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Property (Relationships) Act Review
Law Commission
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Re: Property (Relationships) Act 1976 review – Issues Paper 41

Introduction

The New Zealand Law Society welcomes the opportunity to comment on the Law Commission's review of the Property (Relationships) Act 1976 (PRA) in the *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* Issues Paper 41, October 2017 (paper). We note that the review is focussed on making the legislation more accessible to all New Zealanders. To facilitate that, renaming the Property (Relationships) Act 1976 should also be considered: the 'Relationship Property Act' would be more logical and understandable for the public.

The Law Society has drawn on the expertise of highly experienced family law practitioners (listed in Appendix A) and records its gratitude for the extensive input and assistance it has received in preparing this submission.

Below is a brief executive summary, followed by answers to the paper's questions. We have focused on issues of legal principle, clarity and workability (such as the practical workability of proposed amendments in relationship property disputes and proceedings that come before the Family Court).

Executive summary

The Law Society agrees with the Commission's preliminary view that the framework of the PRA is sound and in general terms achieves a fair and just division of property when partners separate. The paper is comprehensive and outlines many areas in which the legislative response to relationship property division could be improved. The Law Society agrees that in some areas legislative amendment would improve the application of the Act, as discussed in more detail in the body of this submission. Some key features are noted below.

Public education campaign

The Law Society agrees that there needs to be greater public education about the PRA and the obligations and responsibilities that arise under it.

Jurisdiction of the Family Court

The Family Court should have jurisdiction to determine all issues related to PRA proceedings. In the Law Society's view, the jurisdiction should be expanded to enable the Family Court to deal with trust and company property in respect of relationship property proceedings.

Trust and company law are distinct areas of law with their own jurisprudence. Caution must be exercised to ensure that any proposed amendments to the PRA do not undermine the principles of other areas of law or result in unintended consequences.

(a) Trusts

The Law Society agrees that trusts have become problematic in the relationship property context. In our view, the Family Court should have power to treat property held in a trust as relationship property, wholly or partly, where such property would otherwise have been classified as relationship property. There is clear rationale for reform because injustice arises when a trust has the effect of circumventing a number of provisions of the PRA. The Law Society agrees with the Commission that section 44C should be amended to enable a claim under sections 9A and 15 to be brought where the effect of the disposition of property has disentitled a party to a claim under those sections of the PRA. In the Law Society's view, such an amendment should also enable a claim to be made under section 18B.

(b) Company law

Currently, any orders made by the Family Court do not affect a company. In the Law Society's view, the Family Court's existing powers for dealing with company matters in respect of relationship property proceedings need to be broader than those in sections 33, 44 and 44D to 44F. For example, the Family Court needs power to:

- prevent dispositions of company shares to third parties while relationship property matters are being resolved
- temporarily remove a reckless spouse/partner as a director if their actions are diminishing the value of the shares or jeopardising the solvency of the company
- remove or retain notices of claim under the Land Transfer Act 2017

Family Court Rules 2002

There are many options for reform discussed in the paper, some of which will require legislative amendment while others will require amendment of the Family Court Rules 2002 (rules). For many years, the Law Society has advocated for a complete review of the rules. Incremental changes to the rules over many years have resulted in a number of anomalies. In our view, a complete review of the rules is still required and any proposed changes to the rules resulting from the review of the PRA should be considered by a specialist Family Court Rules committee.

Resolving matters out of court

The availability of alternatives to litigation is essential to an effective and efficient dispute resolution process. The cost and social efficiency benefits to both the Family Court and parties in reaching an effective non-litigated agreement are self-evident. The Law Society agrees that cost is a key challenge for access to dispute resolution.

The Law Society considers the current FDR model in place for COCA matters is inappropriate for resolving relationship property matters, as these are often factually and legally complex. In addition, FDR is not appropriate without legal representation. Any agreement reached at FDR would need to be formalised, signed, witnessed, and independently certified by a lawyer.

We do not agree that mandatory mediation or arbitration are desirable or necessary. Lawyers and parties already utilise a range of pre-court dispute resolution techniques (including negotiation) and filing proceedings in court is already a last resort.

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

It would be more beneficial to the resolution of disputes out of court to have mandatory pre-court procedures such as disclosure and codified rules of compliance than a mandatory pre-court dispute resolution process.

There is no express statutory duty for disclosure in out of court matters (pre-filing). The requirement for ongoing disclosure should be expressly provided for in the principles of the PRA so that it clearly applies to pre-court and in-court matters.

Family Court proceedings

Costs and penalties; and filing and hearing fees

The Law Society agrees that the following should be available: stricter consequences for non-compliance, including awards of costs; financial penalties for non-disclosure; and the ability to deduct penalties from the defaulting party's share of the relationship property.

Costs available in PRA proceedings should have their own particular scale. These should be developed by a specialist Family Court Rules committee. In our view, the ability to award costs against a party who has failed to file a proper affidavit will help to secure better compliance.

Filing and hearing fees for relationship property proceedings are significantly higher than filing fees for parenting orders. In our view, the fees create unreasonable impediments for clients trying to resolve relationship property issues when they have reached an impasse, and reform options should be investigated.

Delays

There are significant delays within the Family Court itself because of the unavailability of judicial hearing time, combined with registry delays. The use of sanctions such as monetary penalties for failure to comply with timetabled directions would be a helpful and appropriate way to encourage compliance.

Court procedure and case management

The Law Society supports a more structured case management approach, tailored to relationship property cases, which would allow judicial discretion for some variation in individual cases.

Cases could be triaged to a track, for example, a standard or complex track at the first judicial conference and complex cases managed by a single judge. There may be merit in a fast track specifically for standard cases where the relationship property pool consists of the family home and vehicles below a certain value. An early opportunity to identify issues by filing a memorandum of issues at the judicial conference would be helpful. Any case management procedures should be included in the Family Court Rules and considered by a specialist Family Court Rules committee. There should be a right of appeal available for interlocutory decisions with leave of the court.

Child-centred approach

The paper questions whether children's interests should be given greater importance in relationship property proceedings. The PRA is about the property entitlements of adult partners that arise at the end of a relationship. The purpose of the PRA is to recognise the contributions of the partners to the relationship and to provide for a just division of property when the relationship ends. In the Law Society's view elevating the rights of children is inconsistent with this purpose. It 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 PRA currently recognises children's interests. Section 26(1) includes an overarching obligation on the court to have regard to the interests of any minor or dependent children of the marriage, civil union or de facto relationship in any PRA proceedings. The court is also able to make a range of orders that can directly or indirectly benefit children and appoint a lawyer to represent a child in PRA proceedings if there are special circumstances that make an appointment necessary or desirable.

Division of relationship property where one spouse or partner dies

Part 8 of the PRA is a discrete area of law that is not well known or understood. People generally only become aware of the implications of Part 8 either when they receive advice about it on making a will, or following the death of a partner or spouse.

The Law Society agrees with the Commission's preliminary view favouring a separate statute dealing with succession. However, in the Law Society's view, it would be beneficial to amend sections 75, 76, 87, 88 and 95 (refer to our comments in Part M) to address the operational problems raised with these sections and for clarification.

PART A – Introducing the Law Commission Review

A1 Does the framework of the PRA described in Chapter 3 remain appropriate both in 2017 and in the foreseeable future?

The Law Society agrees with the Commission's preliminary view that the framework of the PRA is sound and in general terms achieves a fair and just division of property when partners separate.

a. Should this regime continue to be based primarily on a theory of entitlement, supplemented by theories of compensation and need?

The Law Society agrees the PRA strikes the right balance between the theories of entitlement, compensation and needs. We also agree that changing this balance would require a substantial redesign of the PRA, which in our view, would introduce greater discretion and uncertainty into the law.

In respect of compensation, the Law Society makes specific comment on section 15 under Part F of this submission.

b. Have we accurately articulated the explicit and implicit principles which should guide the content and interpretation of the rules in the PRA? Should any of the principles be amended or removed? Should any other principles be added?

The Law Society agrees that the Commission has articulated the principles which should guide the content and interpretation of the PRA, subject to the comments below.

There could be benefit if the implicit rules identified at [3.11(a) to (h)] were incorporated with the principles contained in section 1N of the PRA, perhaps as sub-principles: for example, the principles could explicitly state that "a just division of property reflects the assumed equal contributions of both parties".

In respect of the implied principle at [3.11(f)], that "a just division of relationship property should have regard to the interests of children of the relationships," we refer to our comments at Part I below.

In respect of the implied principle at [3.11(i)], that "a single, assessable and comprehensive statute should regulate division of property when partners separate," we do not agree that this principle should be included. People should have the freedom to organise their property affairs as they see fit. Trust law and company law are distinct areas of law both with their own jurisprudence. It is important that amendments to the PRA do not result in unintended consequences in respect of trust and company law. While the Law Society agrees that in certain circumstances the court should be able to claw back trust property into the relationship property pool, it is important that the principles of trust and company law not be undermined. We refer to our discussion on trusts in Part G.

c. Does further consideration need to be given to how tikanga Māori is taken into account in the framework of the PRA? If so, what might this look like?

The Law Society does not have specific expertise in this area and suggests that the Commission consult with Te Hunga Rōia Māori o Aotearoa, the Māori Law Society, as it will have in-depth knowledge of matters in respect of Māori.

A2 Should specific terms be substituted with the neutral terms of "relationship" and "partner" where there is no need to distinguish between relationship types?

We agree that neutral terms of "relationship" and "partner" should be used rather than relationship-specific terms.

We propose that gender-neutral language be used in section 2D and that a de facto relationship be defined simply as "a relationship between two persons:

a. who are both 18 or older; and

b. live together as a couple; and

c. who are not married to/in a civil union with one another."

We also refer to our comments at B12 and B13 in respect of the PRA being able to recognise the start of a de facto relationship at the age of 16.

A3 Do you agree that there needs to be greater public education about the PRA and the obligations and responsibilities that arise under it?

Yes.

A4 Do you have any ideas about ways to promote public education relating to the PRA? Do you agree with any or all of the ideas we have suggested?

We agree with the proposals at [4.58], namely:

- Informing buyers of residential property of potential PRA issues;
- Providing couples who are marrying/entering civil unions with information about the PRA;
- Advising immigrants about the PRA; and
- Including education on the PRA in school civics education programmes.

We also suggest education on PRA matters for others, including financial planners, business advisors, and chartered accountants.

PART B – What Relationships Should the PRA Cover?

B1 Do you agree with our preliminary view that the existing bilateral opt-out regime for de facto relationships is appropriate?

The Law Society agrees with this preliminary view

B2 Is the PRA's bilateral opt-out approach causing issues for de facto relationships? If so, would those issues be best addressed by re-examining that approach, or in other ways, such as education; changes to the definition of de facto relationship; changing the minimum duration requirement (see Part E); changes to the PRA's rules of classification and division (see Parts C and D); changes to the PRA's contracting out provisions (see Part J) or something else?

Differing views of relationships may be influenced by generational expectations. A "one size fits all" legislative regime may no longer be appropriate.

The Law Society agrees that the bilateral 'opt-out' approach is causing issues for some de facto relationships. This could be for varying reasons. The commencement date of the de facto relationship may be the main reason. The nature of the test for the relationship commencement date leaves parties unsure as to when their property rights commence. For example, when both partners are living in separate residences and have separate bank accounts they may not understand they could be captured by the definition of de facto relationship and that to avoid property rights being established they need to contract out of the PRA.

There are increasing numbers of subsequent relationships involving older partners with significant assets (for example, a family home with the average Auckland value of approximately $1 million). If these partners fail to enter into a contracting out agreement, this may result in equal division of the property if the relationship ends.

It appears that section 21 agreements may be too readily set aside, notwithstanding the high statutory threshold of "serious injustice". Consideration should be given to legislative amendment to raise the threshold for setting aside contracting out agreements. The threshold test might include a two-stage test: first, a finding of "serious injustice" and second, that a procedural requirement under section 21F(2) to (5) has not been satisfied.[1] This would be consistent with the principle that partners are entitled to contract out of the Act (i.e. they "may make any agreement they think fit with respect to the status, ownership, and division of their property": section 21(1)). The "serious injustice" threshold is discussed further under Part J.

We have considered the section 2D(2) factors and our comments are set out below under questions B5 – B8, particularly in respect of the nature and extent of a common residence.

B3 Does the definition of de facto relationship unduly capture relationships that are not substantively the same as marriages and civil unions?

The Law Society does not think the definition of de facto relationship unduly captures relationships that are not substantively the same as marriages and civil unions. However, people are often surprised to discover that, at law, their de facto relationship may have commenced at a time prior to their own

[1] See section 21F(2) – (5), PRA: In order for a section 21 agreement to be valid the agreement must be in writing and signed by both parties; each party to the agreement must have independent legal advice before signing the agreement; the signature of each party must be witnessed by a lawyer; and the lawyer who witnesses the signature of a party must certify that, before the party signed the agreement, the lawyer explained to that party the effect and implication of the agreement.

opinion of when it began, or whether a de facto relationship began at all. Examples of this are older people entering into subsequent relationships, "lodgers", and relationships where participants agree to sexual interaction with no commitment.

B4 Did you know that common residence is not a requirement for a de facto relationship?

Lawyers report that many clients are unaware that common residence is not a requirement to establish a de facto relationship.

B5 Should more weight be given to the nature and extent of common residence? If so, why?

There is merit in giving priority to certain section 2D(2) factors – in particular section 2D(2)(b), the nature and extent of a common residence. Most people can easily relate to the concept of a 'de facto' relationship where two people live together in the same household, and judge it a major step in their relationship to 'move in' together. Giving this factor primacy would also reflect High Court jurisprudence. In the case of *L v P*, Justice Asher considered that "the central plank of a de facto relationship is the parties living together".[2]

B6 Do the range of factors in section 2D(2) still reflect what should be considerations when deciding whether two people are in a de facto relationship? Are any of the factors more, or less important?

There may be merit in reviewing the current range of factors in section 2D(2). In particular, the court should consider whether the relationship in question is a second qualifying relationship. Recent cases suggest the parties themselves can sometimes be uncertain as to the nature of their relationship.

Aside from the priority we think due to common residence, the Law Society does not recommend that any of the remaining factors, or any added factors, should be given different weightings. The courts are able to attach such weight to various factors as is appropriate in the circumstances of a particular case (as required by section 2D(3)(b)).

In terms of section 2D(2)(g) – whether two people who live together as a couple have the care and support of children – the Law Society believes that a "child" should be limited to a child born or adopted into the relationship (that is, a de facto couple's biological or adopted child as opposed to the child of a pre-existing relationship).

B7 Does the definition of de facto relationship achieve the right balance between flexibility and certainty?

Arguably it is inconsistent to have an 'opt-in' approach for marriage and civil unions (where entitlement is established from the marriage/civil union date), but an 'opt-out' approach for de facto relationships (with some de facto couples contracting out of equal sharing but others not realising they are in a qualifying de facto relationship and not realising the PRA's application to them). Significant education to

[2] *Lawson v Perkins* [2009] NZFLR 401 (HC) at [44].

inform the public about the PRA should assist in creating more certainty for the public in respect of property entitlements.

Nevertheless, the Law Society believes the courts are exercising discretion where required, and does not favour an exhaustive list of factors.

B8 Would any of these options achieve a better balance between flexibility and certainty, or better capture the essence of what it means to be in a de facto relationship?

The paper sets out three options for reform:

Option 1 – make section 2D(2) an exhaustive list of factors

Option 2 – give more weight to one or more section 2D(2) factors

Option 3 – introduce rebuttable presumption(s) that two people are in a de facto relationship

As noted above, the Law Society does not support making section 2D(2) an exhaustive list of factors, and therefore does not favour option 1.

The Law Society prefers option 2, giving more weight to the "nature and extent of common residence" over all other section 2D(2) factors, for the reasons set out above. We agree with the comment at [6.55] that the remaining factors should be "indicators" to be considered by the court where relevant to a particular case, while preserving judicial discretion and flexibility.

Views within the profession diverge in respect of option 3. Some lawyers favour a rebuttable presumption triggered by the couple's circumstances. For example, partners could be presumed to be in a de facto relationship when they have shared a primary residence and maintained a common household with a child they have had together, for a set period, such as two years; and a period of three years if partners have shared a primary residence but have no child. Where a presumption applies the burden of proof would be reversed to lie with the party wishing to avoid the PRA's rules. A two- and three- year differentiation acknowledges the significance of parties having a child together and the impact this may have on earning capacity and wealth accumulation. There is benefit in having an entitlement commence earlier when the couple has or adopts a child.

On the other hand, some lawyers do not favour the introduction of such a presumption and do not believe that this would create greater certainty. This group prefers to give the "nature and extent of common residence" more weight and to leave the remaining factors to the court's discretion to assign the appropriate weight in respect of the particular case.

B9 Should any new definition of de facto relationship have retrospective or prospective effect?

In the Law Society's view, transitional provisions similar to those at sections 96 – 99 in Part 9 of the PRA should be enacted if any new definition of de facto relationship is introduced.

B10 To what extent should Māori customary marriage be subject to the PRA?

The Law Society suggests that the Commission consult Te Hunga Rōia Māori o Aotearoa, the Māori Law Society, as it will have in-depth knowledge of matters in respect of Māori.

Paragraph [7.4] states that Māori customary marriage likely falls within the definition of a de facto relationship. The PRA should specifically recognise that this is the case. The Law Society agrees that customary marriage does not carry with it any rights to property held by the other spouse, as is the case for marriages and civil unions (as per [7.5]).

B11 Should different rules apply to Māori customary marriage? If so, what would those rules provide? Would they still apply if the parties to the Māori customary marriage also entered a marriage or civil union? Would they be affected by the PRA's approach to classification of property (discussed in Part C) (including or excluding Māori land from the PRA and taonga from the definition of family chattels)?

