



**National Council of
Women of New Zealand**

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Wahine O Aotearoa

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Submission to the Law Commission Review of the Property (Relationships) Act 1976

Introduction

- 0.1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing 258 organisations affiliated at either national level or to one of our 19 branches. In addition, about 390 people are individual members. Collectively our reach is over 340,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we will be better off socially and economically if we are gender equal. Through research, discussion and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right. This submission has been prepared by the NCWNZ Public Issues Standing Committee and the Parliamentary Watch Committee after consultation with the membership of NCWNZ. It draws the responses of NCWNZ branches throughout Aotearoa New Zealand, as well as comments from local and national member organisations as well as individual members. Branches reported lively discussion of issues raised by the Law Commission.
- 0.2. NCWNZ has made a number of submissions in the past on legislation relating to the division of property between intimate partners when they separate. We welcome the Law Commission's review of the Property (Relationships) Act and the opportunity to present the responses of members to the issues raised by the Commission.
- 0.3. This submission focuses mainly on key issues identified on page 2 by the Law Commission in its Issues Paper IP41 *Dividing Relationship Property – Time for Change? Te mātatoa rawa tokorau – Kua eke te wā?* and the "big questions" published on the online consultation website. However, it does not attempt to answer all the questions posed by the Law Commission. The majority of NCWNZ members who considered issues identified by the Law Commission were Pākehā and did not think they had adequate knowledge to consider the implications for Māori of the operation of this legislation. They supported consultation with Māori on its relevance for Māori traditional custom and contemporary practice, especially with respect to consideration of the rights of whāngai children.
- 0.4. While there was some diversity among the views expressed by NCWNZ members, there was a consistent concern about the situation of women in heterosexual relationships when they have brought things of non-monetary value to the relationship through their unpaid work, childcare and support of earning partners or support of partners while they have studied and acquired

qualifications that enhance their capacity to earn. NCWNZ members highlighted the ways in which equal division of shared property (such as equity in the family home) can result in inequitable outcomes for partners who had provided unpaid work and childcare at the expense of their own career advancement or earning capacity. As Caitlin Hollings identifies in her contribution to the *New Zealand Women's Law Journal*: "Which assets are available to a woman at the conclusion of a long-term relationship is of vital importance to her economic freedom and independence. This is particularly true where a woman has compromised her own income to support a partner or raise children."¹

- 0.5. While partners who make these unpaid contributions to a relationship are not exclusively women, women are the majority of those in these circumstances. Gender equality therefore requires close attention to equitable and fair division of property when relationships end rather than strictly equal division of what is defined as shared property. The full recognition of non-monetary contributions during a relationship is essential as well as consideration of ongoing unequal childcare responsibilities when relationships end.
- 0.6. There was strong support for attention to the needs of children when decisions were made relating to the division of property between partners. Members stressed that this was most important when children were under 18 years old. Responses from NCWNZ members included poignant stories about how children's possessions and property (such as beds and bikes and sporting equipment) were defined as their mother's component of shared relationship property resulting in unequal shares of joint possessions and property. A strong case was made for distinguishing children's rights in shared property from the rights of parents, regardless of where the children were living.
- 0.7. NCWNZ members were also very concerned about arrangements that exist to side-step equal division of shared property between separating couples by removing property from the Act regime, such as the use of trusts.
- 0.8. NCWNZ is very aware that the circumstances of couples who separate are diverse. A number of members were concerned about a 'one model fits all' approach to division of shared property and definitions about what constituted shared property. Responses to issues raised by the Law Commission stressed the need for better and more accessible information for everyone before they entered ongoing intimate relationships and as their circumstances changed. One NCWNZ branch stated that: "People know little about what can legally happen to their property when a relationship ends. Clearly, everyone needs to know before they enter into a relationship about the perils of awaiting them should the unthinkable happen and they separate, and the advantages of having a pre-nuptial/relationship contract."
- 0.9. A number of members and affiliated organisations highlighted the need for couples to enter into their own arrangements about property that were appropriate for their circumstances. Arguments were made for both parties to receive independent legal advice. While women with limited opportunities to accumulate property and further their careers were often seen as vulnerable when relationships ended, older women who had acquired equity in their homes were also seen as at risk

¹ Hollings, Caitlin (2017) 'Clayton v Clayton : Addressing the Elephant in the Room - A Case Note'. *New Zealand Women's Law Journal*, Vol. 1, p.215.

of losing property vital to their quality of life in retirement. One member who commented on these issues wrote: “When you enter a relationship, you do not expect that it will fall over and you trust the person has a sense of integrity.” She shared her experience of entering a de facto relationship when she owned her home, paid the mortgage, the rates, insurance and the household accounts, but her partner claimed 50% of its value when they separated after eight years.

