

# Reviewing the Property (Relationships) Act 1976

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on the Law Commission's final report and subsequent Government  
response

## THE PROPERTY (RELATIONSHIPS) ACT 1976 (THE 1976 ACT)

The 1976 Act creates a code which governs the division of property held by married couples, civil union couples and couples who have lived in a de facto relationship (including same sex couples), when they separate or one of them dies. In the case of married couples, the 1976 Act takes into account periods of time during which they may have lived together immediately prior to marriage.

Under the 1976 Act if a relationship ends (by either separation or death) then property that either one or both parties to the couple owns is classified as either:

- (a) Property owned jointly by the parties to the relationship (relationship property); or
- (b) Property owned exclusively by one party to the relationship (separate property).

These definitions are all encompassing and mutually exclusive. This means that at any given time during a relationship, all items and types of property (for example, real estate, cash, financial assets, cars, boats, art, jewellery, and so on), owned by either one or both of the parties to the couple is either relationship property or separate property. However, such property cannot be both relationship property and separate property.

The family home is always classified as relationship property, regardless of whether it was acquired before the relationship commenced or subsequently. Any other property acquired by either party during the relationship will also be relationship property - except in certain circumstances.

Property acquired before the relationship began and other property acquired by inheritance is usually separate property provided it has not been intermingled with relationship property.

It is a fundamental principle of the 1976 Act that relationship property is divided equally between the parties to a relationship if that relationship ends — except in extraordinary circumstances.

Generally when the 1976 Act applies there will be significantly less separate property in a long term relationship than would be the case if a relationship ends after only a short period of time.

Importantly, the 1976 Act allows couples to “contract out” of its terms. This means that couples can determine as between themselves at the outset of a relationship (or during

or at the end of the relationship) how their property will be divided if the relationship comes to an end. In practice this is often a fraught process and can lead to unsatisfactory outcomes.

The 1976 Act is intended to create a regime of fairness and justice to protect those who may be vulnerable. However, often the 1976 Act has unintended and unwanted effects on couples whose intentions may be different to those contemplated by the regime. This is particularly common when one partner brings disproportionately more wealth to a relationship than the other partner.

A reason for some of the unintended consequences of the 1976 Act is that it creates a rules-based deferred property sharing regime, similar to that of Canada and certain European jurisdictions. Other jurisdictions that New Zealand often compares itself with (such as Australia, England and Wales and the Republic of Ireland) take an alternative, discretionary approach based on equitable principles that can be more readily adapted by courts to specific family circumstances.

Under a rules-based approach, the division of property is determined by rules that are not ordinarily displaced by the courts (although they can be in certain circumstances). Under a discretionary approach, partners hold property separately during the relationship, but if that relationship ends the court has a discretion to alter the partners' property interests if it considers it just to do so.

The 1976 Act was amended in 2001 and 2005 to extend its application to civil unions and de facto partnerships. However, it has not been comprehensively reviewed since its enactment in 1976. The Law Commission was asked to review the 1976 Act to determine whether it is still operating appropriately and effectively (the Review). In July 2019 the Law Commission completed the Review and made a number of recommendations for reform.

The main objective of this article is to summarise the Law Commission's recommendations and to outline the Government's subsequent response in November 2019.

## RELATIONSHIPS AND FAMILIES IN CONTEMPORARY NEW ZEALAND

In October 2017 the Law Commission published a study paper. In it the Law Commission observed that New Zealand has undergone significant demographic and social change in the last 40 years in terms of partnering, family formation, separation and re-partnering.

In terms of relationship formation, it was observed that:

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- (a) Fewer people are marrying;
- (b) There are more diverse relationships (for example, civil unions and de facto relationships that were not initially envisaged in the 1976 Act until it was subsequently amended);
- (c) People are marrying later in life;
- (d) Many young people are living in de facto relationships; and
- (e) Some partners “live apart together”.

In terms of having children, it was observed that:

- (a) Women are having children later in life; and
- (b) More children are being born outside of marriage (as opposed to historically where most ex-nuptial conceptions ended as nuptial births which reflected societal norms at that time).

