying period is satisfied and avoid any consequences under the PRA.

- 4.43 Organisations, including NZLS, the Wellington Women Lawyers' Association, HRC and the New Zealand Federation of Business and Professional Women (BPWNZ) supported the PRA applying to all short-term relationships in some situations, as did some practitioner and academic experts. BPWNZ noted that excluding short-term relationships could lead to unfairness in situations where one partner was the primary earner and the other an unpaid caregiver. The caregiver partner has lost the opportunity for income during that time and, in the absence of any property sharing entitlement on separation, may be left far worse off than when they entered the relationship.
- 4.44 Views were mixed as to whether all short-term relationships should be treated the same. Some submitters, including HRC, thought that the PRA should apply equally to all short-term marriages, civil unions and de facto relationships, and that there should not be additional eligibility criteria for short-term de facto relationships. It argued that amending the PRA to apply equally to all short-term relationships would bring the law into greater consistency with New Zealand's international human rights obligations. Nicola Peart agreed that the different treatment of different short-term relationships may not be justified under human rights law. NZLS said that there was a divergence of views among lawyers as to whether the different treatment remains sustainable. NZLS observed that partners who marry or enter into a civil union have "effectively 'opted in' and expressed their commitment by virtue of an official ceremony". But with de facto relationships there is no such evidential basis. Other submitters expressed a similar view. NZLS said that whether the PRA should treat all short-term relationships the same is a question of policy, on which it expressed no view. It did not, however, support removing the additional eligibility criteria for short-term de facto relationships, or applying the same rules of division to all short-term relationships.
- 4.45 NZLS also submitted that the additional eligibility criteria for short-term de facto relationships should be further restricted to where a child of the relationship is the biological or adoptive child of both partners (currently a child of the relationship can include children from a previous relationship, as discussed in Chapter 7: Children's interests). Lawyers reported to NZLS that while partners understand and accept that a biological or adoptive child of the relationship should give rise to entitlement under the PRA, most express surprise or even indignation that a child of a prior relationship can be the gateway to entitlement for the other partner under the PRA.
- 4.46 Few submitters commented on the rules of division that ought to apply to short-term relationships.²⁶⁹ Some submitters were happy to retain the existing rules of division for short-term marriages and civil unions (equal sharing with exceptions), although Wellington Women Lawyers' Association noted the need, when the exceptions applied,

²⁶⁸ Submitters on the consultation website were asked whether a different qualifying period should apply when a de facto couple have children together. 16 submitters said the presence of children should make a difference, while 11 submitters thought it should not make a difference.

²⁶⁹ In the Issues Paper we proposed three options for reform for the rules of division for marriages and civil unions, namely retaining the existing exceptions to equal sharing in special situations with some minor tweaks, applying contributions-based sharing to all short-term marriages and civil unions, or adopting a fruits of the relationship approach to classification for all short-term marriages and civil unions: Law Commission *Dividing Relationship Property – Time for Change? Te mātotoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [16.15]–[16.21]. We also proposed similar options for short-term de facto relationships at [17.40]–[17.42].

to limit the weight to be given to financial contributions over non-financial contributions. HRC favoured extending the rules for short-term marriages and civil unions to de facto relationships. NZLS favoured a fruits of the relationship approach to classification for short-term marriages and civil unions, agreeing that the rationale for special treatment of the family home and chattels may be weaker in a short-term relationship. NZLS submitted:

We believe that most people would understand and accept, particularly in the case of short-term relationships, that the product of the partners' joint contributions during the relationship should be divided equally between them, with the ability to obtain compensation for improvements they had undertaken on each other's separate property, as opposed to changing the status of the underlying nature of the separate property itself.

- 4.47 NZLS did not, however, favour applying the same rules of division to short-term de facto relationships, for the reasons discussed at paragraph 4.44. Nicola Peart favoured a fruits of the relationship approach for all relationships (regardless of length), but also noted that if this were adopted, there may be less reason to depart from equal sharing in short-term relationships.

Short-term relationships in comparable jurisdictions

- 4.48 We have not identified any comparable jurisdictions that have special rules for short-term relationships. Rather, the same rules of classification and division apply to all qualifying relationships regardless of their length, but relationship duration can be a relevant consideration in determining whether an exception to equal sharing should apply (similar to section 13 of the PRA).²⁷⁰
- 4.49 As noted at paragraphs 4.26–4.27, most comparable jurisdictions that include de facto relationships in a property sharing regime impose a qualifying period, with the exception of Scotland.²⁷¹ Several jurisdictions also provide different avenues into the property sharing regime for de facto relationships that do not satisfy the qualifying period. In Australia, the property sharing regime applies if the two year qualifying period is met, *or* there is a child of the de facto relationship, *or* one party has made substantial contributions to the relationship and a failure to make a property division order would result in serious injustice.²⁷² Similarly, the Alberta Law Reform Institute recently recommended that the property sharing regime should apply if the partners live together for three years, *or* live together and have a child together, *or* otherwise enter an

²⁷⁰ For example, in Ontario the court has the power to vary the equal sharing rule if it would be "unconscionable", having regard to the fact that the amount a spouse would receive would be "disproportionately large in relation to a period of cohabitation that is less than five years": Family Law Act RSO 1999 c F-3, s 4(6). Similarly in Saskatchewan the court may order unequal sharing if it would be "unfair and inequitable" to make an equal distribution of family property, having regard to the length of time that the spouses cohabited: The Family Property Act SS 1997 c F-6.3, s 21(2).

