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Property (Relationships) Act Review
Law Commission
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By email: pra@lawcom.govt.nz

Review of the Property (Relationships) Act 1976: Preferred Approach

Introduction

The New Zealand Law Society welcomes the opportunity to comment on the Law Commission's *Review of the Property (Relationships) Act 1976: Preferred Approach, Te Arotake I te Property (Relationships) Act 1976: He Aronga I Mariu ai*, Issues Paper 44 (preferred approach paper).

The Law Society has drawn on the expertise of highly experienced family law practitioners, who were members of a working group who prepared the submission to the Law Commission's paper *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* Issues Paper 41. The Law Society again records its gratitude for the extensive input and assistance it has received in preparing this submission. It also extends its thanks to the Commission for meeting with members of the group to discuss in more detail, the proposals contained in the preferred approach paper.

Below is a brief executive summary, followed by answers to the preferred approach paper's questions.

Executive summary

In its submission on the Commission's initial issues paper, the Law Society agreed with the Commission's preliminary view that the framework of the Property (Relationships) Act 1976 (PRA) is sound and in general terms achieves a fair and just division of property when partners separate, but that in some areas legislative amendment would improve the application of the Act.¹

The Commission's preferred approach paper has identified that some significant changes are needed to better ensure the regime reflects the reasonable expectations of New Zealanders.² As outlined in this submission, the Law Society agrees with most of the Commission's preferred approach proposals and commends the Commission for its thorough and considered review. Some points of particular significance are discussed below.

¹ NZLS submission on Property (Relationship) Act 1976 review – Issue paper 41, 27 February 2018, at p1. The submission is available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0008/119366/I-LC-Relationship-Property-Review-27-2-18.pdf

² *Review of the Property (Relationships) Act 1976: Preferred Approach* (preferred approach paper), at paragraph 1.7.

De facto relationships

The Law Society agrees that the PRA should apply in the same way to all marriages, civil unions and qualifying de facto relationships (P14). However, the Law Society does not support the proposal that the current definition of a qualifying de facto relationship be retained (P15). The current definition is too wide and in the Law Society's view, creates uncertainty and prevents issues being resolved efficiently. The Law Society asks the Commission to reconsider its position in relation to the definition of a de facto relationship, and proposes that section 2D be amended to:

- make the "nature and extent of common residence" the first criterion in section 2D(2); and
- replace section 2D(3)(a) and (b), to provide that the first consideration will be the nature and extent of common residence and only if that criterion is not satisfied, does the court need to consider the remaining criteria.

Classification of Relationship Property, and Family Income Sharing Agreements

The Law Society supports the classification of the family home as relationship property, whether owned by either or both parties if it was acquired before the relationship for the partners' common use or benefit or it was acquired during the relationship, other than as a third-party gift or inheritance (P5-P10).

It also agrees that section 15 and maintenance orders under Part 6 of the Family Proceedings Act 1980 should be repealed and replaced with a new, limited entitlement to share future family income through a Family Income Sharing Agreement (FISA) (P18-P26).

The Law Society accepts this 'suite of changes' provided the changes are retained as a whole. Changing one part of the 'suite' may well result in the new legislation as a whole becoming unworkable.

Trusts

The Law Society supports the Commission's proposals in respect of trusts (P27-P33). It is important that on separation, the court has appropriate powers to deal with the issues arising where property that would otherwise be classified as relationship property has been disposed of to trusts during the relationship.

Children's interests

The Law Society does not support the Commission's preferred approach that children's best interests should be a primary consideration under the PRA, including an "overarching obligation" on the courts to have regard to the best interests of any minor or dependent children (P34).

The PRA concerns the property entitlements of adult partners at the end of a relationship. The Act's purpose is to recognise the equal contributions of the partners to the relationship and to provide for a just division of property when the relationship ends (section 1M). The term "overarching obligation" reaches right across the Act, making every other section in the Act subject to that overriding consideration.

The Law Society suggests that children should be a primary focus when it comes to determining occupation of the former family home, and not the division of relationship property.

Family Court Rules committee

The Law Society agrees a Family Court Rules committee should be established for the purpose of developing specific procedural rules and guidance for PRA matters (P58). Such a committee should comprise members of the Family Court judiciary and senior family law practitioners who are experienced in relationship property matters.

It is essential that rules are brought into force at the same time as the new Act. It would be counterproductive for the legislative changes to be brought into force before the supporting rules are in place.

Chapter 1 – Introduction

P1 A new statute, entitled the Relationship Property Act, should apply to relationships ending on separation

The Law Society agrees with this proposal, and as stated in its earlier submission on the Commission's Issues Paper agrees that the new statute should be renamed the Relationship Property Act.³

P2 The rules that apply to relationships ending on death should be the subject of further consideration, within a broader review of succession law

In respect of the death provisions in the PRA, the Law Society notes the Commission's view that a separate and broader review of succession law is required, including the Commission's preliminary view favouring a separate statute dealing with succession. However, it would be beneficial to amend sections 75, 76, 87, 88 and 95 to address and clarify the current operational problems with these sections,⁴ without having to await the outcome of a broader review of succession law.

P3 The purpose of the new Relationship Property Act should be to provide for a just division of property between partners when a relationship ends on separation

The Law Society agrees with this proposal.

P4 The new Relationship Property Act should include a revised statement of principles to guide the achievement of the purpose of the Act

The Law Society agrees that if new legislation is enacted, the PRA principles should be amended to reflect the Commission's proposed changes.

Chapter 2 – Classification

P5 The property owned by either or both parties should be classified as relationship property if it:

- a. was acquired before the relationship, for the partners' common use or common benefit;
- b. was acquired during the relationship, other than as a third party gift or inheritance; or
- c. is a family chattel

³ Note 1, at p1.

⁴ Note 1, at Part M.