In terms of relationship separation, it was observed that:

- (a) The divorce rate is higher than in 1976 but has been declining since the early 2000s;
- (b) Official divorce statistics do not accurately measure separation because:
  - (i) They do not include de facto relationships; and
  - (ii) Not all marriages/civil unions are officially dissolved (statistics suggest one-third of marriages/civil unions end in divorce).
- (c) Almost half of all divorces involve children; and
- (d) There has been a significant increase in single parent families in NZ.

In terms of re-partnering and step-families, it was observed that blended families are more common than they were 40 years ago.

In terms of the makeup of New Zealand households, it was observed that:

- (a) Couples with children are decreasing in proportion to other family types;
- (b) Couples without children are increasing as a proportion of all families;
- (c) There are more single parent families;
- (d) An increasing number of people live in households with their extended family members; and
- (e) Extended family members (for example, grandparents) taking a parental role is more common.

In terms of work sharing, it was observed that:

- (a) One of the most significant changes since 1976 affecting contributions within relationships is the increasing likelihood for both partners to participate in the workforce;
- (b) The rate of dual earner families is higher;
- (c) More women are in the workforce, but the rate still remains lower than that for men; and
- (d) Women are more likely to perform unpaid work such as childcare, household work and helping someone who is ill or vulnerable.

In terms of financial well-being, it was observed that:

- (a) Most family wealth and debt is tied up in the family home;

- (b) The rate of home ownership is decreasing;
- (c) Many homes are held in a trust;
- (d) Only about half of all adults are saving for retirement; and
- (e) Women have less retirement savings than men.

## LOOKING TO THE FUTURE

When looking to the future, the Law Commission observed that:

- (a) New Zealand has undergone unprecedented demographic, cultural and workforce changes since the 1970s that have had a significant impact on relationship and family formation;
- (b) The New Zealand population is ageing and the average life expectancy has increased. This means more people will be single in the future;
- (c) Women, on average, are living longer than men which means women can be expected to require more retirement savings;
- (d) Diversification of family arrangements (for example, single parent families, same-sex relationships, step and blended families, couple only families, living apart together relationships, multicultural families) will be more common in the future; and
- (e) Reliance on extended family members is expected to be a key future trend.

## LAW COMMISSION REPORT

In June 2019, the Commission completed the Review and submitted its report to Parliament (*Law Commission Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) (the Report)). The Report concluded that, due to the significant social change in New Zealand since the inception of the 1976 Act, it is no longer fit for purpose. The Law Commission proposed the following changes:

- (a) A new statute, entitled the Relationship Property Act (the New Act), to apply to relationships ending on separation;
- (b) The rules that apply to relationships ending on death be the subject of further consideration, within a broader review of succession law generally; and
- (c) The New Act to retain a rules-based deferred property sharing regime rather than relying on judicial discretion.

The central underpinning theory of the recommendations was that each partner is entitled to “share the fruits of the family joint venture” (Report, at [3]). This theory is based on the idea that a “qualifying relationship” is a joint family venture, to which each partner contributes equally, but in different ways. Consequently, there was an expectation that each partner would continue to share in the fruits of that joint venture (that is, the product of their combined contribution) in the future.

The Law Commission recommended that the New Act should be the principal source of law for the division of property where relationships end on separation. This was based on the theory that the New Act would best achieve certainty and predictability for separating couples, which would promote people's ability to resolve property matters outside of court.

## PURPOSE AND PRINCIPLES

The Law Commission recommended that the purpose of the New Act should be to achieve a just division of property

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between partners when a relationship ends on separation. It recommended that the following principles should be adopted to guide the achievement of this purpose:

- (a) Recognise tikanga Māori;
- (b) Treat all forms of contribution equally;
- (c) Share relationship property equally;
- (d) Share economic advantages/disadvantages arising from the relationship or its end;
- (e) Children and their best interests are a primary consideration;
- (f) Partners can contract out; and
- (g) Disputes should be resolved as inexpensively, simply and speedily as is consistent with justice.