1. Type of relationships

- 1.1. There was consistent support for this legislation to apply to people in married, civil partnerships or de facto relationships that have lasted for 3 years or more. One member organisation stated that: “Yes, these relationships should be treated in the same way with continued attention to issues of equality and continued recognition of the diverse range of relationships.” There was broad support for this position.
- 1.2. Overall NCWNZ members support the definition of ‘de facto’ relationships in the current legislation. When asked to consider the weighting of the things to be taken into account, members stressed the shared care of children, especially when those children were under 18. A number of members considered that there was a need for better understanding about what is defined as a de facto relationship.
- 1.3. Some NCWNZ members were concerned about the same provisions applying when people had been in relationships for just 3 years and for over 15 years. They argued that people can “drift” or “slide” into de facto relationships without making a firm commitment to share property. Some members argued that the law should specify 5 years for all categories of relationships before shared property such as a family home was equally shared. Other members considered that some people may enter into such relationships for 3 – 5 years and never intend to make a longer term commitment. One NCWNZ branch commented: “People can maintain a relationship for three years in order to make pecuniary gain”. This can have major consequences for a former partner who has made a much larger contribution to what is defined as ‘shared property’.
- 1.4. One member organisation argued that “living apart relationships” should not be defined as de facto relationships, although a couple may sustain a close relationship over many years. Women may choose to not live with a romantic or sexual partner because they want to retain their personal and financial independence. This may be particularly important when women are living with children from a previous relationship and want to maintain a separate household for their children.
- 1.5. Members were very evenly divided on the issue of whether people in platonic relationships who share a household could be defined as in a de facto relationship for the purposes of this Act. Some members argued strongly that these are different relationships and it was not appropriate for the Act to apply. Others argued that these were often very much like relationships between married, civil union and de facto couples and involve support, closeness, friendship and care. One NCWNZ branch stated that: “Many elderly marriages do not include physical sex. They are none the less marriages, so a domestic relationship that does not include a sexual relationship is no different, e.g. a mother and a daughter where the daughter has looked after the mother for many years.”

- 1.6. Other members argued that people in such ongoing shared households should enter into their own arrangements about property that defined what was 'shared' and what was 'separate'. A member organisation argued that "people living in these types of relationships could be supported to make arrangements that suit their living situations" and highlighted that "a one size fits all solution is not possible."

2. Type of property

- 2.1. NCWNZ considers that the family home should always be defined as 'shared property'. This should apply if a couple have shared the home, regardless of their direct financial contribution to this property. Unpaid contributions such as domestic work, childcare and home renovation should be recognised in the principle of equal division of shared property.
- 2.2. Members recognised that in some circumstances the family home is also a component of a family business in which those other than the separating couple have a financial interest. Concerns about the division of family farms when relationships end were identified. Arguments were advanced about the need to calculate the value of the family home in these circumstances and compensate a partner with an amount that was equal to at least half its value. If they had contributed to the farm as a business, this contribution needed to generate appropriate compensation.
- 2.3. NCWNZ supports the principle that property acquired once the relationship commenced was 'shared property' while previously owned property and inheritance and heirlooms were 'separate property'. Members thought it was very important that debts such as mortgages should also be defined as 'separate debt' if they were entered into prior to the relationship. Debt on a property acquired by both partners should be treated as 'shared debt'. Student loans entered into before a relationship should be treated as 'separate debt'. However, members identified complex circumstances such as the status of previously acquired property with mortgage debt that the other partner had reduced through their contributions to the mortgage, while not being registered as an owner of the property. Members argued that if a person contributed to the payment of the mortgage and the upkeep of a home, it should be treated as shared property.
- 2.4. NCWNZ members tended to consider that the earning power of a partner was 'shared property' rather than 'separate property' when there was evidence that the other partner had supported them as they acquired qualifications or advanced their career. This support could be financial or involve undertaking unpaid domestic work or childcare that facilitated the acquisition of qualifications or career advancement. As one member organisation stated: "One partner may have given up a career, reduced their working hours, not taken promotion, and/or taken primary responsibility for caring for children." Another member stated: "Where the work of one has allowed the other to gain the qualification, there should be some compensation for that". Earning capacity would not be 'shared property' if professional qualifications or career advancement had occurred before the relationship commenced. Members recognised that it was often difficult to calculate the financial value of such contributions to the earning power of a separating partner.
- 2.5. A member organisation had a clear position on issues relating to capacity to earn as shared property: "Although times are changing, it is still the case that women shoulder the bulk of child care within