The Law Society acknowledges that the Commission's preferred approach is to address the unjust outcomes which have arisen under the 'family use' approach in respect of the family home and the constraints of the current legislation.

An alternative option the Law Society considered in its original submission was to retain the current section 8(a) of the PRA (i.e. the family home is relationship property whenever acquired), reform section 16 and promote greater education and the use of contracting out agreements by individuals who want a different regime.

However, the Law Society accepts the Commission's proposal 5 and notes that the proposed change to the treatment of the family home is only one part of a suite of changes which include new Family Income Sharing Agreement (FISA) orders, which may enable occupation orders to be made enabling future occupation of the family home. In the Law Society's view, this suite of changes should be retained as a package. It would be hesitant to support proposal 5 if any part of the proposals was changed. In addition, changing one part of the suite of changes might well result in the new Act as a whole becoming unworkable.

The following aspects of proposal 5 will need to be considered:

- Property acquired during the relationship for the common use and benefit of the couple will be relationship property. This would include the purchase of a replacement family home. The parties have the ability to contract out of the Act in respect of the purchase of a replacement family home, however, it is possible that the parties may be contractually committed to a sale and a purchase before they can receive advice on the effects of that and before they have the ability to contract out in advance. The second home would be acquired from the date that the contract for purchase was confirmed.
- A further consequence of the changed status of the family home is the position where relationship debt is secured over a family home, but where any relationship property portion of the equity in the home is insufficient to meet payment of the secured relationship debt (see comments below on relationship debt). There is therefore the potential for a party without a relationship property interest in a family home to leave a relationship without any relationship property but with a liability for relationship debt which may be a significant sum. In the Law Society's view, amending section 20 to address such situations could be a possible solution.

P6 Property acquired by one partner before the relationship began, or from a third party as a gift or inheritance during the relationship, should be classified as separate property

The Law Society agrees with this proposal.

P7 Payments received under the Accident Compensation Act 2001 or under a private insurance policy for a personal injury should be classified as separate property, except to the extent that the payment compensates for loss of income during the relationship

The Law Society agrees with this proposal.

P8 Any increase in the value of any separate property, or any income or gains derived from separate property, that is attributable to the application of relationship property or to the actions of either or both parties should be classified as relationship property. Section 15A should be repealed.

The Law Society agrees with this proposal.

P9 When the family home is separate property, any increase in the value of the family home occurring during the relationship should be classified as relationship property in every case

The Law Society agrees with this proposal.

P10 The burden of proof of establishing whether property is separate property should be on the owning partner

The Law Society agrees with this proposal.

Chapter 3 – Division

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

The Law Society agrees with this proposal.

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

The Law Society agrees with this proposal.

Paragraph 3.21 of the preferred approach paper states that “section 13 is not, however, an impossible threshold”. While not impossible, in the Law Society’s view, the threshold is almost impossible to reach. There have been few recent cases in which it has been met. The Law Society suggests an amendment to section 13 to slightly lower the threshold from *extraordinary* circumstances to *exceptional* circumstances.

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

The Law Society agrees with this proposal.

Chapter 4 – Qualifying relationships

P14 The PRA should apply in the same way to all marriages, civil unions and qualifying de facto relationships

The Law Society agrees with the proposal to treat all relationships the same.

P15 The eligibility criteria for de facto relationships should retain the existing definition of de facto relationship and the existing three year qualifying period

The Law Society disagrees with the proposal that the current definition of a qualifying de facto relationship be retained. It also disagrees that “the case law does not reveal widespread problems with the way the definition of de facto relationship is interpreted and applied by the courts.”⁵

The Law Society notes that:

⁵ Preferred approach paper, at paragraph 4.31(b).

- The Commission’s case review was for the period 2002 to 2009. There is often a lag of several years before issues caused by legislative change are addressed by the courts – this may explain the apparent lack of problems.
- The start date of a de facto relationship is frequently a key issue (and often the only issue) in PRA proceedings.
- The breadth of the current definition and the uncertainty it often creates, mean that issues cannot be resolved efficiently, particularly given the court’s reluctance to have preliminary issues hearings about whether or not a qualifying de facto relationship exists.⁶

The Law Society asks the Commission to reconsider its position in relation to the definition of a de facto relationship, and proposes that section 2D be amended to:

- make the “nature and extent of common residence” the first criterion in section 2D(2); and
- replace section 2D(3)(a) and (b), to provide that the first consideration will be the nature and extent of common residence and only if that criterion is not satisfied, does the court need to consider the remaining criteria.

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

The Law Society agrees with this proposal and notes that if parties do not want to be bound by the PRA they should be required to opt out of the Act.

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:

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

The preferred approach paper acknowledges the Law Society’s concern that a non-biological or adopted child might not provide an appropriate measure of commitment to a relationship so as to find a property entitlement under the PRA. This may be cured by retaining the court’s discretion where it considers it just to make an order.

While the “social trend” argument advanced by the Commission is noted,⁷ under the proposal the entitlement to a FISA only arises inter alia when “the parties have a child together”.⁸

The Law Society agrees with the reasoning at paragraphs 5.52 to 5.54 of the preferred approach paper and notes the Borrin survey where participants referred to “having a child together ...” as an important factor when considering whether to apply the equal sharing regime.⁹

The Law Society suggests that having two different definitions for a “child of the relationship” as a prerequisite to property entitlements under the PRA may lead to confusion and increased cost when considering contracting out and/or settlement agreements under Part 6 of the Act.

⁶ See *Cornelius v Cornelius* CIV 2007-419-001046, 25 February 2009, Panckhurst J.

⁷ Preferred approach paper, at paragraph 4.56(a).

⁸ Preferred approach paper, at paragraph 5.56.

⁹ Preferred approach paper, at paragraph 5.54.

In the Law Society's view, it is preferable to have a single definition of entitlement throughout the PRA and that such entitlement be where the parties have a child, as distinct from the definition proposed at paragraph 4.56 "partners who have children together".