As noted above, the Law Society suggests that the Commission consult with Te Hunga Rōia Māori o Aotearoa, the Māori Law Society.

B12 Can the age limit of 18 years for a de facto relationship be justified, and if so, on what grounds?

The Law Society does not believe the age limit of 18 years can be justified, notwithstanding the view expressed in [7.10] that a higher age limit might protect young people who drift into a de facto relationship. We agree it is appropriate to lower the age to 16 but note the practical realities of this in our comment at B13.

B13 Should the age limit for entering into a de facto relationship be 18 years, or 16 or 17 years with consent of both guardians or, if that cannot be obtained, a Family Court Judge?

Young people can get married or enter into a civil union at 16 with the consent of both guardians or a Family Court Judge. If young people are motivated to formalise their relationship in this way they will seek consent. With de facto relationships, there is no statutory requirement to obtain this consent, and young people will simply live together as a couple. In the Law Society's view, the PRA should recognise the start of a de facto relationship at the age of 16, particularly in circumstances illustrated by the case study at [7.8]. The introduction of a rebuttable presumption that two people are in a de facto relationship may assist.

B14 Is the PRA working well for members of the LGBTQI+ community?

We refer to our comments at B16.

B15 Is more inclusive language required in the PRA's definition of de facto relationship?

The Law Society agrees more inclusive language is required in the PRA's definition of de facto relationship. We have suggested at A2 above that section 2D should be amended to the gender-neutral "relationship between two persons".

B16 Does the definition of de facto relationship make "heteronormative" assumptions?

The Law Society agrees that the current definition of de facto relationships may exclude transsexuals and intersex parties. Amending section 2D as suggested at A2 and B15 to a gender-neutral definition would address implicit heteronormative assumptions.

B17 How should contemporaneous relationships be recognised by the PRA?

The paper sets out three options for reform:

> Option 1 – amend the definition of de facto relationship or enact a new definition of contemporaneous de facto relationship.
>
> Option 2 – provide guidance in sections 52A and 52B on how to apply the definition of de facto relationship to a contemporaneous relationship.
>
> Option 3 – exclude contemporaneous relationships.

The Law Society does not favour any of the three options above. Our comments at D10 in relation to one partner clandestinely commencing a subsequent relationship are relevant to this question. The Law Society is not aware of problems with the operation of sections 52A and 52B in successive relationships. The introduction of a rebuttable presumption that two people are in a de facto relationship may address the issue of contemporaneous relationships. However, overall we consider the PRA should remain unchanged in this respect.

B18 Should the PRA specifically recognise multi-partner relationships? If so, how should they be defined and what property division rules should apply?

The Law Society does not consider that the PRA should specifically recognise multi-partner partnerships.

B19 Should the PRA apply to domestic relationships? If so, on what basis?

The Law Society does not consider that there is a compelling case for reform to extend the PRA to domestic relationships.

PART C – What Property Should Be Covered by the PRA?

The current scheme of classification of relationship and separate property works well in circumstances where a couple comes to the relationship with few assets, then support each other building up a property pool and developing the career of one party (often while raising a family together). On the whole the scheme of the PRA achieves the objectives set out in section 1N for partners within this category.

The Law Society acknowledges that classification of relationship property on the basis of family use can produce an unfair outcome for a partner who enters a relationship with assets that are converted by use to relationship property. In the Law Society's view, an amendment to section 16 (as we propose at Part

D), the ability for parties to contract out of the PRA by way of a section 21A agreement, and greater public education of rights and obligations under the PRA would go some way to mitigate against unfair outcomes.

The Law Society does not favour a change to a 'fruits of the relationship' approach. In our view this is too drastic a change to the principles behind the Act which are now reasonably well-known and supported by a body of case law.

C1 Should the PRA's definition of property include wider economic resources?

The paper considers whether wider economic resources such as future earning capacity and interests under trusts might be included within the definition of property.

Trusts

If broader economic resources were recognised as part of the division of property under the PRA, this might in part provide a mechanism to deal with unfair situations which currently arise in respect of trust property (namely, that but for the trust, the property would have been relationship property). We comment in more depth at Part G.

If no satisfactory alternative mechanisms are identified to deal with trust property at the end of the relationship, then this approach could remain on the table for consideration.

Future earning capacity

The Law Society agrees that deeming a partner's enhanced earning capacity as relationship property is not a feasible option, for the reasons set out at [11.35] – [11.40].

If the difficulties outlined in chapter 18 of the paper concerning implementation of section 15 in practice can be resolved by reform enabling compensation for economic disadvantage at the end of a relationship, and if maintenance provisions under the Family Proceedings Act 1980 are retained, then there should be no need to widen the definition of property to include future earning capacity.

C2 Should the PRA's definition of property be retained so that questions of whether the PRA applies to emerging forms of property is left to the courts to decide on a case by case basis?

Yes – the Law Society agrees the PRA definition of property should be retained and the courts should decide on a case by case basis whether emerging forms of property are captured by the PRA.

C3 Should the PRA's definition of property be amended so that it defines property in greater detail? If so, is it preferable to amend the definition to expand the items that are included as property? Which items ought to be included?

As noted above, the Law Society does not believe the definition of property in the PRA should be amended. In our view, the definition is wide enough in its current form.

C4 Do you think that the law should provide rights or recognise interests in respect of a family home on Māori land, when one partner is not an owner of that land?

C5 If so, what option do you prefer, and why?

The Law Society suggests that the Commission consult with Te Hunga Rōia Māori o Aotearoa, the Māori Law Society.

C6 Do you think the current classification of relationship property on the basis of family use is still appropriate?

While acknowledging that the current regime creates an unfair result in some circumstances, the Law Society does not advocate change to the principles underpinning the PRA.

C7 Do you prefer any of the options for reform? If you prefer option 2, what length of relationship should justify different rules?

The paper sets out two options for reform:

Option 1 – Move to a pure 'fruits of the relationship' approach.

Option 2 – Adopt different approaches depending on the length of the relationship.

The Law Society does not favour either option for reform for reasons already noted.

C8 Does section 15A perform a meaningful role? Should it be repealed?

It is acknowledged that section 15A is not often used. The text *"Brookers Family Law"* states there are no decided cases under section 15A. However it should not be repealed as it may provide a useful tool in certain circumstances.

C9 Is section 9A in need of reform? If so, what is the preferable option for reform? Are there any other potential options we have not considered?

The Law Society does not recommend substantial reform of section 9A as we believe sections 9A(1) and (2) are generally working well enough, despite the anomalies referred to at [10.16] to [10.27].

The Law Society agrees that section 9A(1) should be amended to address the situation where the application of relationship property to pay mortgage payments does not lead to sharing any increase in value (whereas applying relationship property to make improvements to the property does result in sharing). Both situations should give rise to the parties sharing the increase in value.

C10 Do you think that section 9A(3) has a meaningful role? Should it be repealed?

We acknowledge that section 9A(3) is not often used, but there is no harm in its continued existence. It may provide a useful tool in certain circumstances.

C11 Should the PRA give special treatment to property acquired by one partner from a third party by succession, survivorship, gift or because the partner is beneficiary under a trust?

The PRA provides different rules in respect of separate property which was acquired by succession, survivorship, as a beneficiary under a trust or by gift (section 10), and to separate property acquired by other means (section 9). The property which most often falls within section 9 includes business assets and investments which are brought to the relationship.

The courts have interpreted the PRA so that it is easier to show that separate property acquired by succession, survivorship, as a beneficiary under a trust or by gift (section 10) has kept its classification as separate property than would be the case if the property had been acquired from property owned prior to the relationship (section 9). This has been the case even when the 'section 10' property has been used to acquire property which is held in joint names. For example, when an inheritance has been received and paid into a joint bank account or used to buy a jointly owned property other than a family home, the courts have identified a separate property component in the jointly owned asset. If the same jointly-owned asset was purchased from the sale proceeds of property owned prior to the relationship, the asset would become relationship property.

There is no clear rationale for this distinction. If separate property owned prior to the relationship (section 9) were dealt with in the same manner as the courts currently treat property acquired gratuitously (section 10), this might remove some of the concerns about the inequities created by the PRA. This could be done by creating a hybrid of sections 9 and 10 and amending section 8(1)(c) so that it is subject to the new section (in the same way that sections 8(1)(e) and (ee) are currently subject to sections 9(2) to (6), 9A, and 10).

We refer to our comments at M7.

C12 If so, should such property lose its separate property status if it has been used to acquire property in the partners' joint names?

The Law Society does not favour such a change.

C13 Likewise, should such property be subject to section 9A?

The Law Society does not favour such a change.

C14 Should the intermingling exception under section 10(2) of the PRA be retained in its current form?

In the Law Society's view, section 10(2) should be retained in its current form.

C15 If not, what is a better approach for when gifts and inheritances have been intermingled with relationship property?

See above.

C16 If the PRA's definition of relationship property was based solely on a 'fruits of the relationship' approach, how should increases in value be treated? Do you prefer option 1 or option 2? Why?

The Law Society does not favour such a change.

Chapter 11 – Issues with particular types of property & debts

C17 If a right to ACC or insurance payments arises during the relationship (because of a personal injury or illness sustained during the relationship), should all those payments (including future payments) be classified as relationship property?

The paper seeks comment on how various ACC entitlements should be treated by the PRA.

The Law Society has reviewed the overview provided by Dr Simon Connell and Professor Nicola Peart in the 2017 Otago Law Review article, "Accident Compensation Entitlements under the Property (Relationships) Act 1976", and agrees with the authors' analysis and suggested reform.

The Law Society considers reform should be considered according to each type of entitlement under the Accident Compensation Act 2001 (ACC Act). Whether a particular class of entitlement should be treated as separate property or relationship property must be answered with regard to the actual purpose of the entitlement.

- *Rehabilitation entitlements and lump sum compensation*

  Most rehabilitation entitlements and all lump sum compensation for permanent impairment should be treated as separate property. Rehabilitation payments promote and facilitate the personal rehabilitation of a person. Lump sum compensation is paid for purely personal loss of bodily function, as a one-off payment.

  These purposes would be undermined if the entitlements were subject to the PRA and to the division of property at the end of a relationship.

- *Weekly earnings compensation*

  Weekly compensation on the other hand can properly be considered to be relationship property: it is compensation for lost earnings that would have been relationship property had the person not been injured. However, as discussed in the next section, this will depend on timing: weekly compensation that is paid out *after* the relationship ends should be treated as separate property, even if the injury or illness was sustained during the relationship.

Timing

The Law Society agrees with the Commission that the PRA "[should] classify ACC payments as relationship property only to the extent that they relate to loss a partner has suffered *during* the relationship. If the payments relate to the loss a partner suffered either before or after the relationship, those payments [should] be classified as separate property" ([11.13], emphasis added).

This approach would align ACC entitlements with how property is treated in other areas of the law. This is desirable and would avoid the unfairness that may otherwise arise.

Weekly compensation may be taken as an example. It compensates for lost earnings that would have been earned but for an accident. Had the claimant not suffered an accident, then at the end of a relationship his/her partner would not be entitled under the PRA to share the earnings after the relationship ends. This is an anomalous situation and should be rectified by amending the PRA.

C18 Should the PRA be reformed? If so, do you agree with our suggested amendment? Should it apply to ACC and insurance payments?

The Law Society considers reform is necessary, as discussed at C17. In our view section 123 of the ACC Act is not necessarily a hurdle to reform. Although the section provides that entitlements are "absolutely inalienable", section 4 of the PRA provides that "all other enactments" are subject to the PRA. That is the case unless the other enactment states otherwise. The ACC Act does not.

Insurance and ACC

ACC and insurance payments are conceptually and practically distinct. ACC entitlements are distinguishable from payments made under insurance policies. ACC is a compulsory compensation scheme that operates as a legal system with a statutory basis. In contrast, private insurance is obtained by the choice to purchase an insurance policy.

The source of funding for private insurance and ACC entitlements also differs. The money used to pay insurance premiums during a relationship is relationship property, so it makes sense that payments received under an insurance policy should also be treated as relationship property.

By contrast, ACC entitlements for work-related personal injury are funded by compulsory levies paid by employers and self-employed people. Motor vehicle accidents are funded from a wide base of vehicle registration and petrol levies. And, unlike private insurance, the payment of a levy does not determine cover under the ACC Act (see section 59(1)). These factors all indicate that the legislative intention is to treat ACC entitlements differently from other payments such as those made under insurance policies.

C19 Is the law regarding earning capacity and super profits problematic?

Yes.

C20 Do you agree with our preliminary view that it is not feasible to deem a partner's income earning capacity as enhanced by the relationship as relationship property?

The Law Society agrees with the preliminary view that deeming a partner's enhanced earning capacity as relationship property is not feasible. It is likely to present more problems than it would solve, create the virtually impossible challenge of identifying the relationship property component of a partner's earning capacity, and may unfairly curb the partner's autonomy by forcing him or her to continue to earn that level of income. The disadvantages at [11.35] – [11.40] far outweigh the advantages identified at [11.33] – [11.34].

C21 Should the PRA exclude taonga which fall outside of the definition of family chattels (e.g. land of ancestral significance which is not Māori land)?

C22 Should the PRA provide that taonga which is initially separate property cannot become relationship property in any circumstances?

C23 Should the concept of taonga be defined in the PRA? Or should it be left to be considered on a case by case basis with evidence called as necessary in each case?

The Law Society suggests that the Commission consult with Te Hunga Rōia Māori o Aotearoa, the Māori Law Society.

C24 Should the PRA expressly exclude property with special significance from the definition of family chattels in addition to heirlooms? If so, what types of property ought to be exempt?

Yes. In the Law Society's view, the PRA should provide for chattels of special significance that are not currently captured by the definition of heirlooms, to be treated as separate property.

This would provide for items of particular personal significance that should not fall into the general category of family chattels to be divided as part of the relationship property pool. For example, one partner may have been given a painting in recognition of their individual, significant efforts in some matter, and it will have particular personal significance. Even if it has been hung in the family home it should not be treated as a household chattel and should be able to be retained as separate property.

C25 Are the current rules regarding the treatment of student loans adequate? Could the rules be improved? For example, should all student loans whenever acquired be treated as a relationship debt?

The Law Society acknowledges the issues identified in the paper regarding the treatment of student loans. However, the existing provisions of the PRA and the principles in the existing case law, which enable a court to apportion student debt as part-relationship debt and part-personal debt and to compensate payment of personal debt from relationship property, provide adequate tools to deal with the issues raised. The Law Society does not recommend change to the existing statutory provisions.

C26 Is reform to the PRA needed to respond to the rise in family gifting and lending? Should the presumption of advancement be expressly excluded by the PRA?

The presumption of advancement should be specifically excluded by the PRA. The matter should be determined on the evidence on a case-by-case basis.

PART D – How Should Property Be Divided?

D1 Should the PRA continue to have an exception provision like section 13?

In the Law Society's view an exception provision like section 13 should be available in the PRA. It prevents partners falling prey to strict equal sharing within a narrow probationary period. We are unaware of any general discontent with the working of this provision and believe it is operating fairly.

D2 Is the current wording of section 13 satisfactory? If not, how might the test for departing from equal sharing be formulated?

Section 13 should be retained in its present form. Although there is the occasional hard case, that is a necessary trade-off for a simple universal rule. Rather than changing the now well-understood section 13, we suggest attention should be given to changing section 16 to remedy structural problems that are created by disproportionate property ownership at the beginning of a relationship.

Section 16 provides that where each party owns a potential family home at the beginning of the relationship, both properties fall into the pool. However, this does not address the unfairness where one party provides the home and the other has property of a similar value (for example, held in shares or KiwiSaver): the home provider must share their property as relationship property, whereas the other party can preserve their property as separate property.

This inequity could be addressed by requiring that where one party's pre-relationship home becomes the family home, and the other party has separate property of any kind that remains separate property, the other party's interest in the home shall abate proportionately.

D3 Should misconduct, and in particular family violence, have a greater bearing on how property is divided between the partners?

Family violence is pernicious, and we understand the attraction of attempting to remedy it in relationship property adjustments. However, the Law Society is opposed to re-introducing "fault" as a factor beyond the ambit of section 18A. Those in the profession who recall the contests around virtue and fault under the 1963 Act welcomed the cultural difference of the largely fault-free 1976 Act. Remedies for family violence should be addressed elsewhere. If misconduct were to have a greater bearing on how property is divided, it could have the unintended consequence of encouraging fractious affidavits and incentivising meritless applications relating to family violence.

In recent years, some domestic violence cases seem to have been influenced by the immigration consequences for successful applicants. (Individuals who obtain protection orders can assist their claim for residence if they can assert that the respondent has been violent to them and they should therefore be treated for immigration purposes as if the relationship had not broken down.)

The Law Society would not favour introducing a deviation from equal sharing on the basis of domestic violence. Remedies for family violence should be addressed outside the property regime, except to the extent already provided by section 18A.

D4 If it should, do you have a preferred option for reform? Are there viable options for reform we have not considered?

See our comments under D3.

The Law Society would support the recognition in the PRA of family violence as a factor the court may take into account when deciding whether to set aside a section 21 agreement. Section 21J could be amended in this respect and such an amendment could be linked with the definition of domestic violence in section 3 of the Domestic Violence Act 1995.

D5 Does the excessive expenditure or dissipation of relationship property by one partner during or after the relationship often lead to an unjust division of property?

Where a partner (partner A) has knowledge of dissipation during the relationship, for example where the other partner (partner B) is gambling and partner A takes no steps to protect the property, there need be no adjustment. Where a partner has covertly dissipated property, section 18A(3) may provide a remedy. Where a partner spends or dissipates property in the expectation of relationship failure, or does so after separation, there should be a broad power for the court to make an adjustment to the division of property. There is much to be said for a concept that partners owe a continuing duty of accountability for property until division is achieved.