### QUALIFYING RELATIONSHIPS

The 1976 Act applies to marriages, civil unions and de facto relationships. The Law Commission was of the opinion that the current rules as to what relationships qualify are difficult to understand as the rules are different depending on the length of the relationship and whether the relationship is a marriage, civil union or de facto relationship.

The Law Commission was of the view that the rules needed some reform to ensure that the law applies in the same way to relationships that are substantively the same.

#### Marriages and civil unions

- (a) The 1976 Act applies to all marriages and civil unions, irrespective of their length. However, marriages and civil unions of less than three years' duration are treated differently to those of more than three years' duration.
- (b) Special rules relating to the division of property apply to marriages and civil unions of less than three years' duration and the presumption of equal sharing is displaced in such circumstances. The Law Commission recommended that these special rules be abolished. The rationale for this recommendation was that the current special rules of division were introduced to avoid one partner obtaining a windfall gain if the marriage or civil union ended after a short period of time. The Law Commission noted:
  - (i) Relatively few marriages and civil unions end within three years (because the preceding time in a de facto relationship also counts); and
  - (ii) The other recommendations by the Law Commission relating to the classification of property (like how the family home is treated) reduces the risk of windfalls.
- (c) The Law Commission was of the view that it is appropriate to emphasise and recognise the partners' decision to formalise their relationship rather than to focus on an arbitrary three-year milestone.

#### De facto relationships

Currently, de facto relationships qualify for equal sharing under the 1976 Act when:

- (a) The relationship meets the definition of de facto relationship; and
- (b) The partners have lived together as de facto partners for three years or more.

The statutory definition of de facto relationship requires partners to "live together as a couple" (there are a list of matters to consider in the definition). The Law Commission recommended this definition remain.

The Law Commission also recommended that:

- (a) The three-year qualifying period remain.
- (b) Partners be provided with greater guidance as to when a relationship is likely to be a qualifying relationship. It recommended implementing a statutory presumption that partners who have maintained a common household for three years or more be considered to be in a qualifying de facto relationship.
- (c) De facto relationships of less than three years' duration be excluded from the property sharing regime except where:
  - (a) There is a child to the relationship and the court considers it just to make an order dividing property; or
  - (b) One partner has made substantial contributions to the relationship and the court considers it just to make an order dividing property; and
  - (c) When either of these situations arise, the de facto relationship be subject to the ordinary rules of division rather than the special rules which currently apply.

#### Relationships involving young persons

The Law Commission recommended that the definition of "qualifying relationships" be subject to a minimum age requirement. It suggested the minimum age requirement be 16, as taken from the Marriage Act 1955 and the Civil Union Act 2004.

#### LGBTQI+ relationships

The Law Commission recommended that the statutory definition of de facto relationship be amended to adopt the gender-neutral terminology of a relationship between two people, regardless of their sex, sexual orientation or gender identity.

#### Contemporaneous relationships

- (a) The 1976 Act has special rules to address situations where a person is in more than one qualifying relationship at the same time but the Law Commission considered that these rules are flawed.
- (b) The Law Commission suggested implementing special rules so that, where property is relationship property and there are two or more qualifying relationships, a court can apportion the contested relationship property between the relationships in accordance with the contribution of each relationship to the acquisition, maintenance or improvement of that property.

#### Multi-partner relationships

- (a) The 1976 Act does not apply to three or more people who are in a qualifying relationship together.
- (b) The Law Commission did not consider the New Act should apply to multi-partner relationships but it recommended that further research be undertaken.

#### Domestic relationships

- (a) The 1976 Act does not apply to non-intimate relationships between two people who provide care and support for each other.

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- (b) The Law Commission did not consider the New Act should apply to domestic relationships but it recommended that further research be undertaken.

### CLASSIFICATION OF PROPERTY

The Law Commission recommended the New Act include the same definition of property as is used in the 1976 Act.

The Law Commission considered the way the 1976 Act currently classifies property to be a key issue and recommended that at the end of a relationship partners share all property that is:

- (a) Acquired by either partner for the partners' common use or common benefit;
- (b) Acquired or produced by either partner during the relationship (excluding third party gifts and inheritance); and/or
- (c) Used as a family chattel.