Chapter 5 – Section 15

P18 Section 15 of the PRA and maintenance under Part 6 of the Family Proceeding Act 1980 should be repealed and replaced with a new, limited entitlement to share future family income through a Family Income Sharing Arrangement or FISA

The Law Society in its original submission supported option one – to retain section 15 but to lower the hurdles that Partner A must overcome – rather than supporting the option of FISAs (or financial reconciliation orders as they were called in the issues paper).

After receiving additional information, including the Commission's views of how the proposal would work, the Law Society now supports an amendment that would repeal section 15 and maintenance orders under Part 6 and replace it with a FISA, subject to:

- (a) the concerns about "contracting out", discussed below, being addressed; and
- (b) FISAs being incorporated in the legislation as one part of a suite of changes that must all be incorporated if the new Act is to work as a whole.

FISAs provide protection for spouses by providing a hybrid of an economic disparity compensation and a spousal maintenance payment following separation. In the Law Society's view, FISAs are:

- likely to be more widely available to New Zealanders than a current section 15 claim, so would be advantageous for children;
- simple and therefore readily understandable; and
- easier to calculate and predict than a current section 15 claim.

P19 A partner (Partner A) should be entitled to a FISA in the following circumstances:

- a. the partners have a child together; or
- b. the relationship was 10 years or longer; or
- c. during the relationship:
 - i. Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or
 - ii. Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship

The Law Society agrees with this proposal.

P20 The amount and duration of a FISA should be determined by a statutory formula that equalises the partners' incomes for a period of time that is approximately half the length of the relationship, up to a maximum of five years

The Law Society agrees with this proposal. However, it would be concerned if the FISA proposal was diluted from its currently proposed structure and duration, as it is well pitched, sensibly graduated and likely to achieve broad social justice.

It is also noted that the FISA proposal is one part of a suite of proposals where the value of the family home at commencement of the relationship remains the separate property of its owner, although increases in value, including reductions of mortgage debts, will be shared equally. The Law Society's comments regarding FISA are made on the basis that the entire suite of proposals will be incorporated in the new Act.

P21 Entitlement to a FISA will arise from the date of separation and default rules should provide for the implementation of a FISA by way of monthly periodic payments, unless the partners agree otherwise

The Law Society agrees with this proposal. It is important however that provision is made for emergencies: a party who is suffering hardship should be able to make an urgent application for a FISA following separation, and the order implemented swiftly. This is currently an issue with interim spousal maintenance, as well as child support.

P22 Partners should be able to make their own agreement as to the amount, duration and implementation of a FISA. The PRA should specify when an agreement should be regarded as a settlement agreement under section 21A, requiring compliance with the safeguards in section 21F in order for it to be enforceable.

The Law Society agrees with this proposal. It agrees that parties should be able to make changes to the content of a FISA to reflect their individual circumstances but, as discussed at P24 below, does not agree that it should be possible to contract out of FISAs per se.

P23 A court should be able to adjust a FISA and depart from the statutory formula and/or default rules of entitlement if satisfied failure to grant the application would result in serious injustice, having regard to a number of specified considerations

The Law Society agrees with this proposal.

P24 Partners should be able to contract out of the FISA provisions before or during the relationship under section 21 of the PRA

The Law Society does not agree that it should be possible to contract out of FISAs before or during the relationship – in the same way that parties cannot contract out of child support or spousal maintenance.

If it were possible to contract out of FISAs, the high threshold of serious injustice to challenge an agreement¹⁰ may be insurmountable in some cases and, in the Law Society's view, provides insufficient protection for economically disadvantaged parties.

Family lawyers anticipate that the majority of beneficiaries from FISAs will be women, who as a gender group tend to suffer disadvantage from lower pay and/or child care responsibilities (present or past). At the commencement of a relationship, the impetus for a contracting out agreement

¹⁰ Property (Relationships) Act 1976, section 21J.

understandably comes from the partner who has property.¹¹ A common contracting out paradigm involves a woman with little property, and a man with property or a desire to limit his exposure to compensatory payments in the event of separation. Consultation about reform of the PRA indicates that women in that paradigm rarely appreciate or anticipate the economic effects of bringing up children within a relationship, or ceasing work to support a travelling spouse, or the economic position of each party some years in the future.¹²

This could be addressed in one of the following ways to preserve, as far as possible, the FISA benefits:

- by requiring that contracting out of parts of an agreement relating to FISA be subject to court approval;
- by making FISA an exception to contracting out, with a principled reason to make the exception;
- by entrenching FISA, for example, lowering the threshold to “unfairness” or “hardship” in applications to set agreements aside when FISA rights have been compromised; or by specific provision that an application may be made to set aside or modify only those parts of an agreement relating to FISA.

P25 Strict enforcement measures should be put in place to ensure that, when partners cannot reach agreement, a FISA is implemented in accordance with the statutory formula and default rules of implementation or as otherwise ordered by the court

The Law Society agrees with this proposal.

The proposed enforcement provisions are crucially important to the workability of such orders, as there will likely be reluctant payers. Although it is a periodic payment, default mechanisms should include the ability to capitalise for repeated non-payment.

Consideration should also be given for a FISA to be capitalised in certain circumstances, even where the other party has not defaulted, for example, where to do so may result in the ability of the recipient party to rehouse themselves and the children.

P26 The Government should consider extending the existing administration and enforcement role of the Inland Revenue Department under the Child Support Act 1991 to include the administration and enforcement of FISAs

The Law Society agrees with this proposal, provided that the IRD is sufficiently resourced to be able to deal with all applications, particularly those that are urgent.

¹¹ The same considerations do not however apply in respect of agreements under section 21A at the end of a relationship as the effects of the parties’ respective roles in the relationship are known at that time. As discussed at P22, the Law Society recognises that on or after separation, there may well be separation agreements that impact on FISAs – indeed, trade-offs with the length of the FISA term are likely to be negotiated between the parties, for example the term shortened in exchange for a capitalised payment.