The circumstances in which adjustment could occur, and the extent of the appropriate adjustment, should be left to the court's discretion based on the merits of the case. A post-relationship business decision that has unfortunate consequences should not necessarily result in adjustment, particularly where the decision was in line with decisions made during the relationship.

An allied concern is the inequity that results where one partner uses property in the post-separation period before the final property division, to build up an apparently separate hoard. For example, where a partner fails to pay adequate maintenance and instead applies post-relationship earnings to acquire shares or real estate that rise in value: although the other partner may be compensated for the lost maintenance, the opportunity value is lost. Another example is where a partner applies capital or income from property disputed under section 9A to acquire property in their sole name, and the property rises in value. Once again, accounting for the relationship property, even if interest is added, will not necessarily place the contending partner in an equivalent position.

The Law Society is aware of some cases that have resulted in an unjust division of relationship property, but does not know if there is a sufficient number of these cases to justify a change in the legislation.

D6 Are the current provisions of the PRA adequate to deal with excessive personal expenditure or the dissipation of relationship property?

Apart from our comments under D5 the Law Society is generally satisfied with the current provisions, which it believes adequately equip the court to make fair adjustments in most circumstances which warrant adjustment.

D7 Are there any issues with the way sections 52A and 52B work for successive relationships?

We are not aware of problems with the operation of sections 52A and 52B in successive relationships. The rules are explicable in terms of resolving division for one relationship before the next.

D8 Do the rules for contemporaneous relationships have the potential to lead to an unjust result? If so, in what circumstances?

The Law Society questions whether these sections apply appropriately to polygamous relationships (for example, religious polygamous marriages) where one relationship ends but another (or others) continue. This may require further consideration.

D9 Do the rules for contemporaneous relationships require reform? If so, which of the options we have identified (if any) do you prefer and why?

The paper sets out three options for reform:

> Option 1 – Amend sections 52A and 52B to address their lack of clarity.
>
> Option 2 – Divide all relationship property equally between all partners entitled to share it.
>
> Option 3 – Amend the PRA to better reconcile the rules around misconduct with the rules for contemporaneous relationships.

The Law Society does not favour any of the three options for reform. We consider that the current provisions are preferable.

D10 How should sections 52A and 52B relate to the rules on misconduct in section 18A?

It seems inappropriate that one partner (partner A) can bring about the reduction of another partner's (partner B) property by clandestinely commencing a second relationship (with partner C). It is even more inappropriate where partner C contributes to the subterfuge. The Law Society does not consider that this should be treated as "misconduct" within the first relationship; it would be preferable that the first relationship should have primacy so that partner B keeps their half-share undiminished. On that basis, the new relationship would share the combined relationship property of partner A and partner C.

As to whether there should be adjustment for costs expended by one partner on the new relationship, (for example on gifts, holidays, or accommodation), we refer to our comments at D5. There will, of course, be cases where the new relationship relieves the original relationship of burden, for example, where the new partner is wealthy, and the original relationship is modestly endowed with property.

D11 How often will a dispute between the partners involve a contest over the value of property?

Often.

D12 Are there any ways the PRA and/or dispute resolution processes could be improved to avoid disputes regarding valuation?

Sometimes partners express 'post-relationship suspicion' by obtaining unnecessary valuations. However, this is a function of attitude that cannot be legislated away. Inevitably a fresh valuation will sometimes reveal flaws in an earlier one. The Law Society considers that the current processes work well enough.

D13 Should the courts be more willing to value property against a different standard than the market value of the property?

The valuation needs to be fair for the purpose of dividing property under the Act. The Law Society does not consider there is any need for change.

D14 In what circumstances should property be valued under an alternative standard of value?

The guideline of just division appears prominently in section 1M(c). So long as valuation serves the purpose of just division, there is no need for a new standard of value. Sometimes the circumstances, such as valuing minority shares in a family company, requires the valuer to respond to the PRA context but this does not require the creation of a new standard of value. It is simply a matter of appreciating the context in order to arrive at a just division.

D15 Have we identified all of the issues with the operation of section 33(3)(m) to vary trusts? Is there a need for clear guidance on when a court can vary trusts under that provision?

If the Act is amended to provide power for the courts (including the Family Court) to vary trusts to give better effect to the scheme of the Act, section 33(3)(m) will require amending. Refer to our comments at Part G.

D16 Are there any other issues with the operation of section 25 or section 33 we have not identified?

We have nothing more to add.

D17 Is it preferable for a court to have a specific power to deal with superannuation scheme entitlements rather than use its generic powers under section 33?

The Law Society expresses no strong views on this. The important feature is that the court must have unequivocal power to require the trustees of the superannuation scheme to abide by the appropriate order, whether that requires immediate or deferred payments to the non-member.

For clarity, it should be explicitly stated that section 2G applies to superannuation and KiwiSaver. It appears some confusion may have arisen, with these forms of property being dealt with separately.

D18 Is the requirement under section 31 for a deed or arrangement useful or would a court order on its own be enough for the division of superannuation rights under the PRA?

We refer to our answer to D17.

D19 Should KiwiSaver schemes be treated in the same way as superannuation schemes on the division of relationship property? Or should there be a different approach? What would that approach look like?

KiwiSaver schemes bear some similarities to superannuation. Where appropriate, the proportionate share of benefits referable to the period of the relationship could be ordered to be placed in a KiwiSaver account for the non-member. Nevertheless, it might be useful for the court to have power to require payment out to a partner: for example, the payment may assist the partner to acquire a home. Although there are KiwiSaver rules relating to that issue, they are not designed for relationship property division.

D20 If ACC entitlements can be classified as relationship property, should section 123 of the Accident Compensation Act 2001 be amended to expressly allow division under the PRA?

As noted at C17 above, section 4 of the PRA renders that unnecessary, but for the avoidance of doubt, section 123 of the ACC Act should be amended to expressly allow for division under the PRA.

D21 Do the PRA's provisions regarding pets give sufficient direction to a court? Are the provisions inadequate in relation to non-household pets?

Pets can be a contentious issue. We are aware of cases where a family pet is one of the obstacles to resolution because of its emotional importance to the parties. It might be beneficial for the legislation to require the non-monetary (emotional) value of the pet to be considered when vesting orders regarding pets are required.

In addition, pets sometimes have a commercial investment value (akin to art objects acquired for investment rather than as ornaments). Where the pet has a commercial value, for example for breeding purposes, the court should have discretion to take that property value into account.

It would be preferable to exclude pets from the definition of "family chattels" (removing "(vi) household pets;" from section 2) and to give them a separate classification. We suggest there should be no distinction between a household pet such as a cat and a non-household pet such as a horse. A new section, perhaps section 11C, could be enacted to provide:

> "11C Pets
>
> Where the family or a member of the family owns a pet, whether a household pet or otherwise, the pet shall be allocated to the family member, adult or child, who is most closely associated with the pet or in whose care the pet will most benefit, provided that where the pet has a significant commercial attribute (for example stud value) the court may adjust financially as it thinks fit between parties in relation to that commercial attribute.

D22 Should a court have the power to order an initial payment not associated with specific items of property? If so on what basis?

The Law Society agrees that the court should have power to order interim payments on a pragmatic and just basis, subject to such conditions as the court sees fit. Interim payments can produce a great measure of justice, reduce the apparent size of the dispute to realistic proportions (which encourages settlement), and mitigate against power imbalances in the negotiation and litigation period.

Currently, interim payments that are ordered become separate property. The Law Society considers that there should be power for the court to classify some interim distributions as relationship property so there is power to fine-tune amounts at a later date.

D23 Are there any other options to improve the PRA's provisions for interim distributions?

The Law Society considers that the court should be able to make an interim distribution from one party's separate property in some circumstances, for example, where one party has had access to relationship property and spent it.

In addition, the court should also have power under section 25(3) to include legal costs and should be able to consider all "financial resources" available to the parties.

D24 Should occupation orders be available where the property in question is held on trust or by a company? If so, in what circumstances?

The Law Society considers that the court should be able to make an occupation order over trust-owned and/or company-owned property in certain circumstances. The underlying issue may be to bring the property interest sufficiently under the Act where it is appropriate to do so (see our comments on trust issues at Part G).

At an interim stage, where either or both partners had a licence or other occupation right (even by implication if, for example, the home where the parties lived was owned by a trust or company without any formal arrangements for rental or licence), the court should be able to make occupation orders over such property. This could be extended to the survivor of a deceased partner, at least for an interim period while the property or estate is sorted out (and subject to an interim court order).

D25 If occupation orders should be available regarding trust and company property, would clarifying that an occupation order could be made where either partner could have exclusive possession of the property achieve this purpose? Are there any other options?

The suggested clarification would achieve the purpose in many cases. But there may be other cases where some or all of the property rights should be brought out of the "shelter" of a trust or company.

D26 Should occupation rent or interest be available?

The Law Society agrees that occupation rent and/or interest should be available. The court should have express power to adjust for post-relationship use of property where it is just to do so. Often, where a home is principally used for children, no adjustment, or limited adjustment, should be made. However, where justice lies in individual cases can vary markedly.

D27 Should more guidance be given?

The Law Society does not believe that additional guidance is required in the legislation. The decision to order or withhold an adjustment should depend on many factors. The key point is that the issue should be resolved on a just basis. The Law Society supports the broad discretion being available to the court as it currently is under section 27.

D28 Should the notice of claim procedure under section 42 be able to protect interests in trust property, where a partner only has a discretionary interest or a constructive trust claim?

A notice of claim procedure would be useful. The fairly swift process to discharge notices militates against abuse of the notice process.

There is a need to clarify the protection of interests. Presently there is confusion as to whether section 42 can be used to prevent injustice: for example, where section 44 applies to a trust property (where relationship property was transferred to a trust in order to defeat the other spouse's rights or claim).

That situation currently creates real injustice and reform would be welcomed. We refer to our comments under Part G.

D29 Are there any other issues with the way the notice of claim procedure is working in practice?

We have nothing to add.

D30 Is the threshold test in section 43 too high? If so, would an effects-based test be appropriate?

The Law Society considers that the threshold test in section 43 should remain as it is.

PART E – How Should the PRA Treat Short-Term Relationships?

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

The Law Society agrees that the PRA should have a minimum duration requirement for qualifying relationships and special property division rules for short-term relationships. This acknowledges that it takes time to establish a significant degree of commitment to a relationship.

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

In the Law Society's view, the three-year rule is, on balance, fair and should remain unchanged.

The Commission's observation that "de facto relationships take longer than marriages and civil unions to reach functional equivalence, or to "mature" into the kind of relationship to which the general rule of equal sharing should apply" reinforces the view that a reasonable qualifying period is required.

The three-year rule is a 'bright line' test that is clear and generally well understood. The long history of the rule, its straightforward nature, and the lack of evidence to justify a change in the qualifying period are significant reasons for retaining the current three-year rule.

As to the concept of 'unfairness' where a qualifying period is required before an entitlement is established, there will always be differences of opinion as to the length of the qualifying period. However, the Law Society considers that the three-year rule strikes the right balance between achieving certainty and fairness. It also supports the safeguard of satisfying the section 2D criteria to establish that a relationship qualifies as a de facto relationship.

E3 Do you think the three-year rule is well understood?

The Law Society believes that most people understand that after a fixed period, equal sharing may occur. There is some confusion, however as to whether that period is two or three years. This is compounded by the uncertainty as to when a de facto relationship begins (or whether in fact it is a qualifying de facto relationship). (See our comments elsewhere (such as at A3, A4, B7) regarding the need for more public education about the PRA.)

Following the introduction of the three-year rule, there was some confusion as to whether a two-year or three-year period was necessary to establish entitlement. However, in our experience, many people now understand that a relationship of three years is necessary before being able to obtain full entitlement, with a consequent understanding of a lesser entitlement should the relationship be less than three years.

In the Law Society's view, if the three-year period were changed, it would take some time to bed in a new timeframe and lead to confusion, especially for those who are relying on the existing rule.

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

The paper sets out four options for reform, should reform be necessary to address the concern that the three-year rule is not achieving a just division of property when some de facto relationships end. For ease of reference, the four options are set out below:

> Option 1 – increase the qualifying period for all relationship types
>
> Option 2 – increase the qualifying period for some or all de facto relationships
>
> Option 3 – allow the court to treat a short-term relationship as if it were a qualifying relationship
>
> Option 4 - retain the three-year rule and address issues with its application to de facto relationships in other ways

For the reasons set out above, the Law Society does not favour increasing the three-year period (however, refer to our comments at B13 regarding amendment to the PRA to recognise the beginning of a de facto relationship at age 16).

We have carefully considered all four options and comment below on which option is preferable should reform be considered necessary.

The Law Society does not favour increasing the qualifying period for all relationship types (option 1), or increasing the qualifying period for some or all de facto relationships (option 2). The Law Society agrees with the Commission that option 2 would be a backward step: it "would effectively treat relationships differently depending on the form the relationship took, rather than how that relationship functioned" ([15.43)]. It would also likely cause uncertainty and confusion as to the Act's applicability to those relationships.

The Law Society does not favour option 3, which would allow the court to treat a short-term relationship as if it were a qualifying relationship. In the Law Society's view, the introduction of such judicial discretion may create uncertainty as to the qualifying period and potentially lead to an increase in litigation. It is difficult to see the benefit of such an extension. To our knowledge there are few such cases in the Family Court.

Option 4 contains the following three examples of how concerns might be addressed in cases where the three-year rule is not achieving a just division of property when some de facto relationships end:

(a) changing the definition of de facto relationships (Chapter 6);

(b) changing the definition of relationship property (Chapter 9);

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

Changing the definition of de facto relationship

We refer to our comments in Part B regarding the definition of de facto relationship in section 2D(1)(a) to (c) of the PRA and our suggestion that it is amended to make it gender-neutral. Aside from that change, we do not believe the definition should be amended.

Changing the definition of relationship property

The Law Society does not support amending the definition of relationship property, other than amending the definition of "family chattels" by removing (vi) "household pets" and enacting a new provision in respect of pets (see our comments at D21) and amending the definition of "family heirlooms" to allow for chattels of special significance for one of the parties (see our comments at C8). Aside from those amendments, the definition is sufficiently broad in its current form. See our comment in Part C of this response.

Promoting awareness

The prospect of unjust outcomes may, in part, be addressed by the parties having a greater understanding of the nature and extent of entitlements that are available under the PRA. As is suggested at [15.47(g)], promoting awareness through a public education campaign of the PRA's rules including the ability to contract out, would be preferable to creating rules that would require judicial discretion (option 3) based on the parties' respective views of the relationship.

Chapter 16 – short-term marriages and civil unions

The Law Society supports amending section 14A(2)(a)(i) so that the child of the de facto relationship must be the biological and/or adoptive child of both parties of that relationship, as distinct from a child that one of the parties brings to the relationship from a prior relationship.

Lawyers report that while parties understand and accept that a biological or adoptive child of the relationship should give rise to entitlement under the PRA, most express surprise and even indignation that a child of a prior relationship can be the gateway to entitlement for the other party under the PRA. By way of analogy, in Care of Children Act proceedings where parties have separated, it is rare that the non-biological parent would seek to obtain contact with a child upon separation, notwithstanding that the non-biological parent would be an eligible person to apply for a parenting order under section 47(c) – (e) of the Care of Children Act 2004. In the Law Society's view amending section 14A(2)(a)(i) as suggested above would address those circumstances where a property entitlement has been established solely because of the existence of a child from a prior relationship.

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

The paper sets out three options for reform:

Option 1 – amend the tests in sections 14(2) and 14(4);

Option 2 – adopt contribution-based rules of property division;

Option 3 – equal sharing of the fruits of the relationship.

The Law Society does not favour option 1. On balance, we are concerned that there is insufficient justification for amending the Act in this way given the risk of increasing litigation and creating uncertainty as the courts work to interpret the new amendments.

While adopting contribution-based rules of property division as suggested in option 2 may have merit, the Law Society does not favour the adoption of 'one rule for all relationship property' as set out at [16.17]. This change would be a substantial shift from rules which are by and large understood. People are familiar with the concept of the family home and family chattels being shared equally.

The Law Society prefers option 3, which proposes an equal sharing of the 'fruits of the relationship' for shorter-term relationships. This means that the property one partner acquires before the relationship, or receives as a gift or inheritance during the relationship, would remain as separate property, even if the property is used as the family home or family chattels. We agree with the statement at [16.20] that the rationale for special treatment of the family home and chattels may be weaker in a short-term relationship. However, this acknowledges that it takes a certain period of time for a significant degree of future commitment to a relationship to be established, which aligns with the rationale for a minimum duration requirement for a qualifying relationship.

The Law Society accepts that this would lead to two definitions of relationship property. However, the 'bright line' test in terms of the three-year rule in section 2E(1)(a) is well-established and generally understood by the public. We do not believe the two definitions of relationship property would lead to uncertainty as marriages and civil unions have a clear 'start date' to the relationship, unlike de facto relationships.

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.

E6 Which option for the reform of section 14A(2) (options 1 – 3) do you prefer, and why?

The paper sets out the following options for reform:

Option 1 – repeal section 14A(2)

Option 2 – retain section 14A(2) but clarify its application

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

There is a divergence in views amongst lawyers as to whether or not the current treatment of short-term de facto relationships being different to short-term marriages and civil unions remains sustainable.

While the Commission argues that there is no basis to differentiate, the establishment of a shared commitment is straightforward with a marriage or civil union as the parties have effectively 'opted in' and expressed their commitment by virtue of an official ceremony. With de facto relationships there is no such evidential basis. No amount of tinkering with the legislation will address the difficulty of establishing within a relatively short time whether there is a 'commitment to a shared future' even though the parties may be living in the same household for that period. However, the question involves matters of policy and the Law Society limits its comments below to issues of legal principle.

Given the high number of cases that come before the Family Court for determination, there appears to be an information lacuna in respect of rights under the PRA relating to de facto relationships. Consideration should be given to promoting significant education relating to contracting out agreements, akin to the family violence "it's not OK" campaign.