²⁷¹ However the length of time the couple have lived together is relevant to whether a qualifying de facto relationship exists: Family Law (Scotland) Act 2006, s 25.

²⁷² Family Law Act 1975 (Cth), s 90SB. A similar recommendation regarding the presence of children was made by the Law Commission of England and Wales in Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.31].

agreement to become interdependent partners.²⁷³ In Ireland, the qualifying period is only two years if the partners are parents of a dependent child.²⁷⁴

Preferred approach

P16

The provisions for short-term relationships should be repealed and the ordinary rules of division should apply to all marriages, civil unions and qualifying de facto relationships.

P17

A "qualifying de facto relationship" should include a de facto relationship that does not satisfy the three year qualifying period if it meets the following additional eligibility criteria:

- a. there is a child of the relationship, and a court considers it just to make an order for division; or
- b. the applicant has made substantial contributions to the relationship, and a court considers it just to make an order for division.

4.50 Our preferred approach is to repeal the special rules for short-term relationships in light of our preferred approach to classification, outlined in Chapter 2 and summarised at paragraph 4.39. Our classification proposals overtake the objective of the special rules for short-term marriages and civil unions, as they minimise the risk of windfall gains and strategic or exploitative behaviour.

4.51 Other reasons for repealing the special rules for short-term marriages and civil unions are as follows:

- (a) The special rules for short-term marriages and civil unions rarely apply in practice.²⁷⁵ This is due to the low number of marriages and civil unions that end within three years (Issues Paper at [15.22]). It is also due to amendments to the PRA in 2001, which mean that any time spent in a de facto relationship immediately preceding a marriage or civil union is counted when calculating the length of the marriage or civil union (sections 2B and 2BAA). Given the increasing tendency for partners to live together before marriage, short-term marriages are therefore less likely today than in 1976.²⁷⁶
- (b) Repealing the special rules for short-term marriages and civil unions is consistent with public attitudes and values as evidenced by the findings from the Borrin Survey. For 70 per cent of respondents, marriage was an important factor in deciding whether

²⁷³ Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [229]–[259]. In Nunavut and the Northwest Territories the property sharing regime also applies to de facto relationships of 2 years' duration or relationships of "some permanence" where the partners are natural or adoptive parents of a child: Family Law Act SNWT (Nu) 1997 c 18, s 1(1).

²⁷⁴ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), s 172(5).

²⁷⁵ This is borne out in our review of cases available on Westlaw and LexisNexis, which identified approximately one case per year resulting in unequal sharing under s 14 since 2001, and no successful cases under s 14AA.

²⁷⁶ Superu *Families and Whānau Status Report 2014* (June 2014) at 164. See also Law Commission *Relationships and Families in Contemporary New Zealand – he hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at 17–18.

equal sharing should apply to a couple,²⁷⁷ and these respondents tended to think that the law should apply to married couples much sooner than three years, with 47 per cent saying the equal sharing law should apply as soon as a couple gets married.²⁷⁸

- (c) The risk of unfair outcomes in applying the ordinary rules of division to short-term marriages and civil unions is mitigated by the availability of an exception to equal sharing in extraordinary circumstances (see paragraph 4.32(c)).
- (d) Repealing the special rules for short-term marriages and civil unions would be consistent with the accepted approach in comparable jurisdictions.

4.52 We also propose repealing the special rules for short-term de facto relationships, and extending the ordinary rules of division to short-term de facto relationships that meet the additional eligibility criteria proposed below. In our view this is an appropriate response given our classification proposals, which will have the effect of reducing the pool of relationship property in situations where the family home was owned by one partner before the relationship began. If we were to retain contributions-based sharing for eligible short-term de facto relationships, this would likely result in situations where the non-owning partner receives significantly less than what they would have been entitled to under the current rules. We think this would be an unfair outcome for the small number of short-term de facto relationships that do satisfy the additional eligibility criteria.²⁷⁹

4.53 Our proposals to repeal the special rules for all short-term relationships and extend the ordinary rules of division to some short-term de facto relationships also have the following advantages:

- (a) The eligibility criteria will be simplified, making the PRA easier to apply. One set of property division rules will apply to all marriages, civil unions and qualifying de facto relationships. Partners who are married or in a civil union will not need to determine when their relationship began (including any immediately preceding de facto relationship) or ended in order to determine what rules apply. Equal sharing is also more certain and easier to apply than contributions-based sharing. We consider that these proposals will best achieve the principle of simple, speedy and inexpensive resolution of relationship property disputes, as is consistent with justice.
- (b) Less emphasis will be placed on a relationship passing an arbitrary three year milestone. For marriages and civil unions, greater weight is placed on the partners' deliberate decision to formalise their relationship, consistent with public attitudes and values (see paragraph 4.50(b)). For de facto relationships, the additional eligibility criteria recognises the necessarily arbitrary nature of the qualifying period and gives equal weight to other measures of commitment.
- (c) Removing the rules for short-term marriages, civil unions and de facto relationships minimises the different treatment of different relationship types, consistent with human rights law (see paragraph 4.56).