¹² Preferred approach paper, at paragraphs 5.21 – 5.22.

Chapter 6 – Trusts

P27 Section 44C of the PRA should be amended to provide a single, comprehensive remedy that will enable a court to grant relief when a trust holds property that was produced, preserved or enhanced by the relationship

P28 An amended section 44C should apply in three different situations:

- a. where either or both partners have disposed of property to a trust, at a time when the qualifying relationship was reasonably contemplated or since the qualifying relationship began, and that disposition has had the effect of defeating the claim or rights of either or both of the partners under any other provision of the PRA; or
- b. where trust property has been sustained by the application of relationship property or the actions of either or both partners; or
- c. where any increase in the value of trust property, or any income or gains derived from the trust property, is attributable to the application of relationship property or the actions of either or both partners

P29 The court should have broad powers that include ordering one partner to pay compensation to the other, ordering the trustees to distribute capital from the trust, varying the terms of the trust, and resettling some or all of the trust property on a new trust or trusts

P30 A court must be satisfied that making an order is "just", having regard to a number of specified considerations. These considerations are designed to ensure the amended section 44C achieves an appropriate balance between protecting partners' entitlements under the PRA and the preservation of trusts

P31 Partners should be able to agree not to make any claim under section 44C for the purposes of contracting out of the PRA under section 21, and to settle claims for the purposes of section 21A

P32 Section 182 of the Family Proceedings Act 1980 should be repealed

P33 Section 44 should remain unchanged and should continue to provide a remedy for other avoidance mechanisms

The Law Society strongly supports all the proposals contained in P27 to P33 in respect of trusts. The inappropriate, misguided or unfair use of trusts has resulted in much litigation, and injustice.¹³

The repeal of section 182 of the Family Proceedings Act 1980 is appropriate, provided the court retains an analogous power to redress trusts on separation. Currently, section 182 sits uneasily alongside the PRA remedies contained in sections 44 and 44C – in fact, section 182 is more generous in its application than either of those sections.

The Law Society supports amending section 44C, as set out at P28, which will have the effect of mirroring the remaining sections of the Act so as not to disadvantage parties where trusts have been utilised during the relationship.

On separation, the court needs to have appropriate powers to deal with the issues arising where property that would otherwise be classified as relationship property has been disposed of to trusts during the relationship. The amendments will need to capture issues such as increases in value, for example of a business held by a pre-existing trust at the commencement date of the relationship, but

¹³ Note 1, at Part G.

which during the course of the relationship increases in value due to efforts, or the application of relationship property, for example by earnings being retained by the company where the party is under-remunerated.

Those powers should not be limited under section 44C but should be available to the court generally, so it has the comprehensive toolbox it needs. In the Law Society's view, the appropriate place for those powers is section 33. In order to properly resource the court's suite of powers, the Law Society suggests the Family Court should have concurrent jurisdiction under the Trustee Act 1956 for matters that are ancillary to its relationship property jurisdiction.

The Law Society has considered the range of consequential amendments that will need to be made to ancillary areas, such as notices of claim, occupation orders, if the section 44C preferred approach is adopted. These sections have a remedial and protective purpose for a non-owner partner that either do not apply to trust property or it is unclear as to their application to trust property. These sections are set out below:

(a) Section 25(3) – Interim distributions

This section enables the court to make orders for interim distribution. Section 25(3) should be amended to specifically extend to trust property.

(b) Section 25(4) – Orders for sale

The court should be empowered to make an order for sale of property held by a trust. There are also cases where property is held by a company and the shares in the company are clearly relationship property. The court should be able to make orders that the company's property is sold. Section 25(4) should be amended in this respect.

(c) Section 26A – Postponement of sharing

Section 26A should be amended to enable the court to postpone the vesting of any share in the relationship property to also encompass trust property.

(d) Sections 27 and 28 – Occupation orders and tenancy orders

The court ought to be able to make occupation/tenancy orders in respect of trust property. Sections 27 and 28 should be amended to empower the court to make occupation or tenancy orders in respect of trust property.

Although there have been some cases where the court has considered that the current section applies to trust property (for example *Sutton v Bell* [2017] NZFLR 779), it is by no means certain that this interpretation will hold, particularly at Court of Appeal level.

(e) Section 33 – Machinery Provisions

Section 33 of the PRA should be amended to enable the court to have similar powers as it does under section 182 of the Family Proceedings Act, including to:

- i. make such orders with reference to the application of the whole or any part of the property settled;
- ii. vary the terms of any such agreement or settlement, either for the benefit of the children of the marriage or of the parties to the marriage;
- iii. resettle the trust property onto other trusts; or
- iv. direct the trustees to make distributions to one or other party.

(f) Section 42 – Notices of claim

Section 42 should be amended to enable a notice of claim to be registered against the title where the property is held by a trust. Currently *Heazlewood v Heazlewood* [2015] NZCA 213 has significantly curtailed the ability of one party to protect their contingent interest in property held by a trust, as has *Casey v Casey* [2018] NZHC 1930.

Chapter 7 – Children’s interests

P34 Children’s best interests should be a primary consideration under the PRA. This should be given effect through:

- a. a statutory principle, to guide the achievement of the purpose of the PRA.
- b. an overarching obligation on the courts to have regard to the best interests of any minor or dependent children of the relationship (replacing the existing obligation in section 26): and
- c. procedural rules, to ensure the court is provided with the information it needs in order to effectively perform its obligation at (b) above, and to promote to parents, practitioners and the court the importance of considering children’s best interests and the tools available for meeting children’s needs

The Law Society does not support this proposal.