The Law Society also believes that consideration should be given to legislative change that would make setting aside contracting out agreements more difficult. As discussed at B2, the threshold of "serious injustice" could be changed to a two-stage test, requiring a finding of "serious injustice" and a failure to satisfy one of the procedural requirements of section 21F(2) – (5).

The Law Society does not support the repeal of section 14A(2) – option 1.

There may be merit in clarifying the application of 14A(2) – option 2. However, lawyers' views diverge as to whether "different rules for short-term de facto relationships are justified in contemporary New Zealand" ([17.13]). This is a question of policy on which the Law Society expresses no view.

In terms of clarifying the "substantial contribution" threshold of section 14A(2), the Law Society favours the option in 17.31(a) – a threshold guided by the plain and dictionary meaning of "substantial contribution". Such an approach would follow the established case law in this respect. The Law Society does not favour a threshold that asks whether the contribution is beyond "the norm" as set out in [17.31(b)].

There is merit in establishing a different test for short-term de facto relationships which have a biological or adopted child of the relationship – option 3. The Commission identifies two options in this respect:

(a) remove "serious injustice" and treat short-term de facto relationships with children the same as short-term marriages and civil unions; or

(b) lower the threshold from "serious injustice" to "injustice" for short-term de facto relationships with children.

The suggested change in paragraph (b) has merit. The Law Society also agrees with the Commission that the courts should have discretion to treat a short-term de facto relationship without children the same as a short-term de facto relationship with children, for the reasons discussed at [17.37].

E7 Should there be one set of property division rules for all short-term relationships? If so, what rules should apply and why?

The paper states the Commission's preliminary view that the same property division rules should apply to all short-term marriages, civil unions and de facto relationship and that this could be achieved by adopting, for all short-term relationships, either:

Option 1 – sections 14A and 14AA, with amendments to the section 14(2) and (4) tests

Option 2 – section 14A(3) - the division of relationship property on a contributions basis

Option 3 – equal sharing of the fruits of the relationship

In light of our comments above, the Law Society suggests that the current distinction between short-term marriages and civil unions on the one hand and short-term de facto relationships on the other is understood and should not be amended in the absence of a clear rationale for doing so.

PART F – What Should Happen When Equal Sharing Does Not Lead to Equality?

F1 Should partner A be entitled to more than an equal share of the relationship property pool if there is financial inequality at the end of the relationship as a result of the division of functions in the relationship?

The Law Society agrees that where the division of functions in the relationship has produced inequality, an adjustment should generally follow.

F2 Does your view depend on whether the partners have children?

No, although having (or having had) children, is a common feature in relevant cases.

F3 Do you agree that reform or replacement of section 15 is required?

The Law Society believes that it would be beneficial to amend section 15. By and large over the 15 years since the passing of the 2002 Act the various challenges to section 15 have "bedded down". However, there generally remains a lingering unwillingness by the courts to give wholehearted effect to the section. This is particularly so in enhancement cases.

Calculating quantum remains problematic, which has had the undesired effect of unnecessarily whittling down the compensation sum due. In the Law Society's view, the terms of section 15 are too mechanical, it has been interpreted too narrowly, and consequently it has sometimes failed to achieve the aims the section was introduced to achieve.

The Law Society has suggested at G9 below that if section 44C is broadened as suggested in option 3 at [22.46], this would allow for a claim under section 15 claim to be brought where the effect of the disposition has disentitled a party to make a section 15 claim.

F4 Which option do you prefer and why?

The Law Society generally favours Option 1 and believes such reform would properly address some of the difficulties that have arisen with the past application of section 15. It believes that each aspect has merit:

(a) removing any reference to living standards and focussing instead on financial inequality at the date of separation;

(b) replacing the causation requirement with a rebuttable presumptive entitlement to compensation if there is both financial inequality and a division of functions; and

(c) broadening the property that can be used to satisfy a section 15 award.

The Law Society does not consider Option 2 to be a viable approach because the inclusion of income as property is fraught with difficulties and, in our view, could be too easily subverted. Valuing the future income of a party is prone to be speculative, how long the income can be expected to continue can be vexed, and respondents can manipulate their income or expectations of income.

Whilst Option 3 holds some attraction, continuing enforcement of maintenance orders is a very real issue. We expect the same issue would exist with financial reconciliation orders. In addition, there is a benefit that lump sum orders (even if discounted) enable the parties to know where they stand. Whilst we are not wedded to the 'clean break' concept, there is a definite financial and emotional advantage to the parties in the certainty of lump sum orders. The risk with periodic payments is that the paying party may default due to changes in circumstances.

We can see scope for providing better guidance to the court on the calculation of quantum. Some reasons for financial inequality, for example, illness, disability or inability to earn, may have no nexus to the relationship but should nevertheless continue to give rise to spousal maintenance payments.

F5 If option 3 is adopted, do you think there should be a maximum duration for financial reconciliation orders? If yes, should the maximum duration be one year, two years, five years or ten years?

The duration should perhaps be longer if there are dependent children of the relationship, or if the relationship was long (because the post-relationship effects on an older former partner will probably endure longer). In some cases, for example where the relationship is a long one and where the parties separate in their 50s, the partner who has forgone a career may never recover financially. The Law Society does not think it is appropriate to impose an arbitrary cut off point, and believes it would be best to leave this to the court's discretion.

F6 Are there any other options we should consider?

In the Law Society's view, the adjustment presently achievable under current section 15 should be paid from separate property, if needed. Section 15A currently provides for this, but only in narrow circumstances where the supporting spouse's contributions have led to an increase in value of the other's separate property.

Whatever option is taken, the Law Society favours giving guidance on outcomes, for example, by noting percentage ranges for differing scenarios.

If Option 3 is to be seriously considered and periodic payments favoured, whether for maintenance or property division, the Family Court should have jurisdiction to enforce these. Currently the Family Court does not have that jurisdiction: the District Court has the power to enforce Family Court maintenance orders. Enforcement can be a serious problem in maintenance cases. A reluctant payer can put the maintained party to the cost of issuing and pursuing defended enforcement proceedings. The cost-benefit ratio of such proceedings is often illusory, and usually prohibitive. A capital adjustment is more readily enforced. The Law Society is reluctant to see this problem replicated in section 15 cases. Not only should enforcement move to the Family Court jurisdiction, but the Family Court should also be given a range of options to give full effect to such orders and make them economic to pursue.

The Law Society believes the legislation should adopt a clear formula for the calculation of the quantum of the disparity akin to that set out in the Supreme Court's decision in *Scott v Williams* per Arnold J at [326] – [329].[3] For ease of reference we set out [326] below:

> "(a) Identifying the extent of the disparity resulting from the division of functions within the relationship (presumably most easily done by reference to likely annual income over a period of years, given the close link between income and living standards).
>
> (b) Considering for how long the disparity should be compensated. It should not be assumed that this period will be the same as the potential working life of either partner. This is because:
>
> (i) in the ordinary course, the non-career partner will be expected to undertake income-earning activities; and
>
> (ii) the career partner's personal autonomy must be recognised – he or she must be left with the ability to move on with his or her life.
>
> It will be relevant in this context to consider how long it might take the non-career partner to re-train or up-skill, which will be affected by matters such as whether or not he or she has responsibility for the daily care of minor or dependent children of the relationship.

[3] *Scott v Williams* [2017] NZSC 185.

(c) Applying the necessary discounts to cover the contingencies of life (perhaps by reference to a New Zealand version of the Ogden Tables) and taxation.

(d) Calculating a present value for the annual figures thus derived to identify a particular sum.

(e) Halving that sum, which is necessary to avoid simply transferring the full disparity on to the career partner."

Calculating the quantum of compensation on the basis of measuring the actual disparity between the parties, rather than one party's personal loss or the other's enhancement, would be likely to provide a fairer sum of compensation and less likely to result in niggardly awards. It makes sense to halve the sum in this context otherwise there is a risk of reversing the disparity.

In the Law Society's view, broader scope within section 15A and legislative authority permitting relationship property to be used to pay compensation would also assist. For example, where there is a comparatively small estate but a significant disparity between the parties, a lump sum compensation award that yields a very high percentage of the relationship property (and/or some of the higher earner's separate property) would more often create an overall fair result.

PART G – What Should Happen to Property Held On Trust?

G1 Why do families in New Zealand set up trusts? Are there major reasons other than those we have identified?

The Law Society believes the Commission has covered this point comprehensively in the paper. We agree that trusts have become problematic in the relationship property context (as well as other areas outside the scope of this discussion).

G2 Are there any other reasons why people create trusts that we have not mentioned?

We have nothing to add.

G3 Do you agree that the protection given to trusts over the rights of partners under the PRA is a problem?

Yes.

G4 Do you agree with the reasons we have identified for and against the PRA's current position towards trusts? Do you have any other reasons to add?

The Law Society agrees with the Commission's discussion in the Issues Paper and offers no other reasons.

G5 For what reasons and in what circumstances should a partner have rights under the PRA to recover property from a trust?

The Law Society believes the court should have power to treat property held in a trust as relationship property, wholly or in part, where such property would otherwise have been classified as relationship property.

There is a clear rationale for reform in this area because injustice arises when a trust has the effect of circumventing the provisions of the PRA, in areas such as:

- occupation orders;
- deferment of sharing relationship property;
- occupation rental;
- the application of section 15; and
- section 18B orders.

G6 Do you agree that the remedies to be used for property held on trust give rise to the problems identified?

Yes.

G7 Should the main avenues for redress be found solely under the PRA? Are there disadvantages in this approach?

For simplicity, the Law Society agrees that the main avenues for redress should be found solely under the PRA.

G8 Are there any further issues that trusts cause when a relationship ends?

See answer to G5.

G9 Which of the proposed options do you prefer? Why?

The paper sets out the following four options for reform:

Option 1 – Revise the PRA's definition of "property" to include all beneficial interests in a trust;

Option 2 – Revise the PRA's definition of "relationship property" to include some property held on trust:

(a) Include a new definition of "trust property" in section 2 of the PRA

(b) Include trust property attributable to the relationship within the PRA's definition of relationship property

(c) Amend the orders the court can make in respect of trust property;

Option 3 – Broaden section 44C;

Option 4 – A new provision modelled on section 182 of the Family Proceedings Act 1980

The Law Society agrees that people should be able to settle their property affairs outside the provisions of the PRA. However, our view is that the Family Court should have full jurisdiction to direct a trustee to transfer (or sell) trust property back into the relationship property pool in certain circumstances. If the law is amended in this way, such changes would have to align with the current trust law reform (at the time of writing the Trusts Bill is part-way through its parliamentary stages).

If such an amendment were made, section 21A(1) in respect of contracting out agreements would require amendment, as the words used in that section only cover property owned by either spouse or partner or by both of them. It is not uncommon that a clause is included in a contracting out agreement under the Act that Party A will not claim any property that is owned by Party B's trust.

The Law Society would favour option 3 as it respects the general structures of both the PRA and trusts. We favour a revised section 44C which would enable a claim under sections 9A and 15 to be brought where the effect of the disposition has disentitled a party to a claim under those sections of the Act. A revised section 44C should also enable a claim to be made under section 18B.

In broad terms we consider that section 44C requires a radical overhaul to avoid injustice. In particular, it would be undesirable for the court not to be able to provide a remedy where a party's interests have been defeated.

In the Law Society's view, if, but for the trust, the property would have been relationship property, section 44 should be able to be utilised to claw that property back as relationship property without proof that the intention in putting the property into the trust was to defeat the other person's claim.

The Law Society agrees with the suggested legislative changes identified at [22.46(a) – (c)] except the suggestion at (b) that the court should only have recourse to the trust capital as a last resort. We believe that recourse to the trust capital should be at the court's discretion. In the Law Society's view, a liberal rather than a narrow interpretation should be favoured. This would enable, for example, the court to make an order of compensation from property held in a trust in the situation where the family home is owned by the trust.

We agree with the disadvantages of options 1 and 2 highlighted by the Commission and consider the definitions of "property and "relationship property" should not be amended.

We prefer option 3 to option 4. As the law is currently configured section 182 of the Family Proceedings Act 1980 is an anomalous provision that has been used (only for marriages) in the absence of an effective remedy. In our view, it is preferable for there to be a remedy under the PRA. If section 44C is broadened as suggested in option 3, then section 182 could be repealed as it would be redundant.

G10 Are there any other feasible options for reform we have not considered?

The Law Society has carefully considered all four options proposed by the Commission and considers the options are thorough. We have not identified any other potential options for reform.

PART H – Resolving property matters in and out of court

Practice shows that the vast majority of relationship property cases are resolved by agreement.

Many matters are resolved by negotiation between lawyers, guided by case law. (For example, if the party in occupation of the family home pays the mortgage, rates and outgoings, in practice that is generally taken as sufficient maintenance for the other party's non-occupation.) Having explicit guidelines extracted from case law would make it easier to reach agreement. Clearer guidelines – for example about matters such as disclosure (obligations of full and continuing disclosure) and how to calculate the award for economic disparity – would greatly assist parties to resolve matters short of court proceedings ([23.11]).

We are concerned at the paper's focus on the current FDR model in relation to mediating relationship property disputes. We consider this option gives rise to significant risks. The current FDR model for COCA matters does not readily translate to an appropriate mediation model for relationship property.

The option of out of court resolution is essential, and mediation (for which legal aid is available) is already utilised. Mediation with a legally trained mediator selected by the parties, and legal counsel present, is an established dispute resolution option ([23.9]).

We agree with the four elements identified at [23.14] are essential pillars in achieving a just and efficient resolution of relationship property matters.

H1 Is the current range of publicly available information about the PRA and options for resolving property matters sufficient? If not, where are the current gaps?

While there is some information publicly available, significant education is needed for the public to better understand their rights and obligations under the PRA. Some members of the public have a general understanding about some matters, but a high degree of misinformation and confusion remains. Many members of the public do not know about the ability to contract out or whether they are already in a de facto relationship that qualifies for equal sharing.

Effective publicity campaigns in other areas, such as the family violence "It's not OK" campaign, have been successful in increasing public awareness.

H2 If more information should be publicly available, who should be responsible for providing information, and in what form should this information be available (written/online/telephone)?

Information in writing and online is preferable, but it must be general and not taken as specific legal advice. The Ministry of Justice should be responsible for providing information about the resolution of relationship property matters, as it does currently on other Family Court proceedings (and out of court processes). Other organisations that currently provide information include the New Zealand Law Society, Citizens Advice Bureau and Community Law Centres. Citizens Advice Bureau and Community Law Centres can also provide basic legal advice.

However, the Law Society does not support the creation of an email or phone 'help line': this has the inherent danger of being taken as a substitute for legal advice. There is a risk that members of the public

seeking guidance would not provide full information and would not know what assets and debts might fall into the relationship property pool for division.

An advertising campaign with general information for the public would be helpful and should help correct common misconceptions about relationship property matters (as well as highlight any major changes to the law).

H3 Do you think there is a problem with access to affordable dispute resolution services for property matters in New Zealand?

The paper sets out different dispute resolution services available in New Zealand, including mediation, collaborative law, family arbitration and online dispute resolution. Negotiation should be added to that list.

The availability of alternatives to litigation is essential to an effective and efficient dispute resolution process. The cost and social efficiency benefits to both the Family Court and parties in reaching an effective non-litigated agreement are self-evident.

The Law Society agrees with the summary of the alternative types of dispute resolution at [24.32] – [24.54] and agrees that cost is a key challenge for access to dispute resolution. In our experience, mediation and negotiation are the most often used alternatives to litigation.

We agree there is a lack of access to low-cost dispute resolution services for relationship property agreements. To be legally binding these must satisfy the requirements of section 21F of the PRA. Although legal aid funding is available for relationship property matters, anecdotal evidence suggests that most lawyers will not undertake this work on legal aid due to the inadequate time and remuneration rate provided. The majority of lawyers do not believe they can discharge their professional obligations in the timeframes allocated under the fixed fee framework, and there is a heavy onus on lawyers certifying agreements.

It is a concern that the cost of legal fees can be disproportionate when small property pools and/or debts are in dispute. However, using an online dispute resolution service also risks creating injustice and circumventing the protections of the PRA.

Our experience is that self-represented litigants increase both cost and delay in the Family Court due to their lack of understanding of the relevant law and procedure.

There may be scope for alternative dispute resolution/tribunal resolution in very limited cases: particularly those without disputes over the extent of assets or disclosure issues. We consider that the requirements for a matter proceeding to a tribunal would need to include the following:

a. The procedure is only available for low value claims of up to a specified amount;

b. Exchange of a mandatory pre-proceedings disclosure package with sworn confirmation from each party;

c. Pre-tribunal legal advice would be recommended and funded by legal aid.

d. No arguments about jurisdiction (for example, no dispute about the existence of a qualifying relationship of more than 3 years);

e. No dispute over the extent of the assets.

f. There is a right of appeal from any tribunal decision.

The adversarial court model can be distressing and alienating for all parties. However, we do not have experience about whether the adversarial process is particularly alienating for Māori and other ethnicities. The Commission could consider consulting with THRMOA on this point.

H4 Do you think that FDR (Option 1) or another designated dispute resolution service (Option 2) should be available for resolving PRA matters?

The paper sets out two possible options for reform:

Option 1 – should FDR be available for property matters?

Option 2 – should some other dispute resolution service be designated for PRA matters?

Generally, the Law Society considers the current model of FDR is inappropriate for resolving relationship property matters, as these are often factually and legally complex. In addition, FDR is not appropriate without legal representation. Any agreement reached at FDR would need to be formalised, signed, witnessed, and independently certified by a lawyer.

H5 Should people with a property dispute under the PRA be required to attempt to resolve the dispute before going to court? If so, what steps should they be required to undertake?