### Burden of proof

The Law Commission concluded that the burden of establishing the classification of separate property should be on the owning partner.

### Family home

The Law Commission recommended that:

- (a) Where the family home was one partner's pre-relationship property, or was received as a third-party gift or inheritance, the value of the home when the relationship began or when the gift or inherited property was received should be classified as the owning partner's separate property. This is a significant departure from how the family home is classified under the 1976 Act.
- (b) Any increase in the value of the family home should be classified as relationship property on the basis that the increase is attributable to the relationship.
- (c) Any debt incurred before the relationship began to acquire, improve or maintain the family home should be classified as separate debt. If this debt was reduced during the relationship through the application of relationship property (i.e. using both partners income to pay mortgage) the owning partner should compensate the non-owning partner for an amount equal to half the reduction in principal debt.
- (d) If a new family home was purchased during the relationship it should be relationship property regardless the source of funds used to purchase that home on the basis that it would be purchased for the partners' common use or benefit. If partners wish to retain the value of their separate property contributions, then they would be required to contract out of the 1976 Act.

### Family chattels

The Law Commission recommended that:

- (a) Family chattels should continue to be classified as relationship property when used wholly or primarily for family purposes. This is in line with the current approach under the 1976 Act. The Law Commission did not consider that a departure from this approach was necessary (unlike with the family home) because it

considered there to be a low risk of unfairness in classifying family chattels this way, as family chattels are usually low value and likely to be replaced over the relationship.

- (b) Heirlooms and taonga are currently excluded from the definition of family chattels under the 1976 Act. The Law Commission recommended that an additional category of property should be excluded from the definition of family chattels. These would be items of special significance that have a special meaning to a partner and cannot be replaced by a substitute item of similar monetary value.

### Increases in value of separate property

The Law Commission recommended that any increase in the value of separate property, that is attributable directly or indirectly to the relationship, should be relationship property. The Law Commission recommended that an increase in value of separate property should be attributable to the relationship if such increase is attributable to the application of relationship property or to the actions of either or both partners.

### Gifts and inheritance

- (a) The Law Commission recommended that the intermingling test that applies under the 1976 Act to gifts and inheritances should be abolished and the same rules for when separate property can be converted into relationship property should apply to all forms of separate property.
- (b) Consequently, gifts and inheritances would lose their separate property status if they are used to purchase property for the common use or common benefit of both partners, or as otherwise applied to already existing relationship property (i.e. improving a family home).

### Debt

The Law Commission recommended that:

- (a) The classification of debt under the 1976 Act should remain largely the same.
- (b) A definition of relationship debt should include debt which is incurred for the partners' common use and benefit as opposed to jointly incurred debts.
- (c) The burden of proof to classify debt as relationship property should be on the partner contending that fact.
- (d) The court should be given the power to divide indebtedness where a couple have only debt and no property.
- (e) Creditors should have a two-year period to challenge dispositions or agreements that have a defeating effect.

### ACC/private insurance payments

The Law Commission recommended that:

- (a) Special provision should be made for personal injury payments which are made under the Accident Compensation Act or a private insurance policy.
- (b) Currently, these payments can be treated as relationship property. The Law Commission suggested that this could deprive the injured partner from funds that they need for rehabilitation or from compensation for personal impairment.



- (c) Personal injury payments that support the injured partners rehabilitation should be separate property but personal injury payments that replace the injured partners earnings should be relationship property.

### **DIVIDING RELATIONSHIP PROPERTY**

The Law Commission agreed with the following aspects of the 1976 Act in relation to misconduct:

- (a) A division of property should not be based on moral judgments about a partner's conduct;
- (b) Partners should not be encouraged to unnecessarily focus on each other's behaviour; and
- (c) Misconduct should not generally affect a partner's entitlements under the property sharing regime.

However, the Law Commission considered that the extent to which a court can take into account a partner's misconduct should be clearer under the New Act. It recommended that if misconduct is (1) gross; (2) has significantly affected the value of relationship property; and (3) would make equal sharing repugnant to justice, the court should be able to apply the exception to equal sharing.