The Commission’s preferred approach is that children’s best interests are a primary consideration under the PRA, including an “overarching obligation” on the courts to have regard to the best interests of any minor or dependent children. Using the term “overarching obligation” reaches across the Act, making every other section subject to that overriding consideration.

This is a significant departure from the current legislation. The PRA concerns the property entitlements of adult partners at the end of a relationship. The Act’s purpose is to recognise the contributions of the partners to the relationship and to provide for a just division of property when the relationship ends (section 1M). In the Law Society’s view, elevating the rights of children is inconsistent with this purpose, and may encourage an increase in strategic manoeuvring of parties over the children’s care arrangements in order to gain an advantage in the relationship property proceedings. The Law Society suggests that children should be a primary focus in relation to occupation of the former family home, rather than the division of relationship property.

It appears the Commission considers the Act is currently not sufficiently directive in ensuring the court gives attention to children’s needs. The Act recognises children’s interests: section 26(1) includes an obligation on the court to have regard to the interests of minor or dependent children of the relationship in PRA proceedings. The Law Society does not consider section 26 has been deficient in respect of that obligation.

As already noted, there may be a number of unintentional consequences of elevating the best interests of children in the PRA.

Children may become the focus of the relationship property proceedings. In Care of Children Act (COCA) proceedings, children can often become involved to an extent that is detrimental to them and/or their relationship with their parents.

The 2013 amendments to the Child Support Act 1991 provided for an adjustment in the amount of child support payable by a parent to reflect the amount of day-to-day care of a child that parent had.

Those amendments led to some parents acting strategically in relation to children's care arrangements to reduce the amount of child support payable.

It is easy to envisage a similar situation where one parent seeks to align with a child to further their particular view of property entitlement. This would not only have a negative effect on the child's ability to be parented by both parties but might produce polarisation and put the child in a loyalty bind with potential adverse psychological implications.

P35 A court should have the power to set relationship property aside for the benefit of any minor or dependent children of the relationship, if it considers it just (replacing the existing power in section 26). The court should be directed to have particular regard to any unmet needs of the child or children during minority or dependency

The Law Society agrees with this proposal.

P36 There should be a presumption in favour of granting a temporary or interim occupation or tenancy order on application by the primary caregiver of any minor or dependent children of the relationship. A court may decline to make an order if the respondent partner satisfies the court that an application is not in the child's best interests or would otherwise result in serious injustice.

The Law Society agrees there should be a presumption in favour of granting a temporary or interim occupation or tenancy order on application by the primary caregiver of any minor or dependent children of a relationship.

The Law Society also supports the implementation provisions as outlined at paragraph 7.47 of the preferred approach paper.

P37 The other tools available to meet children's needs should be improved by:

- a. broadening the jurisdiction of furniture orders to include family chattels as defined in section 2, and clarifying that a court must have particular regard to children's needs when making furniture orders:
- b. requiring a court to postpone vesting, if immediate vesting would cause undue hardship for any minor or dependent child of the relationship: and
- c. clarifying that an order made to benefit children under current sections 26, 27 or 28A is not grounds for departure from formula-assessed child support obligations under the Child Support Act 1991

The Law Society agrees with paragraphs (a) and (b) above. However, it queries whether the exclusion of an order made under sections 26, 27 or 28A from being taken into account in relation to a departure order may lead to unfairness in some situations for the non-occupying parent. Two examples might be where the parties' capital assets solely comprise the family home or where one party is unable to access their capital for some years.

In the Law Society's opinion, the provision of the home should be left as a factor that the child support agency is able to take into account in making a departure order, as it currently does with extensive travel costs to facilitate contact between a parent and child.

P38 Children’s participation in proceedings should be strengthened by lowering the threshold for appointing a lawyer for child to “necessary or desirable”, consistent with the Family Proceedings Act 1980

The Law Society does not agree with this proposal for the reasons given at P34, and has the following concerns if the threshold for the appointment of lawyer for child is lowered:

- (a) COCA proceedings have a fundamentally different focus to PRA cases: the former focuses on children’s welfare and best interests, including safety, while the latter is concerned with the division of relationship property, and the role of lawyer for child under the two statutes has a different focus;
- (b) there can be significant difficulties for the lawyer for child in explaining the nature of PRA proceedings to children;
- (c) it may lead to increased legal costs in litigation for the parties if they are required to contribute to the costs of the children’s lawyer, as is now the case in COCA proceedings; and
- (d) it is unclear whether children would have appeal rights under the PRA as they do under COCA. If children were to have appeal rights under the PRA:
 - (i) there could well be issues about who would be a suitable litigation guardian for minor children; and
 - (ii) it may lead to a situation where both parents are in conflict and litigation with their children.

P39 There is a need to review the effectiveness of the Child Support Act 1991 in meeting children’s needs and setting the level of financial support to be provided by parents for their children.

The Law Society agrees with this proposal.

Chapter 8 – Contracting out and settlement agreements

P40 The PRA should continue to enable partners to make their own agreement about how to divide their property during or in anticipation of entering into a relationship, and in order to settle any differences that arise between them. The procedural requirements in section 21F should continue to apply

The Law Society agrees with the Commission’s views that:

- (a) the general scheme of Part 6 is sound;
- (b) any reform of the PRA should contain provision for parties to contract out of and settle matters arising under the Act which broadly replicate the scheme of Part 6; and
- (c) the current law with its distinction between property owned by parties to a relationship and property owned by trusts should be maintained.¹⁴

¹⁴ Preferred approach paper, at paragraph 8.34.