We do not agree that mandatory mediation or arbitration are desirable or necessary. Lawyers and parties already utilise a range of pre-court dispute resolution techniques (including negotiation) and filing proceedings in court is already a last resort.

In the Law Society's view, it would be more beneficial to the resolution of disputes out of court to have mandatory pre-court procedures such as disclosure and codified rules of compliance.

H6 Should there be a duty on lawyers to provide their clients with information about the range of options for resolving property matters under the PRA out of court and the benefits of out of court resolution?

There is already a duty on lawyers to provide clients with options for resolving property matters out of court,[4] and lawyers ensure that alternatives to litigation are explained to clients. Costs awards would follow if a proceeding was unnecessarily issued.

[4] Section 9A of the Family Court Act 1980. See also rule 13.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008: lawyers have a duty when assisting a client with a dispute to keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client has an understanding of those alternatives).

Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules provides that "a lawyer must always act competently … consistent with the terms of retainer and the duty of care". Undertaking a cost/benefit/risk analysis including advice on alternative options for resolution forms part of competent advice to clients in any matter where cost, time and the possible personal impact of litigation is a potentially prohibitive factor (as it is for the majority of clients). Under rule 7.1 a lawyer also has an obligation to take reasonable steps to ensure that the client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client about the steps to be taken to implement the client's instructions.

In light of these obligations, the overlay of an additional statutory duty on lawyers in respect of advising about alternative dispute resolution in relation to PRA matters, would appear to be unnecessary duplication.

H7 Do you think that there should be clear rules of disclosure for parties to follow when resolving property disputes out of court?

There is no express statutory duty to disclose in out of court matters (pre-filing). In the Law Society's view, this should be expressly included in the PRA, rather than the rules which provide for initial disclosure by way of the affidavit of assets and liabilities. All section 21 agreements currently contain clauses that each party certifies their full and frank disclosure to the other party of all their assets, both separate and relationship. The difficulty is that without a statutory obligation behind disclosure, it may take months of correspondence to secure full disclosure in order to finally reach agreement.

The Law Society agrees that the lack of disclosure and absence of clear rules around disclosure for out of court resolution is the single largest impediment to speedy and fair resolution of relationship property matters.

Explicit rules, perhaps including a non-exhaustive list of what documents might be required to be disclosed, would be a significant improvement in assisting resolution.[5] There should be appropriate rules included in the Family Court Rules 2002, rather than contained in the PRA. Any amendment to the rules should be considered by a specialist Family Court Rules committee.

The Law Society also agrees that a prescribed pre-action procedure, similar to that in Australia, would be a sensible model for New Zealand to adopt. In our view, it would ensure consistent and uniform procedures and ensure that disclosure is provided. It would also assist to prevent delay by one party stonewalling settlement through failure to provide full and timely disclosure.

H8 Is legal reform needed to better enable parties to use collaborative law to resolve property disputes?

As stated in our answer at H9, there are a variety of dispute resolution services already available as alternatives to litigation. While legislative reform is not required to promote collaborative law, it may be

[5] See Schedule One, Family Court Rules 2004 (Cth), schedule 1, part 1, clause 4.

beneficial for the PRA to provide for collaborative law as a valid pathway for resolving relationship property disputes.

H9 Is legal reform needed to promote the use of family law arbitration as an alternative to court in property disputes?

Arbitration, mediation, collaborative law, and online dispute resolution are already available as alternatives to litigation. There is some debate amongst the profession as to whether or not arbitration is permissible under the PRA.

While legislative reform is not required to promote family law arbitration, the Law Society considers it may be beneficial to provide explicitly for arbitration as a valid pathway for resolution. A ruling at arbitration will not "contract parties out of the Act". If this is to be included in the PRA, section 21 should also be clarified to provide that parties are able to agree to arbitrate in respect of disputes with contracting out agreements, provided they have received independent legal advice.

H10 Should costs be available in PRA proceedings on the same basis as in other civil proceedings?

We agree with the Commission that PRA proceedings are different in nature to other civil proceedings. In our view this justifies a different approach and costs available in PRA proceedings should have their own particular scale. If PRA proceedings are to have their own scale costs, these should be developed by a specialist Family Court Rules committee.

The discretion in relation to costs awards should be retained, as it is often the case that each party will succeed on different points. This context justifies a different approach to that taken to determining civil costs where the party who loses generally pays costs to the party who succeeds.

We also note that filing and hearing fees are a significant barrier to access to justice for many in Family Court proceedings. Fees for relationship property proceedings are significantly higher than filing fees for parenting orders. In our view, the filing and hearing fees create unreasonable impediments for clients trying to resolve issues when they have reached an impasse, and reform options should be investigated. The Law Society would welcome the opportunity to discuss this with the Commission.

H11 In your experience, do you think there is unreasonable delay in the current court process for PRA proceedings? If so, have we identified all of the particular sources of delay?

In the Law Society's view, the biggest source of delay in out of court matters is disclosure.

There are significant delays within the Family Court itself because of the unavailability of judicial hearing time, combined with registry delays (causes of delay can differ from registry to registry). This is exacerbated in relationship property proceedings due to the triaging system which prioritises Care of Children Act, Hague Convention and Domestic Violence Act cases (and the significant number of without notice cases filed in these proceedings) ahead of property matters.

Prescribed time frames for completing certain steps might be helpful. However, the current Family Court Case Management Practice Note prescribes timeframes that the court cannot meet, mainly due to the lack of judicial resourcing and court time.

The use of sanctions such as monetary penalties for failure to comply with timetabled directions would be a helpful and appropriate way to encourage compliance.

H12 Do you think that there is a problem with identifying issues in dispute in PRA proceedings?

Sometimes poor drafting of generic applications with broad goals means that issues are not identified early enough.

However, some issues will only emerge as the case progresses and further facts are disclosed. It is not possible to identify issues early on if full disclosure has not been made.

We do not consider that failure to identify issues early is the main problem with PRA proceedings, although it can be exacerbated by the absence of full information in the PR1 form.

H13 If so, do you support a change to the Family Court procedure to either require parties to PRA proceedings to file pleadings (a statement of claim and statement of defence), or to identify the matters in issue in a memorandum of issues filed before the first judicial conference, or some other change in procedure?

The Law Society supports a change to the procedure. However, we do not agree that filing formal pleadings (a statement of claim and defence) is desirable or necessary. The narrative affidavit provides a helpful chronological summary of the relationship and property involved which helps to identify the key issues in a way a statement of claim would not.

The documents currently filed are useful and appropriate, provided they are properly completed. If there were better compliance and a stronger expectation that the PR1 and narrative affidavit were complete, this would facilitate early identification of the issues and any evidential gaps in disclosure of assets or liabilities. An early opportunity to identify issues by filing a memorandum of issues at the judicial conference would be helpful, provided the list of issues can be altered if required as the case progresses. Early identification of issues may avoid the technique where one party files interlocutory applications obfuscating the issues as a delay tactic.[6]

In our view, the ability to award costs against a party who has failed to file a proper affidavit, will help secure better compliance.

H14 Do you think the current case management process for PRA proceedings is problematic?

The Law Society agrees the current case management process for PRA proceedings is problematic. There appears to be no prescribed process and cases often proceed according to specific directions requested by lawyers rather than following a standard set of directions. There may also be regional variances between the Family Court registries in respect of case management for relationship property cases.

Late last year, the judiciary implemented a relationship property docket system in three of the Auckland Family Courts that applies to all cases where a response has been filed. The intention of the new docket system is to give these cases better focus and achieve consistency in how they are managed. The judges

6 Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" at page 7.

have been placed into teams of two. Each judicial team is allocated a number of files and deals with all interlocutory matters on those files. The narrative affidavits are filed and counsel are prepared to address discovery issues at the first conference. The new system is in its early stages but it intends to make discovery orders at that initial conference where appropriate, aligned to the kind of disclosure required in the High Court Rules, and to introduce standard directions for relationship property cases. The Commission may find it beneficial to investigate this system further to inform any proposed changes to a case management system for relationship property matters.

In the Law Society's view, it would be beneficial if cases could be identified as standard or complex at the first judicial conference and complex cases managed by a single judge. However, that may not be possible in many courts due to judicial scheduling systems.

In the Law Society's view, many of the suggestions at [25.47] are sensible and could be adapted for relationship property proceedings. Some would be better dealt with in the Family Court Rules and decided by a specialist committee. Other procedural amendments (such as codifying the rules of disclosure prior to the commencement of proceedings and once proceedings are commenced), should be provided for in the legislation.

Due to the organic nature of relationship property proceedings, judicial discretion to vary the standard directions when circumstances require such a variation is desirable.

H15 If so, should a process similar to the District Court case management process be adopted? If not, what?

While the Law Society generally agrees that timetabling and more prescriptive case management may assist more efficient resolution of cases, the unique characteristics of relationship property proceedings mean that there is no 'one size fits all'.

The case management procedure in the District Court could be considered as a starting point for establishing an overall case management system. The Law Society suggests that the Commission considers the Auckland Court initiative (as discussed above in H14). Any case management procedures should be included in the Family Court Rules and considered by a specialist Family Court Rules committee.

H16 Should single issue hearings be available for PRA proceedings in the Family Court?

Single issue hearings are already available for relationship property proceedings in the Family Court. In every case, a careful assessment needs to be made whether resolving that single issue will enable the efficient and speedy resolution of the proceedings as a whole. Sometimes the parties will agree to mediate the balance of the issues once one issue is judicially determined (for example, whether the relationship is a qualifying relationship for the purposes of the Act).

H17 Do you think that the current disclosure obligations on parties in PRA proceedings are problematic? If so, have we identified all of the issues?

The Law Society agrees that the current disclosure obligations are problematic. Non-disclosure is one of the main causes of delay in PRA proceedings. Disclosure obligations are articulated in the common law but not in in the legislation. In the Law Society's view, the requirement for ongoing disclosure should be expressly provided for in the legislation, perhaps even in the principles of the PRA. Specific rules relating to disclosure could then be included in the Family Court Rules, including penalties for non-disclosure. Any amendments to the rules should be considered by a specialist Family Court Rules committee.

We agree that penalties for non-disclosure are desirable. Financial sanctions may assist in encouraging full disclosure and could also be a useful lever for dealing with parties.

We agree that non-compliance could be regarded as criminal contempt for particularly egregious cases, and any fine should be levied against the property pool of the offending party. However, we are uncertain whether the criminal sanctions for disposing of family chattels (the only current criminal sanction) has ever been actioned as a criminal offence by the police.

H18 Which of these options for reform do you support, and why?

H19 Are there any other options for reform that you think we should consider?

H20 Do you think that changes need to be made to the power to order section 38 inquiries? If so, what?

The Law Society's responses to these questions are set out below under each of the seven options proposed by the Issues Paper.

Option 1 – Introduce pleadings for PRA cases

As noted above the Law Society does not consider that filing formal pleadings (a statement of claim and defence) is desirable or necessary. The narrative affidavit provides a helpful chronological summary of the relationship and property involved which helps to identify the key issues in a way a statement of claim would not.

We support the requirement for better and more comprehensive pleadings by way of the PR1 and narrative affidavits, with penalties for inadequate compliance.

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

Option 2 – Introduce a more structured case management process

The Law Society supports a more structured case management approach, tailored to relationship property cases, which would allow judicial discretion for some variation in individual cases. In our

experience, the 'one size fits all' approach is not likely to work for relationship property cases. Case management tracks should be set out in Family Court Rules, not in the PRA, and any amendments to the rules should be considered by a specialist Family Court Rules committee.

Cases could be triaged as to a track, for example, a standard or complex track. There may be merit in a fast track specifically for standard cases where the relationship property pool consists of the family home and vehicles below a certain value.

Option 3 – Confirm the duty of disclosure in the PRA

The Law Society supports the duty of disclosure being expressly provided for in the PRA (as suggested above, in the principles of the Act) so that it clearly applies to both pre-court and in-court matters.

Option 4 – Amend the Rules to improve the quality of initial disclosure

The Law Society agrees it would be helpful if the types of disclosure to be provided were set out in a non-exhaustive list, similar to that in the Schedule to the Australian Family Court Rules.[7] The option set out at para (d) on page 2 of those rules could apply unless there was agreement that some disclosure was not required.

In the Law Society's view, the obligation to provide disclosure should be triggered more easily and with penalties for non-disclosure within specified time limits. Ideally this process could be commenced by notice between the parties without the need to file any court applications. At that point both parties should be obliged to provide a basic capsule of early disclosure. The pre-proceedings discovery process in rule 140 of the Family Court Rules 2002 inefficiently leaves it to parties to specify what disclosure is required, opening up argument about what disclosure is necessary and delaying proceedings.

Providing a general disclosure bundle would not be onerous. Such documents already have to be collated and provided so that the advising lawyers can complete due diligence (unless the parties agree that some disclosure is not required). This disclosure obligation should apply before court proceedings are issued.

Tailored disclosure could be sought for items outside the scope of general disclosure. Such orders could be used as an adjunct to general disclosure, where the parties dispute a specific issue or the sufficiency of general disclosure.

Option 5 – Impose stricter consequences for party non-disclosure

The Law Society agrees with the following three suggestions:

- Stricter consequences, including awards for costs. Such awards should be on a different scale to and allow for greater judicial discretion than the District and High Court Rules (because PRA cases are rarely decided only in favour of one party).

[7] Family Law Rules 2004 (Cth), Schedule 1, Part 1, clause 4.

- Financial penalties for non-disclosure may ensure greater compliance with the rules. A civil pecuniary penalty would be appropriate. For the most egregious cases criminal sanctions could be warranted.
- Deducting penalties from the defaulting party's share of the relationship property has considerable attraction and would avoid the need for an order for costs.

Option 6 – Introduce sanctions for lawyers in connection with client non-disclosure

The paper discusses the possibility of imposing sanctions on lawyers for a failure by a party to disclose relevant information to the other party ([25.58] – [25.60]). The Law Society is not aware of concerns regarding widespread non-compliance by lawyers relating to non-disclosure. For the reasons given below, the Law Society agrees with the Commission's preliminary view that in the absence of clear evidence of a widespread problem, existing avenues are sufficient to address this issue.

Lawyers already have various obligations in respect of professional and ethical responsibilities to the court (as outlined in chapter 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008). These obligations include:

- rule 13 and a lawyer's overriding duty to the court,
- rule 13.1 duty of fidelity and honesty to the court;
- the protection of court processes as outlined in rule 13.2;
- rule 13.9 specifically provides that to the best of the lawyer's ability, he or she must ensure that discovery obligations are fully complied with by the client and must not continue to act if they know that there has been a breach by the client and the client refuses to remedy it.

Deliberate conduct by a lawyer aiding and abetting a client's failure to comply with discovery obligations, or any order or direction or conduct intended to delay, frustrate or avoid discovery, can be dealt with as contempt of court as well as a breach of professional obligations. There are already sanctions available to the court to deal with non-compliance with court timetabling orders.

There is a risk that imposing sanctions in the context of a single type of civil proceeding would be disproportionate and risks inconsistency and uncertainty. There are already appropriate safeguards and avenues available for sanction through the established disciplinary processes without overlaying a separate sanction regime.

Rather than focusing on indirect measures such as sanctioning the parties' lawyers, the focus should be on clarifying and strengthening disclosure obligations on the parties to address potential imbalance and unjust outcomes (as canvassed at [25.52] – [25.55]).

It may be difficult to identify who has caused the delay or failure in complying with the rules. If there has been a breach of discovery obligations by a client, and the client refuses to remedy the breach, there should be pecuniary penalties against that client.

Option 7 – Encourage better use of section 38 inquiries

Section 38 inquiries appear to be currently under-utilised and at times have not been directed by the court even when requested. This may be because section 38 inquiries suffer the same shortcomings as a rule 400 inquiry (for example, a referee under section 38 cannot require a person to attend an interview, answer questions or require the production of documents). In addition, a section 38 inquiry is only able to assist once proceedings are commenced. Discovery prior to the proceeding being heard is a more significant issue that prevents many cases being resolved expeditiously.

The paper suggests amending section 38 to enable the court to direct parties to pay the costs of any inquiry rather than imposing that cost on the Crown and seeking repayment when proper to do so. We do not think such an amendment would encourage better use of section 38.

H21 Should section 39 of the PRA be amended to provide for a right to appeal interlocutory decisions under the PRA? If so, should there be guidance as to what interlocutory decisions are appealable?

The Law Society agrees that there should be a right of appeal available for interlocutory decisions. Interlocutory decisions, for example those regarding evidence or interim distributions, can have far-reaching consequences that may affect the substantive result. In the Law Society's view, section 39 should be amended so that it is clear that interlocutory decisions may be appealed with leave of the court. The source of that jurisdiction should be section 39 of the PRA, rather than the District Court or Family Court Rules.

H22 Have we identified all of the issues with the jurisdiction of the Family Court and High Court to determine PRA and related disputes?

The Law Society believes all the issues with jurisdiction have been identified.

H23 Should the Family Court have jurisdiction to determine all issues related to PRA proceedings, in particular to determine issues regarding trust property? (Option 1)

The Law Society considers that the Family Court, as a specialist court with specialist judges and practitioners, is the proper court to determine all matters coming within the ambit of relationship property proceedings. However:

a. The Family Court needs to be able to deal with trust property and company property when the need arises and thus requires some equitable jurisdiction. We agree with the Commission's earlier recommendation about this in the 2013 Review of Trusts paper and refer to our comments at Part G.

b. The Family Court's existing powers for dealing with company matters are too limited. It is recommended that its powers are broader than those in sections 33, 44 and 44D – 44F. At present, any orders made by the Family Court do not affect a company, which must change if the Court is to have sole jurisdiction to deal with all relationship property cases at first instance. For example, it needs wider injunctive powers preventing dispositions of company shares to

third parties while property matters are being resolved (section 43 is of only limited assistance), or the ability to temporarily remove a reckless spouse as director (for example, if their actions are diminishing the value of the shares or their actions are jeopardising the solvency of the company). Such proposed changes should be carefully considered as these will have implications for company law.

c. The Family Court needs to have sole jurisdiction under the Land Transfer Act 2017 to remove or retain Notices of Claim under section 42.