The Law Commission also recommended that the Government should consider the relevance of family violence to the division of property at the end of a relationship under the New Act.

### **ADJUSTMENTS TO EQUAL SHARING**

The Law Commission also recommended that the court be imbued with the power to adjust property sharing in certain situations, such as where:

- (a) Both partners owned a home at the beginning of the relationship but only one of these is relationship property;
- (b) One partner's separate property was sustained by the other party, by relationship property, or by the other partner's separate property;
- (c) One or both partners made contributions after the relationship ends;
- (d) One partner's separate property was materially diminished by the deliberate action or inaction of the other partner;
- (e) After the relationship ended, one partner materially diminished the value of relationship property by their deliberate action or inaction; or
- (f) One partner's personal debts were satisfied out of relationship property or the other partner's separate property.

### **SHARING ECONOMIC ADVANTAGES AND DISADVANTAGES**

Section 15 of the 1976 Act gives the court the power to compensate one partner from the relationship property pool when there is significant disparity in the partners' income and living standards because of the way they divided their functions during the relationship.

The Law Commission concluded that this remedy was mainly intended to address situations where one partner worked less during the relationship, usually to care for the partners' children and maintain the household, leaving the other partner free to pursue a career. At the end of the

relationship, equal division of relationship property would not recognise the reduced income-earning prospects of the partner who gave up workforce participation, nor would it recognise the economic benefits the other partner would continue to enjoy from their established career.

However, the Law Commission noted that the s 15 remedy has been unsuccessful in addressing economic advantages and disadvantages due to:

- (a) The time and cost in bringing a claim;
- (b) Inconsistent approaches being adopted in the courts; and
- (c) Compensation being awarded only from relationship property, which is an issue when there is not much.

There is also an ability for the court to make one partner pay the other maintenance under the Family Proceedings Act 1980 (FPA). However, the Law Commission concluded that this remedy still fails to adequately reconcile economic advantages and disadvantages between parties.

Consequently, the Law Commission recommended that s 15 of the 1976 Act and maintenance under the FPA be repealed and these provisions replaced with Family Income Sharing Arrangements (FISAs). Under a FISA, partners would share income for a specified period, calculated by a statutory formula that would consider the partners' income before separation and the length of the partners' relationship.

### **FAMILY INCOME SHARING AGREEMENTS**

The Law Commission recommended that an economically disadvantaged partner be eligible for a FISA where they were in a qualifying relationship with the other partner and:

- (a) Have a child together; or
- (b) The relationship was for 10 years or longer; or
- (c) During the relationship:
  - (i) Partner A stopped, reduced or did not undertake paid work or declined a promotion or other career advancement opportunity; or
  - (ii) Partner B was able to undertake training/education/other career sustaining or advancing opportunities due to contributions of partner A.

The Law Commission suggested introducing a statutory formula to calculate the amount payable under a FISA. Under the formula, the economically disadvantaged partner would be entitled to half the family income following separation for a period of time that is approximately half the length of the relationship, up to a maximum of five years.

The Law Commission also recommended providing partners with the option to contract out of FISA provisions, to make their own FISAs, or to capitalise a FISA entitlement through the payment of a lump sum or the transfer of property.

### **TRUSTS**

Section 44C of the 1976 Act gives the court certain powers in situations where property which has been disposed of to a trust.

The Law Commission recommended that s 44C of the 1976 Act should be retained in the New Act but amended to provide a single comprehensive remedy that will enable a court to grant relief when a trust holds property that was produced, preserved or enhanced by the relationship.

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The New Act would cause s 44C to apply in three different situations:

- (a) Where either or both parties have disposed of property to a trust, at a time when the qualifying relationship was reasonably contemplated or since the qualifying relationship began, and that disposition has had the effect of defeating the claim or rights of either or both of the partners under any other provision of the 1976 Act; or
- (b) Where trust property has been sustained by the application of relationship property or the actions of either or both partners (this will apply to trust property that has been settled by third parties or trusts settled before the relationship was contemplated — for example, if the trust was settled well before the relationship, and the trust held the family home, then a partner will have a claim in respect of the increase in value of the home that is attributable to the relationship or if the trust held a family farm that was settled by one partner's parents the other partner will have a claim if they can show the farm was preserved or enhanced by the relationship); or
- (c) Where any increase in the value of trust property, or any income or gains derived from the trust property, is attributable to the application of relationship property or the actions of either or both partners.