P41 A new provision should be included in Part 6 of the PRA to the effect that a lawyer may use audio-visual technology to witness a partner signing a contracting out or settlement agreement under section 21F(4)

Lawyers are frequently now needing to use skype and other technology in order to properly witness agreements. The Law Society agrees that a new provision should be included in Part 6 of the PRA, or alternatively, that section 21F(4) is amended, to provide that a lawyer may witness agreements under Part 6 by using audio-visual technology.¹⁵

However, it would be too burdensome and inflexible for the statute to prescribe how audio-visual witnessing is to be managed. The onus of being satisfied that it is suitable in a particular case should be borne by the certifying lawyer.¹⁶

Any amendment to the PRA in respect of the use of audio-visual technology to witness the signing of a contracting out or settlement agreement should contain the safeguards listed at paragraph 8.45 of the preferred approach paper.

P42 Section 21E of the PRA and the Property (Relationships) Model Form of Agreement Regulations 2001 should be repealed

The Law Society agrees that section 21E of the PRA and the Property (Relationships) Model Form of Agreement Regulations 2001 should be repealed. The model form of agreement creates risks by inviting use of that template without completing the due diligence inquiries and the consideration of what is required for each situation.

P43 A court should have the additional powers under section 21J to set aside an agreement in part, or to vary an agreement if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice

The Law Society agrees it is appropriate that the court should have additional powers under section 21J to set aside an agreement in part or to vary an agreement.

P44 Section 21J(4) should be amended to require a court to have regard to the best interests of any minor or dependent children of the relationship in deciding whether giving effect to a contracting out or settlement agreement would cause serious injustice

The Law Society has concerns about some aspects of the Commission's proposals in relation to non-complying agreements and children's interests.

The Law Society maintains its position that the PRA is about adult rights and that the suggested advantages of elevating children's interests as a consideration to Part 6 (and other parts of the Act) are likely to be outweighed by disadvantages of increased complexity, uncertainty and expense.

However, if the Commission considers that children's interests should be a factor in Part 6, then those interests should be addressed by amending section 21J(4) to require the court to have regard to the interests of children. The Law Society does not consider that anything is added by the adjective "best" in P44.

¹⁵ Preferred approach paper, at paragraph 8.42.

¹⁶ Preferred approach paper, at paragraph 8.42.

Additional matters – section 21H

The Law Society notes that the Commission does not propose any amendment to section 21H (as was suggested in our submission on the issues paper)¹⁷ to include a list of matters for the court to consider when addressing the discretion under that section.

The Law Society agrees with the Commission's comments that the High Court has confirmed that when considering the section 21H discretion, it should have regard to the criteria of section 21J. However, in the Law Society's view, that implicit recognition of the role of section 21J(4) should be made explicit. The principal advantage of incorporating reference to the section 21J(4) criteria into section 21H is that the criteria are apparent on a first reading of the statute, rather than by reference to case law.

Chapter 9 – Tikanga Maori

The Law Society suggests the Commission seeks input on proposals P45 to P51 from bodies such as Te Hunga Rōia Māori o Aotearoa, the Māori Law Society.

Chapter 10 – Resolution

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

The Law Society agrees with this proposal.

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

The Law Society agrees with this proposal but considers that individualised advice as to substantive legal matters such as classification of property and/or relationships and possible entitlements under the PRA should be provided by lawyers. Given the complex issues often associated with relationship property matters, there is a risk that parties receiving inaccurate initial advice will be disadvantaged in the process of resolving relationship property issues.

Better access to early legal advice (including improved provision for legal aid funding as suggested at P54) would be a positive step in ensuring that parties have sound legal advice from the outset about resolving their particular relationship property issues.

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

The Law Society supports this proposal.

In respect of current legal aid provision for pre-proceedings advice and representation, the Commission notes the limited access to fully subsidised legal advice on PRA matters, given that legal

¹⁷ Note 1, at J15.

aid and the Family Legal Advice Service (FLAS) are not available for legal assistance, advice or representation for dispute resolution processes out of court, such as private mediation.¹⁸

Legal aid is available for pre-proceedings advice and assistance and for the preparation and execution of a section 21A agreement. Legal aid will typically be extended to cover private mediation as part of the pre-proceedings fixed fee.

The issue is not about the unavailability of legal aid, but rather that most legal aid providers will not undertake relationship property work due to the inadequate time allowed in the legal aid steps and the remuneration provided. Legal aid funding only covers a fraction of the costs that a lawyer accrues on a relationship property file due to the time and remuneration allocated by legal aid.

The Law Society notes the Commission's reference to the possibility of extending the scope of FLAS for PRA matters.¹⁹ FLAS was introduced following the removal of legal aid for pre-proceeding advice and legal representation in the early stages of COCA proceedings. FLAS provides for limited legal advice and information. It does not provide for legal representation. It has created fragmentation in legal representation. It is also an administrative burden as there are two systems – FLAS and legal aid – both of which have different income eligibility thresholds, tasks to be completed, remuneration rates and administrative systems.

The Law Society has recommended in its submission to the Independent Panel evaluating the 2014 changes to the family justice system, that FLAS should be disestablished and legal aid reinstated for COCA proceedings, including pre-proceeding matters.²⁰

In our view, it would be a retrograde step to introduce FLAS in respect of preliminary relationship property advice, as lawyers would not be able to undertake the due diligence required in order to properly provide legal advice and discharge their professional obligations.

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

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

The Law Society agrees with the Commission's proposals to promote out of court dispute resolution for PRA matters, subject to an exemption where urgent application is required, for example to preserve property.

However, the Law Society does not believe that such proposals would make a significant difference in practice. As noted in our original submission, filing proceedings in court is already a last resort. Lawyers routinely use out of court resolution processes, especially negotiation and mediation. As the

¹⁸ Preferred approach paper, at paragraph 10.11.

¹⁹ Preferred approach paper, at paragraph 10.36(d).

²⁰ NZLS submission on the Examination of the 2014 Family Justice Reforms, 12 November 2018, at paragraph 50. The submission is available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0004/128722/I-MOJ-Family-Court-Review-12-11-18.pdf.

Commission notes at paragraph 10.39, this is reflected in the low number of relationship property cases within the court system.