relationships. This often allows the (male) partner to develop a greater earning capacity at the cost of the (female) carer's own career. This reality should be taken account of within the legislation so that this inequality can be addressed. Obviously this will benefit male or other partners where the female partner is the one who has been able to develop a better capacity to earn. Therefore, the capacity to earn a high salary should not be 'separate property'."

- 2.6. Members considered that retirement savings should be defined as 'shared property', particularly if one partner had supported the other partner while they engaged in paid work or businesses that led to contributions to retirement savings. Some members highlighted that there were problems involved in breaking into Kiwi Saver retirement savings and recommended that these should ideally remain intact and the share in these savings transferred to increased rights in other shared property, such as the family home. A number of responses to the issues raised about division of property by the Law Commission stated that there was insufficient information available about the division of retirement savings when relationships ended.
- 2.7. NCWNZ considers that ongoing ACC payments should always be considered 'separate property' as they are paid to individuals whose capacity to earn has been affected by an injury that has diminished their access to earnings. As one member stated: "They will need it for their future care." However, there was a diversity of views on the payment of lump sums that might have provided compensation for earnings in the past or been used to modify a home. Some members argued that if these payments were for lost earnings which replaced the earnings of an ACC applicant whose earning power had been facilitated by their partner, this ACC payment should not be considered 'separate property' when assets were divided. If their partner had been involved in providing care for their injured partner, this should also be taken into consideration when determining how property was to be divided.

3. Equal sharing of relationship property

- 3.1. NCWNZ supports the principle of equal rights to shared property when a relationship covered by the Act ends. As one organisation stated: "Human rights demand equality of gender in all legal outcomes which should only be displaced in truly exceptional circumstances."
- 3.2. NCWNZ members considered that "exceptional circumstances" apply when one partner has diminished earning capacity at the end of a relationship when they have supported the career development and achievement of their partner through the provision of unpaid domestic work and childcare. One NCWNZ branch argued that: "Property separation needs to be equitable not equal. Equal distribution of property can lead to financial stress for the main carer (generally women)."
- 3.3. Members considered that it was problematic that the trend for compensation in these circumstances amounted to less than 10% of the value of shared property. A member organisation stated that: "Difficulties of calculation do not prevent remedial calculation in other areas of the law. Suitable guidelines should be developed to assist the court. Additionally, this should not be seen as compensation for the difference, but simply what is required to correctly calculate the proper shares of the parties." Another member organisation argued that, when one partner has significantly less

earning power than another as a result of taking on childcare responsibilities, equal division of property “would be unfair.”

- 3.4. Members often stated that the partner with the most individual resources (often because they were in a well-paid job) had the advantage in disputes about the division of property because they could hire experienced lawyers to advance their interests. One NCWNZ branch stated that “clever lawyers can make things very difficult for women.” Several branches and member organisations included stories about women who had found it very difficult with limited financial resources to arrive at separation agreements about property that were in their interests and those of their children. Discussion at a NCWNZ branch led members to suggest that: “There should be a stronger element of attention to individual circumstances... We suggest a non-partisan independent financial mediator should be involved in decisions about division of property. This removes the ability of the richer partner to pay for better lawyers. The financial mediator could penalise parties for non-disclosure of assets. The cost of the mediator could be met by a percentage contribution from the settlement.”
- 3.5. Most NCWNZ members considered that when there was evidence of violence in a relationship, ‘exceptional circumstances’ should apply and the victim of such violence should receive more than half of the shared property. They argued that the impact of domestic violence needed to be taken into account and highlighted the need for resources for counselling and the impact on the employment circumstances of the person who had experienced such violence. One branch argued that: “Generally the woman is so beaten mentally that she is disadvantaged when trying to establish a new life.” Other members argued that law relating specifically to family violence should apply in these circumstances.
- 3.6. A number of members commented on issues relating to the misuse of shared property through gambling and credit card debt and argued that compensatory measures should be applied in determining the share of the other person in the relationship.