The amended s 44C would give the court broad powers which include ordering one partner to pay compensation to the other, ordering the trustees to distribute capital from the trust, varying the terms of the trust and/or resettling some or all of the trust property on a new trust or trusts.

The Law Commission also recommended that:

- (a) To ensure a balance is achieved between protecting partners' entitlements under the New Act and preserving trusts, the court must be satisfied that any order made is 'just';
- (b) Parties should have the option to contract out of the new s 44C;
- (c) Section 182 of the FPA (which gives the court power to deal with property owned by a trust, but which only applies to married couples) should be repealed as the court would have similar powers under the new s 44C.

### CHILDREN'S INTERESTS

The Law Commission considered that children's interests should be a primary consideration under the New Act. It recommended giving the court the power to set relationship property aside for the benefit of any minor or dependent children of a relationship.

The Law Commission also recommended establishing a presumption in favour of granting a temporary or interim occupation or tenancy order on application in favour of the primary caregiver of any minor or dependent children.

The Law Commission also recommended that:

- (a) The jurisdiction of furniture orders should be broadened to include family chattels and the rules should be clarified to make it clear that a court must have regard to children's needs when making furniture orders;
- (b) A court has the power to postpone vesting if this would cause undue hardship for any minor or dependent child of the relationship;

- (c) Any orders made under the New Act should be in addition to child support obligations under the Child Support Act 1991 (and not grounds for departure from the obligations);
- (d) Children's participation in proceedings should be strengthened by lowering the threshold for when a lawyer is required to be appointed for a child to "necessary or desirable"; and
- (e) The Government should review the effectiveness of the Child Support Act 1991.

### CONTRACTING OUT AND SETTLEMENT AGREEMENTS

The Law Commission recommended that the New Act retain the option for parties to create contracting out agreements. The requirements for these contracting out agreements would remain the same as those provided in the 1976 Act.

The Law Commission recommended that:

- (a) The 1976 Act should expressly provide that lawyers may use audio-visual technology to witness the signing of a contracting out/settlement agreement;
- (b) Courts should retain the power to partially uphold or vary a contracting out agreement if there is serious injustice; and
- (c) The court should have regard to the best interests of any minor or dependent children of the relationship in deciding whether giving effect to a contracting out or settlement agreement would cause serious injustice.

### TIKANGA MĀORI

The Law Commission recommended that the framework of the New Act should continue to accommodate and respond to matters of tikanga Māori. It indicated that further thought should be given to several issues including:

- (a) Providing remedies in relation to family homes built on Māori land through Te Ture Whenua Māori Act 1993;
- (b) Defining Taonga in the 1976 Act within a tikanga Māori construct;
- (c) Classifying Taonga as a special item of separate property that cannot become relationship property in any circumstances, and preventing the court from making orders requiring a partner to relinquish taonga as compensation to the other partner;
- (d) The Family Court should be able to appoint a person to make an inquiry into matters of tikanga Māori and report it to the Court; and
- (e) Providing tikanga Māori education for Family Court judges.

The Law Commission also recommended that further consideration should be given as to whether Māori Land Court judges should sit alongside judges in the Family Court, where there is a difficult matter of tikanga Māori at issue.

### KIWISAVER

The Law Commission recommended providing the court with the power to bind superannuation and KiwiSaver scheme managers even if the partners do not enter an arrangement or deed (which is a requirement presently). It also suggested introducing specific provisions allowing partners to divide KiwiSaver entitlements without needing a court order. This power would be limited to specific circumstances.

## OCCUPATION ORDERS

The Law Commission noted that the court's powers to grant occupation and tenancy orders are important to provide for the accommodation needs of partners and their children after separation.