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

The Law Society supports the proposal for state-funded dispute resolution services for PRA matters, subject to the safeguards set out by the Law Commission.²¹ These include access to essential legal advice before and during any dispute resolution process. This ensures that any agreement reached is able to be properly witnessed and certified.

In addition to those safeguards, the Law Society recommends that the mediator or facilitator of a dispute resolution process must be suitably qualified and experienced in relationship property matters. This may be addressed by amending regulation 7 in the Family Dispute Resolution Regulations 2013 in respect of the qualifications and competency requirements of an applicant seeking to be appointed as a Family Dispute Resolution (FDR) provider by an Alternative Dispute Resolution Organisation.

In its original submission, the Law Society considered that a separate dispute resolution process might be established for low value property cases, subject to a number of safeguards. Having considered the Commission's views,²² it agrees with the Commission's preference not to establish a separate dispute resolution service. It considers that a state-funded service referred to above at P56 would address the needs of a full range of relationship property disputes, irrespective of property value.

P57 The PRA should include an express duty of disclosure.

The Law Society agrees with this proposal, which is in line with its original submission.

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

The Law Society agrees with this proposal. Such a committee should comprise members of the Family Court judiciary and senior family law practitioners who are experienced in relationship property matters.

As already noted, it is essential that rules are brought into force at the same time as the new Act. It would be counterproductive for the legislative changes to be brought into force before the supporting rules are in place.

P59 The Family Court Rules should be amended to include:

- a. pre-action procedures that set out dispute resolution and disclosure requirements prior to making an application to the court: and
- b. a clear procedure for initial and subsequent disclosure tailored to the needs of PRA proceedings.

The Law Society agrees with this proposal. In respect of the proposal for the rules to include pre-action procedures regarding dispute resolution, the Law Society reiterates its concern that an

²¹ Preferred approach paper, at paragraph 10.43.

²² Preferred approach paper, at paragraphs 10.44 – 10.45.

exemption would be required for urgent applications, for example, to preserve property (see comments at P55).

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

- a. the consequences for non-compliance with disclosure obligations should be clearly set out in the Family Court Rules;
- b. guidance should be provided on the imposition of costs and other consequences for non-disclosure; and
- c. case management processes that facilitate application for, and imposition of, costs for non-disclosure should be considered.

The Law Society agrees with these proposals.

P61 The Ministry of Justice should:

- a. provide clear guidance to parties about how to complete key court documentation, including information about the potential consequences of non-compliance; and
- b. develop process guides to better prepare self-represented litigants for court processes.

The Law Society agrees there should be better public information provided by the Ministry about the law relating to relationship property. Such information should not attempt to provide legal advice nor suggest that relationship property matters can be dealt with on a DIY basis. Self-represented parties often do not understand what comprises relationship or separate property or debts, or the rules around intermingling of property. These are not simple matters to explain in a way that would truly enable participants to dispense with legal advice in this complex area.

Overall, the Law Society agrees that there needs to be greater public awareness of the general rules about classification and sharing of property, and that ideally, this information could be provided at “common trigger points”²³ as stated in our original submission (at paragraph A4). The Borrin survey confirmed that even key principles of sharing under the Act are not well understood by the general population.

In particular, the Law Society encourages provision of information about pre-action procedures and the availability of out of court dispute resolution mechanisms. Greater attention should also be given to the provision of adequate funding for legal aid, as previously stated. As grants of legal aid will generally be repayable by legally aided parties on the resolution of property matters, increasing legal aid funding is unlikely to impact significantly on the overall legal aid budget.

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

The Law Society agrees with this proposal. It is essential that the Family Court Rules are implemented by a properly constituted committee and brought into force at the same time as any new Relationship Property Act.

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

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

²³ Preferred approach paper, at paragraph 10.32.

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

The Law Society supports the clarification of the powers available under section 38, such as requiring both parties to make payment into court for the inquiry and defining the scope of the inquiry, which may encourage greater use of the section.

The section 38 inquiry is most often used when there is a party who is not engaged in the process or is not following directions to provide relevant disclosure.

However, the Law Society is aware that section 38 is under-utilised and frequently the court is reluctant to direct such an inquiry to be held. Part of the reluctance relates to the costs falling on the court and the ability in some cases to use other remedies such as notices to admit facts or notices for further particulars.

While the inquiry under subsection (b) would appear to provide the court with inquisitorial powers, the court must limit its inquiries to relevant and admissible matters under sections 6, 7, 8 of the Evidence Act 2006.

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

The Law Society agrees with this proposal. Non-compliance with court orders and directions creates unnecessary expense and delay. All parties, whether legally represented or self-represented, who have failed to comply with procedural directions should be liable for costs awards. Guidance will be particularly important where a party is not legally represented.

Currently, there is some inequity due to the prohibition against an award of costs against a legally aided party except in exceptional circumstances.²⁴ In the Law Society's view, where there is property payable to a legally aided party on resolution of matters, the restriction on the court's jurisdiction to award costs is not necessarily appropriate.

Removal of the restriction on awarding costs in such circumstances would ensure that both parties face the same consequences for non-compliance with timetabling and other directions, and would incentivise resolution as inexpensively, simply, and speedily as is consistent with justice.²⁵

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

The Law Society agrees with this proposal. It would be unsatisfactory to import the current District Courts scale of costs for PRA cases. Appropriately scaled costs established in the Family Court Rules should be established. However, discretion should be maintained so as to recognise that cases between ex-partners under the PRA are not akin to ordinary civil litigation and that often there is benefit to both parties in achieving resolution. Generally speaking, costs ought not to be imposed unless one party has taken an unreasonable approach.

²⁴ Legal Services Act 2011, sections 45 to 46.

²⁵ As required by the Property (Relationships) Act 1976, section 1N(d).