4. Property held in trusts

- 4.1. NCWNZ welcomed the provision that the court can rule that a separating partner has a claim in a property held in a trust. Overall, members considered that any property that has operated as a family home should be considered ‘shared property’ and the principle of equal division of property should apply, except where there are ‘exceptional circumstances’. They were concerned about what the Law Commission has identified as confusing and inconsistent law relating to trusts and the operation of the Property (Relationships) Act.
- 4.2. Members were aware that trusts were sometimes set up in order to remove the family home from a sharing regime. If that arrangement can be demonstrated, the court must have the power to allow fair sharing. As one NCWNZ branch stated: “If a person has financially, emotionally or physically contributed to the property in a trust, then they should get a share of the trust on separation. Trusts should not be able to be used to ensure that a person in a long term relationship does not get a fair share of assets they have contributed to during the relationship.”

5. Children's interests

- 5.1. NCWNZ considers that children's interests should always be taken into account when decisions are made about the division of shared property. Some members commenting on the current legislation argued that their interest should be paramount. Others argued that the weight given to children's interests should relate to the age of children, their needs and their levels of dependence on those involved in caring for them.
- 5.2. The majority of members supported the inclusion of all dependent children,² including those who were fostered or cared for under a Māori customary arrangement. However, some branches and individual members considered that biological or adopted children had prior rights. There was a recognition that children with a range of different connections to the couple separating might be living with them at the time of separation. Members stated that children being cared for could include grandchildren of one or both of the separating couple.

6. Own agreements about property

- 6.1. NCWNZ supports people's right to enter into their own legal arrangements about property. A number of members argued that, given the very different circumstances of couples, the opportunity to make their own arrangements was the best strategy for many people. Others argued that power imbalances in relationships and non-disclosure of assets could mean that vulnerable partners could enter into agreements that were not in their interests.
- 6.2. Members also support the right of the court to set aside such agreements if they are judged to be a 'serious injustice'. They supported the possibility of the court varying the agreement as long as that was involved consultation and mediation with the people who were involved. One branch argued that: "At all times the courts should have the flexibility to do what is reasonable and equitable." Another branch argued that it was very important that courts should exercise this power if there had not been full disclosure of property that could be defined as 'shared property'.

7. Conclusion

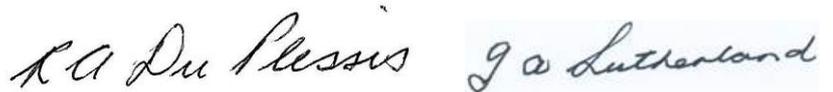
- 7.1. NCWNZ Branches, member organisations and individual members supported the principle of equal division of relationship property, but frequently argued that distributing the same amount to each of the people separating was not equitable or fair in all circumstances.
- 7.2. While recognising diversity in relationships and the distribution of domestic, childcare and earning responsibilities among couples, members were concerned about the ongoing impacts on women of the gendered distribution of responsibility for childcare and its impact on women's future earnings when relationships ended. This resulted in support in certain circumstances for treating a partner's capacity to earn as 'relationship property'.

² One NCWNZ member suggested that definitions of dependent children should be consistent with those used by government agencies such as Inland Revenue, Ministry of Social Development and WINZ.

- 7.3. A number of branches, member organisations and individual members highlighted the need for better public information about law relating to division of property when relationships end. One branch had very specific advice for those entering intended long-term relationships which included the need to record carefully at the beginning of a relationship what is separate property and what is relationship property. The need for information in a variety of different forms was highlighted, including scenarios that set out how the Act could be applied in different circumstances and access to information about the pros and cons of entering into a pre-nuptial/pre-relationship contract and getting independent legal advice.
- 7.4. Members highlighted the high costs of lawyers' fees in situations where there were long-running disputes about property settlements at the end of a relationship. Women, who have often spent more time in unpaid work and are located in occupations with lower earnings, can often be disadvantaged in the determination of property disputes on separation.
- 7.5. NCWNZ welcomes the public release of this submission and looks forward to the publication of the Law Commission's final report.



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