H24 Should the High Court have a broader role under the PRA, to either hear and determine PRA proceedings concurrently with the Family Court (Option 2), or to hear and determine applications to transfer proceedings (Option 3)?

See the response at H23 above regarding option 1.

H25 Should the Family Court be able to seek assistance from experts in tikanga Māori, such as through powers of inquiry or through the appointment of cultural advisers?

The Law Society considers that it may be appropriate to enable the Family Court to seek assistance from experts in tikanga Māori where required, although it would be preferable for each party to bring relevant expert evidence about this.

We do not have sufficient expertise or experience in the interface of tikanga in relationship property cases to comment in more detail and suggest the Commission seeks input from bodies more qualified to comment, such as Te Hunga Rōia Māori o Aotearoa, the Māori Law Society.

H26 Should the Māori Land Court and/or Māori Appellate Court have a role in PRA cases involving questions of tikanga?

H27 Enabling Māori Land Court judges to sit in the Family Court?

H28 Referring questions of tikanga to the Māori Land Court?

H29 Allowing claimants to file a PRA case involving a question of tikanga in the Māori Land Court?

H30 Enabling the Family Court to transfer a PRA case involving a question of tikanga to the Māori Land Court, or to the Māori Appellate Court if the matter was complex?

In the Law Society's view, the Family Court should have sole jurisdiction in respect of PRA cases.

If questions of tikanga are raised, the party advocating a particular position should commission a report (and affidavit) from a properly qualified expert.

If there is a dispute over whether a particular piece of land is Māori land or general land, it would be preferable ask the Māori Land Court to provide a ruling or verification about the land's status.

We suggest the Commission also seeks input on this question from bodies such as Te Hunga Rōia Māori o Aotearoa, the Māori Law Society.

H31 Should appeals from the Family Court on matters of tikanga be heard in the Māori Appellate Court rather than the High Court?

We suggest the Commission seeks input on this question from bodies such as Te Hunga Rōia Māori o Aotearoa.

H32 Should Part 2 of the Domestic Actions Act 1975 be repealed?

The paper correctly identifies an awkward fit between Part 2 of the Domestic Actions Act 1975 and the PRA.

The 1975 Act was passed at a time when de facto relationships were less common than is the case today. However, there are still cases brought under the 1975 Act, and some of those cases may pertain to litigants who have not cohabited but have been engaged to be married. It remains appropriate to recognise actions resulting from the conscious decision involved in an agreement to marry. If Part 2 is repealed, that group who have not cohabited will have imprecise causes of action.

The Law Society agrees with the Commission's preliminary view that Part 2 of the Domestic Actions Act 1975 should be repealed so that those who have been in de facto relationships will be obliged to seek redress under the PRA. In our view, the PRA should be amended to preserve a principled avenue of redress for those who, although not in a de facto relationship, have committed or applied property in reliance on a promise to marry or to enter into a civil union (or perhaps even in reliance on a promise to enter into a de facto relationship). Examples would cover more than the return of engagement rings. An intending partner may pay a deposit for a house or a car in the name of the other intended partner or contribute substantially to an asset already owned by that person. Supportive family members may have been induced to do likewise. A simple principled avenue for redress remains desirable.

If Part 2 is not repealed, the Family Court should have exclusive originating jurisdiction in these cases.

PART I – How Should the PRA Recognise Children's Interests?

Part I discusses how property division at the end of a relationship affects children and the role of the PRA in addressing children's interests. Whether children's interests should be given greater importance in relationship property proceedings is largely a matter of social policy and the Law Society expresses no view. However, we do make the following observations about the current legislative scheme.

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 current provisions of the PRA adequately recognise children's interests in this context. Section 26(1) includes an overarching obligation on the court to have regard to the interests of any minor or dependent children of the marriage, civil union or de facto relationship in any PRA proceedings. The court is also able to make a range of orders that can directly or indirectly benefit children and to appoint a lawyer to represent a

child in PRA proceedings if there are special circumstances that make an appointment necessary or desirable.

Orders under these sections are not common (as noted at [28.4]). However, that may be due to the court's focus on the purpose of the PRA and the 'clean break' principle, that relationship property matters should be divided as soon as practicable at the end of a relationship to enable the parties to live their lives independent of each other.

The Law Society considers that the PRA's current approach to children's interests aligns with the purpose of the Act. Replacing the general rule of equal sharing with a new rule or rebuttable presumption that the primary caregiver receives a greater share of relationship property where there are children of the relationship might also encourage an increase in strategic manoeuvring by parties over the children's care arrangements in order to gain an advantage in the relationship property proceedings. By way of analogy, there appeared to be an increase in applications to vary parenting orders to increase the amount of day-to-day care following the enactment of the 2013 amendments to the Child Support Act 1991. (The amendments 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.)

We have identified below some potential difficulties if the Act were to be amended to give greater emphasis to the rights of children in relationship property matters.

I1 Does the way that the PRA operates on the death of one partner raise any specific problems for children?

In the Law Society's view, the way the PRA operates on the death of one partner does raise specific problems for children.

First, a child may not necessarily be granted leave to participate in proceedings. Even if leave were granted, a child would need a representative to participate.

Second, the property brought by one partner to the relationship may represent effort and contributions made not only by that partner but by a deceased former partner of that person and by their children. This can lead to the loss of property from a family which represented the fruits of a previous partnership in circumstances where both partners to the previous relationship might have foreseen that those assets would ultimately benefit their children. The assets produced by the previous relationship may ultimately benefit the children of the future partner instead.

Third, there is a higher threshold for an estate to commence a claim against a living partner than for the living partner to claim against an estate (see M7 and M8 below). Divergent views from lawyers in respect of this point are set out below:

- In cases involving potential claims by an estate against a living partner, the estate needs leave to apply and must show serious injustice. Claims are usually brought by child beneficiaries of the estate and some are to set aside the arrangements made by the couple about their property (that is, contracting out agreements). Such litigation is expensive and difficult, particularly because the deceased party cannot give evidence. In practice, the courts read

down "serious injustice" in these cases and give it a slightly different interpretation to its use in the rest of the PRA. One view is that it is inappropriate to have "serious injustice" in one part of the PRA that is interpreted differently than in other parts of the PRA and the threshold test should therefore be lowered to "injustice" to align with the court's current interpretation.

- The other view is that while the difference in threshold for applicants seems anomalous, there is a sound body of case law surrounding the "serious injustice" threshold in this part of the PRA and the courts are responding well to the cases that come before it. There are good reasons for this higher threshold and while it is a hurdle to overcome, it is not an insurmountable one. If the threshold test were lowered to "injustice", that may open the floodgates. The statutory threshold should remain the same and the case law relied on for its interpretation.

I2 Do you agree with our preliminary view that the PRA should take a more child-centred approach, but that the general rule of equal sharing should remain?

In the Law Society's view, the PRA should not be amended in this respect. Section 26(1) imposes an overarching obligation on the court to have regard to the interests of any minor or dependent children of the relationship in any PRA proceedings. The PRA also provides the court with powers to make a range of orders that can benefit children. We agree with the reasons given at [28.15] – [28.19] for retaining the current approach.

I3 How can any risks associated with a more child-centred approach be mitigated?

See our comments at I2.

I4 Is the current interpretation of a "child of the relationship" in the PRA too narrow or too broad?

In the Law Society's view, the current interpretation of a "child of the relationship" is satisfactory. However, the Law Society supports amending section 14A(2)(a)(i) so that the child of a de facto relationship must be the biological and/or adoptive child of both parties of that relationship, as distinct from a child that one of the parties brings to the relationship from a prior relationship (see our comments at Part B).

I5 Which children should be children of the relationship?

The paper suggests two options for reform:

Option 1 – narrow the concept of "member of the family".

Option 2 – widen the concept of "member of the family".

The Law Society does not favour either option.

I6 Should the PRA make special provision for the status of whāngai children as a child of the relationship to be determined in accordance with the tikanga of the respective whānau or hapū?

The Law Society suggests that the Commission consult with Te Hunga Rōia Māori o Aotearoa, the Māori Law Society, on this point.

I7 Is there a need for a timing requirement in the definition of the second category of children?

The Issues Paper states that the timing requirement in the second category of children is an issue for the purposes of assessing contributions to the relationship and sets out the following two options for reform:

> Option 1 – clarify that the care of a child that no longer qualifies as a child of the relationship is still a contribution to the relationship.
>
> Option 2 – remove the timing requirement from the definition.

The Law Society agrees the timing requirement in the second category of children is an issue and favours option 1.

I8 Do you agree with our preliminary view that the PRA's current focus on minor or dependent children is appropriate?

The Law Society agrees that the PRA's current focus on minor or dependent children is appropriate.

I9 Should a "minor" for the purposes of the PRA be a person under the age of 18?

The Law Society agrees that "minor" for the purposes of the PRA should be a person under the age of 18, provided the definition of dependent child is extended as suggested at I10.

I10 Who should be a dependent child for the purposes of the PRA?

The Law Society supports a wider definition of "dependent child" as suggested at [28.56]. This would enable the needs of a child who is over the age of 18 but still dependent on parental care (for reasons such as intellectual capacity or health) to be met and ensure a protective approach for such a child.

I11 Do you agree with our preliminary view that children's interests should be a primary consideration in PRA proceedings?

The paper sets out three options for promoting children's interests in the principles of the PRA:

> Option 1 – children's best interests as a primary consideration.
>
> Option 2 – children's best interests as the first and paramount consideration.
>
> Option 3 – refer specifically to implementation of relationship property division.

The Law Society does not favour any of these options on the basis that the current approach to children's interests in the PRA aligns with the purpose of the Act.

I12 Should parents' responsibilities have greater prominence in the PRA's principles provision?

The Law Society does not consider that parents' responsibilities should have greater prominence in the PRA's principles. We consider that parental responsibilities are sufficiently clear in other legislation.

I13 How should the children's interests be given a higher priority in PRA proceedings?

The paper sets out three options to give children's interests a higher priority in PRA proceedings:

> Option 1 – give children's interests a higher priority, in particular, in the implementation of the division of property between the partners. This option replaces section 26 with a provision that does the following three things:
>
> (a) retains the general duty to consider children's interests in PRA proceedings;
>
> (b) introduces a new specific duty to consider children's interests when implementing a division of property; and
>
> (c) incorporates non-division orders.
>
> Option 2 – retain the general duty to provide guidance in a list of factors to consider when making non-division orders.
>
> Option 3 – require a court to be satisfied that children's needs have been met before making a division order.

The Law Society does not favour any of these options. The current approach to children's interests in the PRA aligns with the purpose of the Act.

I14 In what circumstances should a court settle property for the benefit of children?

The Issues Paper proposes to amend section 26 to signal that orders can be made to meet children's specific needs in certain circumstances.

In the Law Society's view, section 26 should be retained in its current form. Whilst it is rarely used, and has been interpreted using a restrictive approach, it is nevertheless a provision that is available to be used in appropriate circumstances.

In the Law Society's view, amending section 26 as suggested would be inconsistent with the PRA's main focus on a just division of property between adult partners and would undermine parental autonomy. The Law Society agrees that it is not the PRA's role to address actual or perceived shortcomings with the Child Support Act 1991, as expressed at [29.36].

I15 Should orders be able to be made settling relationship property for the benefit of independent adult children? If so, should these orders only be made in exceptional circumstances?

The Law Society does not agree that orders should be made settling relationship property for the benefit of independent adult children.

I16 Should the threshold for making postponement orders be changed? If so, what should the threshold be?

The paper sets out the following three options for reform in respect of postponement orders:

> Option 1 – expressly refer to undue hardship for children in section 26A.

Option 2 – replace the undue hardship test in section 26A with a more general discretion.

Option 3 – automatic postponement of vesting where there are minor or dependent children.

The Law Society acknowledges the limitations with section 26A outlined at [29.42]. The Law Society favours option 1, given that it reflects the way in which the courts have interpreted section 26A.

I17 Should vesting be automatically postponed in certain circumstances?

The Law Society does not support a change to enable automatic postponement.

I18 Should more weight be given to the need to provide a home for the children when considering occupation and tenancy orders?

The paper proposes amending section 28A to direct a court to give higher priority to the accommodation needs of children when considering occupation and tenancy orders, by replacing the direction to have "particular regard" to the children's need for a home with a direction to treat the children's needs for a home as a primary consideration, or even the first and paramount consideration.

In the Law Society's view, section 28A should be retained in its current form.

I19 Is there a need for a separate category of children's property? If so, how should it be defined and dealt with under the PRA?

The Law Society does not see the need for a separate category of children's property. We agree with the Commission that this would be difficult to determine where property is shared, for example a home computer used by children and partners. The PRA already contains mechanisms that can address these issues.

I20 Should children's views be heard more often in PRA proceedings, and if so, in what circumstances?

The Law Society believes that the existing provisions in the PRA are adequate for the court to hear children's views where appropriate.

I21 Is the threshold for appointment of lawyer for child too high? If so, what should the threshold be?

The Law Society does not agree that the threshold of "special circumstances" for appointment for lawyer for child is too high and believes the section should be retained in its current form.

As stated at [29.70], the PRA's focus is on the adult partners and their property entitlements. We agree with the Commission that providing for more frequent appointment of lawyer for child in PRA proceedings could turn the case into a three-way contest between partners and children. In the Law Society's view, even though the appointment of lawyer for child in PRA proceedings is "seldom utilised",

the courts do appoint lawyer for child in appropriate cases, for example, in *L v P* where a child's substantial inheritance had been partly intermingled with relationship property.[8]

I22 Who should pay for the cost of greater participation of children in PRA proceedings?

In the Law Society's view, the existing provision in section 37A(2)(b) for the allocation of costs between the parties for lawyer for child appointments in PRA proceedings is adequate.

PART J – Can Partners Make Their Own Agreements About Property?

J1 How common is it for partners to enter a contracting out agreement under section 21 or section 21A?

In the Law Society's experience, it is much more common for settlement agreements under section 21A to be made than contracting out agreements under section 21.

J2 In what circumstances will partners enter a contracting out agreement under section 21 (pre-nuptial agreement)? For what purposes do partners enter section 21 agreements?

Partners who enter into section 21 agreements generally fall into three categories (and there is considerable overlap between them):

- partners who want to protect "separate property" for their children and do not want the equal sharing regime to apply without some modification;
- partners entering first relationships where there is a significant difference (including in value) in the property each partner owns; and
- partners entering into second or subsequent relationships.

The Law Society believes these circumstances are the most common ones in practice

J3 How common is it for matters to be settled without a section 21A agreement (settlement agreement)? What prevents people from entering a section 21A agreement?

In the Law Society's experience, the majority of people who do not enter into a section 21 agreement, and who settle matters, record that settlement in a section 21A agreement. However, there are some cases where partners do not enter into a section 21A agreement, generally due to the following reasons:

- where there was no property of significant value;
- where parties had divided relationship property at a previous time; or
- where neither party wants to incur legal costs of litigation nor legal costs of drawing up a section 21A agreement.

[8] *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011.

In respect of the last reason, often there is correspondence between the partners' lawyers in respect of the "agreement" reached to settle a particular property dispute. In this case, the Law Society considers that, in the absence of a signed section 21A agreement, the exchange of correspondence would provide an evidential basis for the court to make a declaration pursuant to section 21H, if one partner subsequently brought a claim under the PRA.

J4 Are there particular issues in relation to contracting out agreements which reflect tikanga Māori?

The Law Society suggests that the Commission consult with Te Hunga Rōia Māori o Aotearoa, the Māori Law Society.

J5 Do the contracting out provisions in the PRA strike the right balance between (a) offering partners freedom to arrange their own property affairs, and (b) ensuring each partner contracts with informed consent?

The Law Society considers that the PRA strikes the right balance in respect of offering partners the freedom to arrange their own property affairs and ensuring each partner contracts with informed consent.

J6 Do any issues arise from New Zealand's increasingly diverse population wishing to contract out of the PRA in order to recognise other cultural norms?

Lawyers report that some ethnic groups often come to relationships with different amounts of property but 'pool' it with their partner for immigration purposes. In these situations, it might be beneficial if education was available on the benefit of contracting out of the PRA (see A4 above, regarding the need to give immigrants information about the PRA).

J7 Is more public education needed so people better understand the opportunity to contract out of the PRA?

Yes. The Law Society agrees significant education is needed for the public to better understand their rights and obligations under the PRA and ways they can 'opt out' of the Act if they wish.

J8 Should the contracting out provisions in the PRA be amended to enable partners and trustees to resolve matters regarding trusts? If so, what would be appropriate amendments?

The proposal to amend the PRA to enable parties to contract out and settle division of trust assets has merit, given the widespread use of trusts to hold 'family assets' and the frequent disregard by parties of the legal requirements of trust law. However, the Law Society believes that the PRA should not be amended in this respect.

The distinction between trust property and property owned by partners (relationship property) should be emphasised, not blurred. If the distinction is blurred by allowing contracting out agreements to resolve matters regarding trusts, there is a risk of litigation by disaffected beneficiaries against trustees who implement settlements without reference to the beneficiaries of the trust.

A preferable approach would be to emphasise the distinction between property owned by the parties personally and property owned by a trust, and to continue the developing practice of having two different agreements – a section 21 agreement to deal with relationship property and a property sharing agreement to deal with trust property.

While the requirements for two agreements have costs consequences, that should not be a reason not to require them. Parties have chosen to distinguish between trust property and personal property, generally for tax or financial advantages and should be required to bear the costs consequences of this choice.

J9 Can and should the contracting out provisions in the PRA be reformed to achieve greater certainty regarding the reliability of agreements made under section 21 that address a claim under section 15?