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

The Law Society agrees with this proposal. Application and hearing fees for PRA proceedings are prohibitive for many parties. Frequently, it is the party dealing with the disengaged party (who fails to provide disclosure or consider sensible resolution), who is forced to bring proceedings in the first place, and therefore bears the full application and setting down fees. This creates inequity.

The Law Society favoured the Commission's earlier proposal – that costs are shared so that there are equal, but not prohibitive, filing costs for both the applicant and respondent. However, the Law Society agrees that the Ministry should consider reducing the application and hearing fees in PRA matters, or alternatively, accept the Commission's earlier proposal that costs are shared between the parties.

Chapter 11 – Creditors

P67 The Government should undertake further policy work that considers the options for amending or repealing the protected interest provisions within a broader investigation into the relationship between the insolvency regime and the interests of partners under the PRA. Such an investigation should also:

- a. reach a concluded policy decision on the availability of retirement savings to creditors in bankruptcy;
- b. consider whether to give greater rights to bankrupts and their families over unsecured creditors in the Insolvency Act 2006; and
- c. progress the repeal of the Joint Family Homes Act 1964.

P68 The PRA should clarify that a creditor may only challenge an agreement, disposition or other transaction between the partners that has the effect of defeating the rights of creditors as void within two years of the agreement, disposition or transaction being made.

P69 The Official Assignee should be able to treat an agreement, disposition or other transaction between the partners as an insolvent transaction under the Insolvency Act 2006 if it:

- a. enabled a partner to receive more than they would in the other partner's bankruptcy; and
- b. was made within the two years immediately before the partner is adjudicated bankrupt.

P70 An application by the Official Assignee to set aside an insolvent transaction should displace any claims by other creditors that an agreement, disposition or other transaction has the effect of defeating creditors' rights.

P71 A court shall not be able to order recovery from a partner who receives property under a section 21A agreement if the recipient:

- a. received the property in good faith from the other partner;
- b. did not suspect the other partner was insolvent; and
- c. gave value for the property or altered their position in the reasonably held belief that the transfer of property was valid and would not be cancelled.

The Law Society agrees with the proposals at P67 to P71.

Relationship debt

The Law Society notes that relationship debt has not been specifically addressed in the preferred approach paper. In the Law Society's view, there are issues with the way debt is currently dealt with in the PRA that would benefit from amendment.

(a) *Jurisdiction to make orders in respect of responsibility for debt where there is no net relationship property:*

Section 25 allows the court to make orders determining shares in and/or dividing relationship property between the parties. The value of relationship property available for division is calculated by deducting relationship debt (section 20D), but there is no specific provision for the court to determine responsibility for debt.

This can be a source of injustice particularly where relationship debt is in one party's name and there is insufficient relationship property to allow for a fair net division of assets and liabilities.

(b) *Protected interest:*

The Law Society's previous submission at K3 referred to the anomaly that the "protected interest" confers greater protection on those who have invested in a home rather than other types of property asset.

The current provision discriminates against those who do not own a home, as the "protected interest" only covers the home, and not other forms of relationship property such as KiwiSaver which are not protected in the same way against creditors. That rule also operates unevenly throughout the country due to the disparity in house values around New Zealand. However, any amendments to section 20C would need careful consideration as it is important that creditors' rights generally are not unnecessarily eroded.

(c) *Section 20E – compensation for satisfaction of personal debts:*

Section 20E allows the court to make an adjustment where Party A's personal debt has been satisfied out of relationship property. The section has an internal inconsistency: subsection (2) provides that the court *may* make an order on its own initiative but *must* make an order if party B applies for such an order. Given the range of circumstances in which a personal debt may have been paid out of relationship property, the Law Society considers that the court should have a discretion whether to make such an order, whether on its own initiative or on the application of a party.

(d) *Combined operation of section 20E and FISAs:*

The Law Society highlights the potential for unfairness arising from the combined operation of section 20E and FISAs. For example, Party A incurs a significant student loan to qualify as a doctor before the relationship. Party A then goes on to earn a significant income throughout the relationship and has paid off most of the student loan from income by the time of the separation. Such repayment of personal debt from relationship property triggers section 20E.

However, Party A's high income, arising as a direct result of the qualification, would be shared for a period following the separation if the parties' circumstances meet the FISA criteria. Both parties have benefited from Party A's high income during the relationship. Party B will continue to benefit from it after the separation under the FISA. The categorisation of the student debt as personal debt in such circumstances may be seen as unfair.

This could be addressed in one of three ways:

- (i) by amending section 20E to make an award discretionary (see (c) above);
- (ii) by widening the definition of relationship debt in section 20; or
- (iii) through the discretion in awarding a FISA.

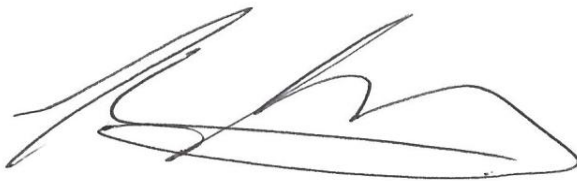
(e) *Discretion under section 20:*

There is no discretion under section 20 as to the classification of debt as personal or relationship. There are situations where the lack of discretion may cause injustice. For instance, where a party has unilaterally incurred a relationship debt, it might be appropriate for such a debt to be classified as personal or for some adjustment to be available in favour of the other party. The Law Society notes the wording “unless the context otherwise requires” in the introductory part of subsection (1), which might be argued to create a discretion but thus far there have been no decisions interpreting this part of the section. The Law Society suggests that this issue should be considered as part of the Commission’s review.

Conclusion

The Law Society hopes these comments are helpful to the Commission and would be happy to discuss the comments in further detail. Contact can be made in the first instance through Kath Moran, NZLS Family Law Section Manager (kath.moran@lawsociety.org.nz / 04 463 2996).

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Kathryn Beck', with a large, stylized flourish at the end.

Kathryn Beck
President