²⁷⁷ 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 26 (Figure One).

²⁷⁸ At [140]–[141].

²⁷⁹ Our review of cases available on the legal databases Westlaw and LexisNexis identified that the additional eligibility criteria for short-term de facto relationships in s 14A(2) have been satisfied in 21 cases since 2001, an average of less than 1.5 cases per year.

Additional eligibility criteria for de facto relationships

- 4.54 De facto relationships that do not satisfy the qualifying period should be subject to the PRA if they satisfy additional eligibility criteria. These criteria provide different ways to measure commitment that should be given equal weight to the deliberate decision to formalise a relationship by getting married or entering a civil union, or satisfying the qualifying period.
- 4.55 The additional eligibility criteria proposed below are broadly consistent with the existing criteria under section 14A(2), with the important distinction that the threshold of "serious injustice" is lowered to "justice". We consider that this will achieve fairer outcomes through greater access to the court's discretion.
- 4.56 We propose that the PRA should apply to short-term de facto relationships in two situations:
- (a) **When there is a child of the relationship and the court considers it just to make an order dividing relationship property.** Partners who have children together can be presumed to be in a family joint venture, to which the partners contribute equally, although in different ways.²⁸⁰ Results from consultation and the Borrin Survey affirm that the presence of children make a difference to people's attitudes about whether equal sharing should apply. Some respondents to the Borrin Survey regarded having children together as being a more important factor than how long the partners have been together (see paragraph 4.24(c)). We acknowledge the concern raised by NZLS that the presence of a child of the relationship that is not the biological or adopted child of both partners might not provide an appropriate measure of commitment. We are concerned, however, that a more limited definition of child of the relationship for this purpose would be inconsistent with social trends towards more diverse family structures and may fail to properly accommodate whāngai and stepchildren. In our view this concern is best addressed by reserving some discretion to the court, so that it must still be satisfied that making an order for division would be just in all the circumstances.
 - (b) **When one partner has made substantial contributions to the relationship and the court considers it just to make an order dividing relationship property.** A short-term de facto relationship to which one partner has made substantial contributions should also qualify for equal sharing. This gives a court broad discretion to recognise situations in which the substantial contributions made by one partner to the relationship demonstrate a significant commitment to the relationship. It also

²⁸⁰ We agree with the recent conclusion of the Alberta Law Reform Institute in Alberta Law Reform Institute *Property Division: Common Law Couples and Adult Interdependent Partners: Final Report 112* (June 2018) at [250]:

It is reasonable to presume that partners raising a child or children are in an economic partnership, even if the relationship lasts less than three years. Usually, both partners contribute to meeting the needs of the family. The contributions may include money, caregiving, or other domestic work.

This is supported by some research that suggests de facto partners raising children together have made a personal commitment to each other, and have a degree of financial interdependence. See for example Jan Pryor and Josie Roberts "What is Commitment? How married and cohabiting parents talk about their relationships" (2005) 71 *Family Matters* 24 at 31; Simon Duncan, Anne Barlow and Grace James "Why don't they marry? Cohabitation, commitment and DIY marriage" (2005) 17(3) *CFLQ* 383; L Jamieson and others "Cohabitation and commitment: partnership plans of young men and women" (2002) 52(3) *The Sociological Review* 354; C Lewis, A Papacosta and J Warin *Cohabitation, Separation and Fatherhood* (Joseph Rowntree Foundation, York, 2002); and J Lewis *The End of Marriage? Individualism and Intimate Relationships* (Edward Elgar, Cheltenham, 2001).

provides an avenue into the PRA for child-free couples, and avoids discriminating on the basis of family status under human rights law.²⁸¹

- 4.57 Under our proposals short-term de facto relationships will continue to be treated differently to marriages and civil unions of the same length, as they will only be eligible for equal sharing if they satisfy the additional eligibility criteria proposed above. We are satisfied that this different treatment is not discriminatory under human rights law, given that early stage de facto relationships are different in nature to marriages or civil unions of the same length.²⁸² In a de facto relationship the partners have not made a deliberate decision to formalise their relationship, and cannot be presumed to have accepted the legal consequences that entering into marriage or a civil union entails. Requiring the satisfaction of additional eligibility criteria for short-term de facto relationships ensures the PRA treats different relationship types that are substantively the same in the same way, and avoids imposing property sharing obligations on de facto relationships that are not substantively the same as marriages or civil unions.

²⁸¹ Section 19(1) of the New Zealand Bill of Rights Act 1990 together with s 21 of the Human Rights Act 1993 affirm the right to be free from discrimination on the grounds of family status (which includes having the responsibility for the part-time or full-time care of children or other dependents).

²⁸² Differential treatment of people or groups on a prohibited ground of discrimination is potentially discriminatory under human rights law, but only if it treats people in comparable situations differently: *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109]; approved in *Child Poverty Action Group (CPAG) v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43].