The Law Society agrees that section 21 should be amended to allow parties to contract out of section 15 and the other compensatory provisions of the PRA, for example, sections 17, 18B, and 18C.

It should be left to the parties to the agreement as to which parts of the PRA they wish to opt out of, without limitation.

J10 Should the PRA provide that a contracting out agreement made under the PRA requires a KiwiSaver provider to implement a division of a partner's KiwiSaver scheme entitlements?

The Law Society agrees that the PRA should be amended to require a KiwiSaver provider to implement a division of a partner's KiwiSaver scheme if this is provided for in a contracting out agreement.

There appears to be an increasing number of cases where the parties reach an agreement under section 21 and only issue proceedings because of the requirement to divide a KiwiSaver entitlement. There is no prescribed way to simply apply to the court for an order about a single asset, such as KiwiSaver.

An application under the PRA must be accompanied by a narrative affidavit and an affidavit of assets and liabilities. The respondent is required to file the same documents. Parties circumvent the requirements of the Family Court Rules by filing

- an application for orders under the PRA relating solely to the KiwiSaver entitlement;
- affidavit evidence which includes a completed section 21A agreement;
- a schedule of property for division;
- a consent to orders signed by both parties and witnessed by counsel; and
- in some cases, a joint memorandum of counsel whereby counsel advise the court that the proposed settlement is within the parameters of the PRA.

The order is sought solely because of the difficulty with KiwiSaver and requesting orders in terms of the joint memorandum.

The Law Society is not aware whether this is a consistent practice in the family law jurisdiction. In our experience, there is no standard response from the courts. In some cases, the court makes an order on the papers but in other cases, the court has required a judicial conference. That inevitably involves further cost and delay.

J11 Should the PRA allow the signature of a party to the agreement to be witnessed by a lawyer through audio-video communication? If so, what safeguards should be put in place to ensure the reliability of the witnessing process?

The Law Society agrees that the PRA should be amended to allow for the signature of a party to be witnessed using audio visual technology.

In our view, the issue is not so much about the reliability of the witnessing process but more about the reliability of the certificate the lawyer must sign to certify that the lawyer has explained to the party the effect and implications of the agreement.

The party who is executing the document by conventional means wants to know that the agreement has been properly executed. In most cases where agreements are executed at a distance, there has been considerable negotiation about the terms of the agreement between the lawyers. There may have also been communication between the parties. In those circumstances, it will be rare that a lawyer who witnesses via Skype will be certifying an agreement without having established a relationship with the client at a distance and being confident that when the client executes the document, he or she does so of his or her own free will.

Any safeguards should address issues such as:

- any language issues with respect to the advisor, the person receiving the advice, and/or the person witnessing the signature;
- that the process for advice and witnessing has been agreed to, i.e. Skype or some other method (this could be included in the certification);
- confirming there is no-one else present who may be placing that person under duress to sign the agreement; and
- ensuring that what the party is signing via Skype (or other method) is the same agreement the lawyer explained to the party.

J12 Do you agree that the model agreement prescribed by the Property (Relationships) Model Form of Agreement Regulations 2001 is inadequate as a precedent?

The Law Society agrees that the model agreement is inadequate as a precedent.

J13 If the model form agreement was amended to address its deficiencies, could it save legal costs for partners wishing to contract out?

The Law Society does not believe that an amended model form agreement would save legal costs. The paper at [30.91(a) – (i)] identifies the model form agreement's deficiencies.

Any section 21 agreement must consider each of the issues identified. Whether they are included in an agreement depends on an individualised assessment of the client's needs. While lawyers would have their own precedents, they are adapted based on the client's individual requirements. As the Commission has identified at [30.94], drafting the agreement itself is only a portion of the work a lawyer must undertake.

In the Law Society's view, it would be unhelpful, confusing and expensive if the standard agreement had multiple opt in/opt out clauses for each matter required to be considered

J14 Is the test in section 21H for when a court can give effect to a non-complying agreement set at the proper threshold?

In the Law Society's view, the test in section 21H is set at the proper threshold.

J15 Would section 21H benefit from additional criteria to guide a court on when a noncomplying agreement should be given effect? If so, what criteria should there be?

The Law Society agrees that section 21H would benefit from additional criteria to guide the court on when a non-complying agreement should be given effect. Currently there are no published criteria. In our view, section 21H should be amended to incorporate provisions similar to those in section 21J(4), so that the court is required to consider:

- the provisions of the agreement;
- the length of time since the agreement was made;
- whether the agreement was unfair or unreasonable when it was made;
- whether it has become unfair or unreasonable in light of any changed circumstances since it was made; and
- any other matter that the court considers relevant.

An extra consideration that might be included is whether the parties had complied with the terms of any informal agreement throughout the course of the relationship.

J16 When exercising its power under section 21J, should a court have the power to set aside an agreement wholly or in part? Should the court have power to vary an agreement?

In the Law Society's view, the court should have the power under section 21J to set aside an agreement wholly or in part. It should also have the power to vary an agreement. We agree with the Commission at [30.100] that a high threshold should be required before a court is able to set aside an agreement wholly or in part or to vary it.

If the court had a power to vary any agreement, section 25(1)(a) would need to be amended by adding a new paragraph (ii), "implementing in whole or in part an agreement made by the parties pursuant to section 21, but which has been declared void, wholly or in part, pursuant to section 21J or section 21F".

J17 In what circumstances should the court exercise its powers?

If the court is to have this power in relation to agreements which are avoided under section 21J, there should be a similar provision for agreements that are void for non-compliance under section 21F. The Law Society is aware of cases where the agreement itself would not be challengeable under section 21J (i.e. for serious injustice) but is void because one party's lawyer did not give proper advice.

The Law Society suggests that section 21F should be amended so that the court should only declare an agreement void for non-compliance with formalities if enforcement of the agreement would cause serious injustice.

J18 Should the interests of children be a consideration when partners contract out of the PRA?

The Law Society does not consider that the interests of children should be a consideration when partners contract out of the PRA. While we agree that the PRA is social legislation, a section 21 agreement is about adult property rights, not children's rights.

Incorporating the interests of children as a consideration when reviewing a section 21 agreement is likely to add more complexity, uncertainty, and expense which are likely to outweigh any benefit.

We commented in more detail in Part I on how the PRA recognises children's rights.

J19 Should partners be required to have regard to the interests of children, or make provision for the needs of their children, when entering into a contracting out agreement under the PRA?

The paper sets out two options for reform to provide additional safeguards for children's interests:

> Option 1 – amend section 21D to require partners to have regard to the interests of their children
>
> Option 2 – amend section 21J(4) to expressly state a court may set aside a contracting out agreement which harms the children's interests

We refer to our comments at J20 and also in Part I.

Section 21 agreements are often signed when parties enter into a relationship. In some cases, there will be no children at the time the agreement is made. In other cases, one or both partners will have children from a previous relationship.

Children will be of different ages and at different stages of life. By the time the agreement is relied upon, the interests of the children could well have changed in ways that could not have been anticipated at the time the agreement was made.

It is difficult to see how a lawyer can properly advise a client at the start of a relationship how the interests of the children of the relationship (which would include children from earlier relationships and any new children) might be affected by a section 21 agreement at the end of a relationship.

J20 Should section 21J(4) expressly direct the court to consider the interests of children when assessing whether giving effect to a contracting out agreement would cause serious injustice?

If the interests of children are to be a consideration when entering into a section 21 or 21A agreement, amending section 21J(4) would be a preferable option to amending section 21D.

The court's consideration of the interests of children will be at the time the parties are seeking to rely on their agreement. The many ways the end of a relationship could affect the children (discussed at J19 above) will have resolved into more concrete realities.

PART K – Should the PRA Affect the Rights of Creditors?

K1 Is the way the PRA treats creditors appropriate or are there specific problems that justify reform?

The Law Society considers the general principle underlying the PRA's approach to creditors – that the rights of creditors should remain largely unaffected by the operation of the PRA, except for limited exceptions – is appropriate, for the reasons set out at [31.34] – [31.35].

We agree with the Commission's conclusion at [31.39] that any changes to the existing exceptions to the basic principle should be made with caution.

Lender enforcement action is frequently a difficult experience for debtors and others who have provided security. Despite their agreement by signing the relevant security agreements that losing their rights over the property is a possibility, they seldom expect to lose their rights. Consequently, lender enforcement activity is frequently viewed as harsh or unfair.

However, as noted at [31.36], any amendment to the PRA that alters creditors' rights could have significant implications. Creditors' ability to enforce securities is critical for the effective operation of the credit market. The PRA's universal application means any change to its treatment of creditors may have a significant impact on the ability to enforce securities and materially impact on lending and enforcement practices.

K2 Should the PRA continue to provide a partner with a protected interest that takes priority against the other partner's unsecured creditors?

The philosophy behind the 'protected interest' in the family home is that one partner's share of relationship property should not be seized to satisfy the purely personal creditors of the other partner. The Law Society agrees with the Commission's preliminary view at [31.46] that the PRA should continue to provide partners with a protected interest (with potentially some changes, as noted below).

K3 If so, should the protected interest apply to the family home or to relationship property generally?

The paper notes arguments for and against attaching the protected interest to the family home. The current approach (protected interest attaching to the family home) has the benefit of simplicity and

clarity. However, it is becoming less appropriate in light of falling rates of home ownership and the fact that many people have an increasingly diverse spread of assets (for example, KiwiSaver balances now make up a significant and growing proportion of the relationship property pool).

The Law Society agrees it is potentially anomalous that the PRA protected interest confers greater protection on those who have invested in a home rather than other types of property ([31.51]). The current provision discriminates against those who do not own a home and the fixed sum operates unevenly throughout the country because home values vary regionally ([31.47] – [31.58]).

If the concept of protected interest is to protect a person against their partner's unsecured debts, there is no clear reason why the protected interest should be limited to one particular asset.

For these reasons, the Law Society agrees with the Commission (at [31.63]) that it may be better for the protected interest to apply to relationship property generally, rather than limited to the family home. As the Commission notes at [31.63], that change will be necessary if, as discussed at [31.60], the PRA's classification of relationship property moves from a 'family use' to a 'fruits of the relationship' approach.

It is however acknowledged that a protected interest spread over a global pool of relationship property may prove unwieldy, and less easy to identify than the extent of a partner's interest in a family home (as noted at [31.62)].

K4 What should be the extent of the protected interest?

The purpose of the specified sum (currently set at $103,000) is to "represent the equity required for a house of a reasonable minimum standard" ([31.53]). The Law Society considers that the protected interest should be set at a level that better reflects the purpose of facilitating home ownership after the end of the relationship.

There also appears to be a need to re-examine whether the intention is to ensure there is money available for the affected partner to find alternative accommodation, or to provide a resource pool that ensures that one partner is protected against the other's unsecured debts.

We agree with the conclusion ([31.56] – [31.58]) that there are insurmountable problems in fixing a sum or a percentage that is principled and fair across the country. Providing for a calculation that takes into account the relationship property pool and circumstances of the partners might be fairer; we suggest that consideration be given to an alternative methodology that identifies the maximum sum that can be granted to a partner, depending on the nature and value of the relationship property pool and the circumstances affecting the specific relationship.

K5 Should the PRA continue to provide partners with the ability to lodge notices of claim in respect of land in which they claim in an interest? Why or why not?

Yes. The notice of claim process remains relevant as a means of ensuring a claimant (or potential claimant) is able to preserve property that will form part of a relationship property claim.

This process is particularly critical for a partner potentially affected by dealings with relationship property where that partner has no control over the property in question. Because the PRA is a deferred

regime, a partner's rights in relation to relationship property can easily be effectively eliminated during the relationship (or at least prior to any claim under the PRA being made). For the PRA to operate as intended it is essential that a potentially affected party has a 'halting' right. That the right can be exercised quickly and at relatively low cost (akin to a caveat lodgement) also makes the right accessible from a practical perspective.

The process can be considered a reasonable exception to the general principle concerning creditors' rights. Creditors, secured or otherwise, can be assumed to understand the legal impact on them of a notice of claim registered against given property. Particularly following the passage of the Personal Property Securities Act 1999, public registers are at the heart of credit-related activities, and digitisation of public registers has made searching them very easy. It is not therefore unduly onerous to expect a creditor to monitor relevant public registers, recognise when a notice of claim has been lodged, and take action as considered necessary to preserve its position.

K6 Should section 47(2) continue to operate as a limitation period so that creditors must challenge an agreement within a two-year period after the agreement was made? Why/why not?

For the reasons given at K7, the Law Society considers that section 47(2) should continue to operate, with the amendment described below. Partners should be able to achieve certainty in managing their property relationship matters.

K7 What is the best option for the reform of section 47(2)? Are there other preferable options we have not identified?

The Law Society agrees with the Commission that Option 1 (removing section 47 and leaving the matter to general insolvency law) would be an extreme step ([31.77]). It submits that Option 2 (amending section 47(2)) is the best reform option.

In light of the issues identified by the Supreme Court in *Felton v Johnson* (the uncertainty, unfairness, and apparent illogicality of the PRA being out of step with general insolvency law), the Law Society also prefers that section 47(2) be harmonised with the Insolvency Act 2006, by providing that an agreement or transaction could be challenged if it is made within the two-year period prior to a partner's bankruptcy (as discussed at [31.81]).

The amended provisions should be expressed in simple terms that can be easily understood by all practitioners and clients, rather than just insolvency experts. A statute of such universal application should be as accessible as possible. To the extent necessary, other statutes can be amended by referring to section 47(2), or any other relevant section of the PRA, where that reference is helpful to those seeking to understand the full impact of section 47(2) on those other statutes.

K8 Should a partner's rights under a settlement agreement take priority over the rights of unsecured creditors for the purposes of section 47(2)? If so, why?

The Law Society shares the Commission's concerns ([31.87]) about the apparent arbitrariness of providing partners who have separated with greater rights than those who have not. This also

undermines the rule in section 20A of the PRA that creditors have the same rights as if the PRA had not been enacted.

Nevertheless, the paper sets out a good case at [31.88] – [31.89] for a settlement taking priority in many instances, because it relates to the rights and obligations of the parties to the specific relationship and provides the benefits of stability and certainty flowing from a settlement agreement (as opposed to the cost and uncertainty of a dispute).

Ultimately, the Law Society considers that this is an issue that needs to be the subject of further policy work and consultation.

K9 Are there any circumstances in which a partner's rights should or should not take priority?

See answer above.

K10 Which option for reform do you prefer? Why?

As noted at K8, the Law Society has not reached a conclusion on the case for reform. But if we were to express a preliminary preference, it would be for the PRA to better align with the defences provided under insolvency law (Option 2: ([31.91]).

K11 Are there viable options for reform that we have not considered?

One option might be for the PRA to provide that the Disputes Tribunal should have jurisdiction where there is a net debt situation or where the total quantum of relationship property equity falls within Tribunal's jurisdiction under section 10 of the Disputes Tribunal Act 1988.

PART L – What Should Happen When People or Property Have a Link to Another Country?

L1 Should there be express statutory reference to exceptions to excluding foreign immovable property from the PRA in keeping with the exceptions to the Moçambique Rule?

There was some uncertainty as to what this question meant. The Law Society has assumed that the Commission is asking whether there should be a statutory amendment to allow the court to depart from the Moçambique Rule (i.e. that as a general rule of private international law, a New Zealand court cannot make a judgment or order relating to foreign immovable property) where there would otherwise be a valid PRA claim over that property.

The Law Society would support such an amendment. However, the problem we foresee is that even if New Zealand law creates an exception to the Moçambique Rule, that would not necessarily mean the foreign court would apply the New Zealand judgment or order. The foreign court may assert its sovereignty and rule that only the court in the jurisdiction where the property is located is able to make orders relating to it.

If that is the case then, given the inability of New Zealand to legislate over foreign states, a preferable option might be to give the court power to award compensation in respect of foreign immovables,

rather than conferring a jurisdiction on the New Zealand courts over foreign immovables (see our comments at L2).

L2 Should provision be made in the PRA to allow a court to order compensation to take into account foreign immovable property?

The Law Society agrees there should be provision in the PRA to allow a court to order compensation to take into account foreign immovable property where there is clear evidence that the property exists and evidence of its value. The Law Society suggests the PRA is amended in this respect and for the amendment to give clear guidance on considerations the court must take into account when ordering compensation. Such considerations might include, for example, whether the majority of the parties' relationship property is in New Zealand. There should also be a requirement that one of the partners is domiciled in New Zealand as per section 7.

L3 Do you agree that reform of the law is needed?

The Law Society agrees with the summary of issues with section 7 and 7A at [32.74] and agrees that reform is required.

L4 Do you agree that section 7A should refer to an agreement to apply "New Zealand law" rather than the PRA?

The Law Society agrees that section 7A should refer to an agreement to apply "New Zealand law" rather than the PRA. We also agree with the reasons given at [33.6] that reference to New Zealand law is broader and would encompass any unforeseen circumstances where a broader application of New Zealand law might be required.

L5 Do you agree there should be no timing requirement for agreements entered into under section 7A(1)?

The Law Society agrees there should be no timing requirement and would support an amendment to section 7A(2) in this respect.

L6 Should the PRA always apply if partners do not say in their agreement which country's law should apply?

The Law Society does not consider the PRA should always apply where the agreement is silent as to which country's law applies. In our view, it should be left to the court's discretion to decide whether the PRA should apply, having regard to the specific circumstances of the case.

L7 Should there be recognition of an implicit choice that New Zealand law is to apply?

The Law Society believes that there should be a rebuttable presumption that New Zealand law applies. The onus should be on the person seeking to rely on the foreign law to prove otherwise.

L8 Do you think that a couple should be able to agree at any point during their relationship, or even after separation, that a different law should govern how they divide their property?

Yes.

L9 Do you agree that the timing requirement should be removed from section 7A(2)?