It recommended that the court be granted greater powers to make occupation orders over property that is not relationship property (i.e. property which is separate property or property that is held on a trust that is connected to the relationship).

## DISPUTE RESOLUTION

A major issue identified by the Law Commission during its review was the fact the 1976 Act does not facilitate inexpensive, simple and speedy resolution of relationship property matters. The Law Commission's recommendations in relation to dispute resolution are therefore designed to promote the just and efficient resolution of relationship property matters. It recommended:

- (a) That the Ministry of Justice should develop a comprehensive information guide for separating partners, explaining the 1976 Act and providing information about the different options for resolving 1976 Act matters;
- (b) Promoting voluntary out-of-court dispute resolution by introducing new "pre-action procedures" in the Family Court Rules 2002 that provide a clear process for partners to follow when attempting to resolve relationship property matters out of court;
- (c) That the Government consider extending a voluntary, modified Family Dispute Resolution service or other form of State-funded dispute resolution service to 1976 Act matters; and
- (d) Introducing an express duty of disclosure (recognising that disclosure is necessary for the just resolution of relationship property matters).

## CROSS-BORDER ISSUES

Currently, the 1976 Act applies to immovable property situated in New Zealand and movable property regardless of where it is situated if at least one of the partners is domiciled in New Zealand.

The fact the 1976 Act does not apply to immovable property situated outside of New Zealand creates problems as it prevents the resolution of property disputes under a single legal regime.

The Law Commission recommended that the law to be applied to property disputes between partners should be the law of the country with which the relationship had its closest connection. Under this rule, a court should be able to classify all of the partners' property as relationship property or

separate property regardless of where it is located and the new value of relationship property available for division between the partners should include the value of any items of relationship property that are situated overseas.

## GOVERNMENT'S RESPONSE

On 27 November 2019, the Government published their response to the Law Commission's report. The Government accepted the Law Commission's conclusion that the 1976 Act requires amendment in order to accurately represent 21st century New Zealand. The Government also acknowledged the Law Commission's recommendation that the property division rules relating to relationships ending on death should be considered separately in the context of wider succession law. However, the Government concluded that it does not intend to implement the Law Commission's recommendations at this stage. Instead, the Government has indicated that it will reconsider the recommendations after the Law Commission has conducted a review of succession law, so it can consider both topics together.

## CONCLUSION

The Law Commission proposed that the New Act be enacted to replace the 1976 Act. The New Act would implement number of reforms and alterations to the regime created under the 1976 Act. The purpose of the New Act would be "to provide for a just division of property between partners when a relationship ends on separation".

The New Act would be an improvement to the 1976 Act by introducing a clear, rules-based approach to the classification and separation of property. However, the Government has indicated that while it acknowledges the Law Commission's recommendations, it will not consider implementing them until after the Law Commission has conducted a review of succession law. The terms of reference for that review are yet to be set and so it seems likely that any implementation of the recommendations of the Law Commission will be some years away.

Nevertheless, the Report is recommended reading for lawyers practising in this area because of the comprehensive way in which it discusses the relevant issues, makes comparisons with other jurisdictions, and applies the law to present circumstances. In the writers' view the Report will inform and influence the judiciary in those areas where they are required to take a discretionary approach to the 1976 Act.

The writers therefore recommend that lawyers advise their clients and draft documents in a way which is broadly consistent with the principles that the Law Commission considers should be incorporated into the New Act. This may require a change of mindset to acknowledge that each partner is entitled to "share the fruits of the family joint venture". □

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orders to engage the writ and at what expense that something more may be to an individual's personal liberty and freedom of movement rights. The focus when determining if an individual is detained for the purposes of the writ should not necessarily be on what an individual *can* do under the orders, but rather what an individual *cannot* do. And the answer to that question must almost certainly be that an individual

cannot exercise their right to go wherever, whenever they please.

Adopting a broad view of detention is not to suggest the writ of habeas corpus should have been issued in the *Ardern* decisions or should be issued more readily in the future. It simply ensures that historically and constitutionally important questions relating to an individual's personal liberty and freedom of movement rights are not dismissed without considering the question of lawfulness. □