The Law Society agrees with the reasons at [33.13] – [33.15] as to why the timing requirement should be removed and supports an amendment to section 7A(2).

L10 Should there be recognition of an implicit choice that the law of another country should apply?

In the Law Society's view, the default position should be that New Zealand law applies unless the parties either expressly or by necessary implication elect the law of another country.

L11 Would it be sufficient to refer to the law of another country without stating which body of law should apply (for example property or family law)?

We agree with the view at [33.16] that the reference to the "property law of another country" is unnecessarily restrictive and that it would be sufficient to refer to the "law of another country".

L12 Do you agree that a clear test for when a court can set aside an agreement under section 7A would be useful?

The Law Society agrees there is little judicial guidance to indicate how section 7(3) will be interpreted in respect of cross-border issues ([33.18]) and it would be useful for a clear test to be included in the legislation to clarify when a court can set aside an agreement under section 7A.

L13 Which of the options do you prefer and why? Are there any other "relevant factors" you would include? Are there any other options you would like to suggest?

The court should recognise the right of the parties to organise their own property affairs. The Law Society favours option 1 (the adoption of a test that includes the factors that the court must have regard to as is used in section 21J). This would set a clear contest between the division of property in accordance with the parties' agreement versus the division of property in accordance with the PRA. Given that the parties have chosen to live in New Zealand, the New Zealand legislation should apply unless there are good reasons why it should not apply, or a rebuttable presumption could be introduced, as discussed above at L7.

The issue of threshold is vexed. The paper at [33.19(a)] makes the valid point that section 7A agreements do not have the same list of procedural criteria for the agreement to be valid. This means there is no guarantee that both parties were informed of, or understood, the implications of the agreement before they signed it. We also note that the agreement must be valid according to the law of the nominated country, but every country will have different tests for validity. The paper suggests that, for these reasons, the test for setting aside a section 7A agreement should not be as high as "serious injustice" (the test for setting aside contracting out agreements under section 21J). The Law Society agrees, but does not offer a view on what the threshold test should be.

An agreement that expressly provides for the law of another country to apply and dividing property differently to division under the PRA (i.e. that would be viewed as a "serious injustice" in New Zealand and set aside under s 21J) should not automatically mean the agreement must be set aside. Such a position respects the rights of the parties to arrange their property affairs as they see fit.

L14 Do you think a court should be able to read an implied term into an agreement on which country's law should be applied?

The Law Society considers that the court should have the power to read an implied term into an agreement in respect of which country's law should be applied, having regard to the particular facts of a case.

L15 Do you agree that if an agreement deals with only certain items of property, New Zealand law should apply to all other property of the partners?

The Law Society agrees with the points made at [33.24] and also agrees that New Zealand law should apply in these circumstances.

L16 Do you agree that where a relationship has its closest connection with New Zealand the PRA should be the law applied to any relationship property dispute?

The Law Society agrees with the logic of applying the PRA to a relationship which is most closely connected to New Zealand. However, this may raise issues of enforceability.

L17 What factors will be relevant in determining the place a relationship has its closest connection with?

In addition to the factors listed at [33.37], other significant factors would include:

- the residency/citizenship/visa status of the parties;
- any children of the relationship and their nationality;
- the spread of assets in the various jurisdictions; and
- whether the family home is in the New Zealand jurisdiction.

L18 Do you agree that any dispute involving the potential application of foreign law should be able to be transferred to the High Court? If not, why not?

The Law Society agrees that any dispute involving the application of foreign law should be able to be transferred to the High Court.

L19 Is there capacity for the Family Court to exercise originating jurisdiction, for example, if there is a dispute whether a section 7A(2) agreement is valid? If this was resolved and a finding that the law of another country was to be applied, should this then be transferred to the High Court?

In the Law Society's view, there is capacity for the Family Court to exercise originating jurisdiction and this should be retained. Issues arising, for example dispute about whether a section 7A(2) agreement is

valid, can adequately be addressed under this jurisdiction. Just because the law of another country might apply does not mean that a matter should automatically be transferred to the High Court. The Family Court has jurisdiction to transfer a matter to the High Court if required.

L20 Do you agree that a court should have to take into account all overseas property when making an inventory of all relationship property?

The Law Society agrees that all overseas property should be taken into account.

L21 Do you have suggestions for expanding the range of remedial measures?

As discussed above, the Law Society favours the court having power to award compensation for foreign immovable property that would otherwise be relationship property.

In our view, such compensatory relief would not interfere with the jurisdiction of a foreign court, as such an order for compensation is not an order of the New Zealand court against a foreign immovable.

In our experience situations where compensation orders are justified arise where the foreign immovable is in the hands of the party who does not want to share it. That party would still be able to deal with the property in the foreign jurisdiction, but the New Zealand court would still be able to divide the parties' relationship property effectively in accordance with New Zealand law

PART M – What Should Happen When One Partner Dies?

M1 Are the options available to the surviving partner under the PRA, and the implications of those options, well known and understood by will-makers, surviving partners and professional advisers? If not, what could be done to better inform people?

Part 8 of the Act is a discrete area of the law that is not well known or understood by members of the public and also professional advisors. People generally only become aware of the implications of Part 8 either when they receive advice about it on making a will, or following the death of a spouse.

Typically, the advice given to a will-maker will be in general terms and will be qualified, as the relationship property entitlement of the surviving spouse will only crystalise on their partner's death, and there may be significant changes in circumstances affecting the extent and classification of property between the making of the will and the time of death.

The surviving spouse will be advised by the estate lawyer of the right to elect option A or B following the death of the will-maker. That lawyer will advise the surviving spouse of their right to obtain independent legal advice about the options.

In practice, spouses generally make more generous provision for each other under their wills than their respective entitlements under the PRA. In those cases, option B will be the obvious choice, and the surviving spouse may not feel it is necessary to obtain independent legal advice or make a formal election. Option B is then deemed to apply (section 68(1)).

Better public understanding of Part 8 should be promoted. This could be done by including information on this area of the law on the Ministry of Justice's Family Justice website. The Ministry could also make brochures on the topic available through the courts, Community Law Centres and Citizens Advice Bureaus. These could also be available through lawyers' offices. Increased awareness might also be achieved through media publicity on the current Law Commission review and any recommended changes to the law.

Many lawyers providing advice to will-makers and surviving spouses do not have an in-depth knowledge of the PRA and Part 8 in particular. This is an area that should be addressed through education for the legal profession (as a Continuing Professional Development (CPD) requirement).

M2 On the death of a partner, should short-term marriages and civil unions continue to be treated the same way as qualifying relationships?

In the Law Society's view, short-term marriages and civil unions should continue to be treated in the same way as qualifying relationships. The court has a discretion to divide the relationship property according to the rules in section 14 where it considers that equal division would be "unjust" (section 85(2)). The PRA does not define "unjust"; however, in our view this is appropriate given the wide range of relationships and circumstances that may fall to be considered under this provision. We do not see any need to amend the current provisions.

M3 On the death of a de facto partner, should short-term de facto relationships continue to be treated differently to short-term marriages and civil unions?

Our preliminary view is that it would be preferable to have consistency in the treatment of short-term marriages and short-term de facto relationships on the death of a partner. This view rests on the assumption that a relationship (whether a marriage or a de facto relationship) that ends by death would otherwise have endured beyond the qualifying three-year period, justifying the more favourable treatment on death than separation.

A provision similar to section 85(2) would need to be introduced to address the injustice that might arise in situations where the level of commitment and contribution to the relationship does not justify equal sharing.

However, we acknowledge that there are also valid policy reasons in favour of the continuation of the status quo, leaving the surviving spouse with a remedy under the PRA only if the de facto relationship meets the two-stage test that applies on separation in section 14A(2). The couple may have drifted together and the level of commitment that would justify an entitlement under the PRA may have continued building over time. Unlike a married couple, there may have been no conscious decision to form a relationship which has such significant legal consequences.

In the case of a short-term marriage or de facto relationship the personal representative may face evidential problems in making or opposing an application under the PRA. The children of a previous relationship or other family members of the deceased may have had little to do with the surviving

partner. In that situation it may be difficult for the personal representative to present evidence to counter claims made by a surviving partner.

The surviving partner has an additional advantage due to the presumption in section 81 that property of the estate is relationship property. Section 81 gives an evidential advantage to all surviving partners making claims under the PRA, but the potential for injustice as a result of the presumption is likely to be more pronounced in the case of short-term relationships.

The appropriateness of a change to the law to treat short-term de facto relationships the same as short-term marriages needs to take these practical considerations into account.

M4 Should the application of the PRA on death continue to be based on an election by the surviving partner?

The current provision for the election of option A or B works well in practice and should be retained. As noted above, the majority of spouses make more generous provision for each other under their wills than their respective entitlements under the PRA. Most surviving spouses therefore choose option B, or do not make an election with the result that option B applies by default (section 68(1)). This is reflected in the figures in footnote 91 at page 844 of the paper showing that in 2016 option A was elected only 14 times out of 16,000 estates.

Option A will only be considered by the minority who receive less than their PRA entitlement under the will. They are referred for independent advice to make a formal election. Whether they elect option A will depend not only on the extent of the shortfall between their PRA entitlement and the provision made for them under the will, but also on other factors such as any beneficial entitlement they may have under a trust, and gifts they may have received during the will-maker's life.

Electing option A means that the surviving spouse forgoes any provision under the will. This is an important factor in the surviving spouse's decision. In many cases this may be in accordance with the will-maker's intentions, as the gift may not have been included in the will if the will-maker had understood that the surviving spouse would elect option A.

There is provision for the surviving spouse to seek additional provision to include gifts under the will if the court is satisfied it is "necessary to avoid injustice" (section 77(1)). The will-maker can also specify in the will that a particular gift to the surviving spouse is to have effect even if option A is elected (section 76(1)). As noted at [35.18], this is not often done and there is room for improved understanding among will drafters of the benefits of using this provision. However, these provisions provide scope for the surviving spouse to receive his or her entitlement under the PRA plus additional gifts under the will in appropriate cases.

M5 If not, should the PRA presume an election of option A? If not, what would you change?

The Law Society does not favour this proposal as in our view it would represent a substantial change from the status quo (which works well in the vast majority of cases). The default option should be the option that the majority would elect, so that fewer people are inadvertently adversely affected.

The existing presumption in favour of the will provides certainty as a will specifies the property being gifted. A presumption in favour of option A would create uncertainty in many cases as there are often issues about the classification and valuation of property, the extent of claims against separate property, and the actual division of specific assets, particularly where there is no section 21 agreement.

A change to the law as proposed would also have significant implications for wills already in existence. Will-makers would need to review their wills in light of any law change and those who failed to do so might be adversely affected by the change.

In addition, there may be reasons acceptable to the surviving spouse for a will-maker to have provided for less than a half-share of the relationship property. For instance, there may have been gifts to the spouse during the will-maker's life or there may be provision for the surviving spouse in trusts.

The proposal for the surviving spouse to receive a half-share of relationship property plus any gifts under the deceased's will may also be problematic in that the will-maker may have made certain provisions in the will for the surviving spouse on the understanding that no relationship property claim would be made. If the surviving spouse were to receive both the relationship property entitlement and any gifts under the will, this could frustrate the will-maker's intentions. Sections 76 and 77 make provision for gifts under the will to be added to the relationship property entitlement in certain circumstances (as referred to above).

M6 If the choice to elect option A or option B remains in the PRA, should the personal representative have an automatic right to apply for a division of relationship property, or should the requirement to seek leave of the court remain?

An application for leave to apply for division of relationship property will generally be considered by the personal representative with the purpose of recovering assets for the estate in order to provide for beneficiaries under the will or claimants under the Family Proceedings Act 1980 (FPA) and/or the Law Reform (Testamentary Promises) Act 1949 (TPA). With more complex family arrangements these days, it is not uncommon for a will-maker to have obligations to third parties as well as to the surviving spouse.

Typically, the battleground is between the surviving spouse and the deceased's children from a previous relationship. This was the situation in *Public Trust v Whyman* [2005] 2 NZLR 696 (CA) where there was nothing in the estate for the children of the deceased's first relationship as the assets were jointly owned and passed by survivorship to the surviving spouse.

The current operation of section 88 is problematic.

The paper at [35.34] refers to Nicola Peart's argument that the personal representative should be able to apply for division under the PRA as of right, as the surviving partner can, on the basis that this would provide a more consistent approach that does not favour either partner. The Law Society agrees with this view.

We note that the existing requirement for the personal representative to apply for leave relates only to section 25(1)(a) (the determination of shares and division of relationship property). It does not apply to section 25(1)(b) (any other order) and section 25(3) (an order or declaration in respect of specific

property). Applications by the personal representative under section 25(1)(a) or section 25(3) therefore avoid the leave requirement but may achieve a similar result. The Court of Appeal commented on this odd result in *Whyman* at [21]. The Law Society does not consider that there is good reason to treat section 25(1)(b) applications more restrictively. Removing the requirement for leave altogether would remove that differentiation.

A decision by the personal representative to make an application to the court entails a significant commitment of cost and will generally be made only where there is a genuine claim. We do not consider that the removal of the leave requirement would 'open the floodgates'. We refer to our comments at M7.

M7 If the requirement to seek the leave of the court remains, is the threshold in section 88(2) the right one and if not what should it be?

If the requirement for leave is retained, we consider that the current threshold of "serious injustice" should be reconsidered as it creates a very high threshold for the personal representative to meet. There have been conflicting decisions about the threshold of "serious injustice" for leave to be granted. The Court of Appeal in *Whyman*, when considering this issue, indicated that the Public Trust would have "very reasonable prospects" of obtaining leave in the circumstances of that case (see [51]).

The "serious injustice" threshold that applies in section 21J applications for the setting aside of a relationship property agreement is appropriate (see above at J16 – J17). However, in our view, the circumstances in which a personal representative would consider applying for division of property under the PRA do not justify the same high threshold. The claim would generally be based on inadequate provision having been made in the will for beneficiaries or potential claimants under the FPA or TPA, but also may be due to a wide range of other factors. We refer to our comments at C11.

If the requirement for leave is retained, we suggest that the "serious injustice" threshold be replaced with a lower threshold of "injustice". Non-exclusive factors could be specified that would be relevant to a determination of whether leave should be granted.

M8 Do you have any further suggestions for reform of the rights of the personal representative or third parties to apply for a division of property under the PRA on death of a partner?

Practical problems are created in many cases by the will-maker's choice of executor. Often the surviving spouse will have been appointed as executor and will have a conflict in making any claim under the PRA to claw back part of the estate for third party claimants. If a family friend has been appointed as executor, he or she will usually know the surviving spouse and other family members well. The decision to proceed with a claim can, in those circumstances, be vexed.

In such circumstances, it may be necessary to apply to replace the personal representative in addition to making an application for leave to apply under the PRA. If those applications are opposed, the costs and delays in the court process can be extreme. A more streamlined process is needed to avoid these procedural issues.

The Law Society sees merit in the suggestion at [35.51] that third parties, such as children, could apply directly for division of relationship property. Such applications would be considered contemporaneously with any third party FPA claims.

The paper at [35.53] makes suggestions for the re-working of other sections to clarify the consequences when application is made by a personal representative under the PRA:

(a) *Section 75:* We agree that an equivalent provision should be inserted for applications brought by the personal representative, for the sake of consistency. An equivalent provision would also be needed to cover applications by third parties, such as children.

(b) *Section 76:* We agree that clarification is needed about the effect on the will when a personal representative (or a third party) seeks division under the PRA. Section 76 provides that if a surviving partner applies for a division of relationship property, any gift to that surviving partner in the will is cancelled. The question is whether the same provision should apply where the application is made by the personal representative or a third party. When an application is made by a third party, our view is that section 76 should apply. It would however be important that the court's power under section 77 to allow the gift to stand should also apply in such circumstances. In the case of an application being made by a personal representative, such an application is normally made on behalf of other parties, such as the children of a previous relationship. In that case it would not be appropriate for any gift to the personal representative to be cancelled.

(c) *Section 87:* We support the view that the personal representative should have the right to challenge a section 21 agreement in appropriate cases.

(d) *Section 95:* The wording of this section is awkward and should be clarified, as discussed by the Court of Appeal in *Whyman*. The personal representative should not be precluded by section 95 from making a claim where the surviving spouse had elected option B. Commonly the surviving spouse will have chosen option B where they have received all, or a substantial portion, of the estate. That will be exactly the kind of situation where there is more likely to have been inadequate provision for other potential claimants against the estate. Section 95 should be re-drafted to clarify this.

We suggest that consideration should also be given to clarifying the right of a surviving spouse to use sections 44B and 44C to claw back assets transferred to a trust (as per our comments in Part G). This is unclear under the current law.

We also suggest that the applicability or otherwise of section 15 should be clarified. Section 15 is not available where a spouse has died as there can no longer be a disparity of income or living standard. However, section 75 suggests that section 15 would apply. Factors that would justify a section 15 award if the relationship had ended by separation would be likely to be relevant to an FPA claim and a remedy is likely to be available in that context.

M9 Do you agree there should be a separate statute? If not, why not?

The Law Society agrees with the Commission's preliminary view favouring a separate statute dealing with succession. Greg Kelly's Master's thesis, *An Inheritance Code for New Zealand* (2010), addresses this issue and recommends fundamental reform of succession laws.

If there is to be a review of succession law in the foreseeable future, this would have implications for the PRA review if any changes to the Act were to be closely followed by further change when succession legislation is subsequently introduced. That is good reason not to make fundamental changes to Part 8 of the PRA (for instance, changing to a presumption of option A). However, pressing issues such as the issues with section 88 and the clarification of other sections could usefully be addressed now.

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,

Kathryn Beck
President

Appendix A: New Zealand Law Society working group

Appendix A: Property (Relationships) Act 1976 review, IP41 – NZLS working group

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