



February 2018

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

Citizens Advice Bureaux New Zealand (CABNZ) Ngā Pou Whakawhirinaki o Aotearoa welcomes the opportunity to make this submission on the Law Commission's Review of the Property (Relationships) Act 1976. Please contact us if you have any questions, or want any clarification about our submission.

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## Review of the Property (Relationships) Act 1976

Citizens Advice Bureaux New Zealand (CABNZ) Ngā Pou Whakawhirinaki o Aotearoa acknowledges the significant work of the Law Commission in producing this comprehensive review of relationship property law in New Zealand. Please note that in this document we have referred to the Law Commission's Issues Paper *IP41 Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* as the 'PRA Review'.

We have based our submission on an analysis of our client enquiries. While the enquiries we receive from clients touch on many of the issues covered in the review we consider that the area where we can offer the most valuable insight is in relation to people's access to support services when navigating issues relating to relationship property. For the purposes of this submission we have therefore focused our comments on Part H of the Issues Paper – *Resolving property matters in and out of court*, particularly *Chapter 23 How are property matters resolved in practice?* and *Chapter 24 – Resolving property matters out of court*.

Where possible we have supported our comments with examples of enquiries received from CAB clients. Identifying details have been removed and some details have been altered to ensure privacy is protected.

### About Citizens Advice Bureau

The purpose of our organisation is to:

- Ensure that individuals do not suffer through ignorance of their rights and responsibilities or of the services available; or through an inability to express their needs effectively — Me noho mataara kia kaua te tangata e mate i tōna kore mōhio ki ngā āhuratanga e āhei atu ana ia, ki ngā mahi rānei e tika ana kia mahia e ia, ki ngā ratonga rānei e āhei atu ana ia; i te kore rānei e āhei āna ki te whakaputa i ōna hiahia kia mārama mai ai te tangata.
- Exert a responsible influence on the development of social policies and services, both locally and nationally — Kia tino whai wāhi atu ki te auahatanga o ngā kaupapa ā-iwi me ngā ratonga ā-rohe, puta noa hoki i te motu.

We support the principle of partnership reflected in the Treaty of Waitangi — E tautoko ana Ngā Pou Whakawhirinaki o Aotearoa i te mātāpono o te pātuitanga e ai ki Te Tiriti o Waitangi.

We work to empower individuals to resolve their problems and to strengthen communities. The person-to-person service provided by over 2,300 Citizens Advice Bureau (CAB) volunteers is unique in New Zealand. From 82 locations around New Zealand, the CAB provides individuals with a free, impartial and confidential service of information, advice,



advocacy and referral. Ka mahi mātou ki te whakakaha i ngā tāngata takitahi ki te whakatika i ā rātou ake raruraru, ki te whakakaha hoki i ngā hapori. He mea ahurei i roto o Aotearoa te ratonga kanohi-ki-te-kanohi e whakaratohia e ngā kaitūao 2,300 o Citizens Advice Bureau (CAB). Mai i ngā takiwā e 82 puta noa i Aotearoa, e whakaratohia ana e te CAB ki ngā tāngata takitahi he ratonga koreutu, tōkeke, matatapu hoki e pā ana ki te mōhiohio, te tohutohu, te tautoko me te tukunga.

In the 2016/17 financial year, the CAB assisted with over half a million (525,525) client interactions, including over 200,000 in-depth enquiries where we offered information, advice and support across the range of issues that affect people in their daily lives. We use the insights we gain from our work with clients to advocate for socially just policies and services in Aotearoa New Zealand.

### **Client enquiries about relationship issues**

Enquiries about relationship issues are among the most common received by CABs. This includes enquiries at all stages of relationships and about the range of associated issues – formalising relationships including celebrants and certificate requests, relationship counselling, parenting issues, care of children (contact, day-to-day care, guardianship, paternity), separation and dissolution of relationships and relationship property.

In the past financial year CABs across New Zealand received 14,759 of such enquiries with 2,366 (16%) being categorised as primarily relating to relationship property issues and a further 4,654 (31.5%) recorded as relating to separation and dissolution. Over the past four years the number of relationship property enquiries has increased by 44%.

For relationship property and separation and dissolution enquiries where demographic details were recorded, clients spanned a wide range of age groups and ethnicities. While half of these clients identified as New Zealander or New Zealand European, other ethnic groups that had noticeable representation were Māori, Indian and Chinese. The majority of clients seeking assistance with relationship property and separation and dissolution issues were female (66%).

### **Common relationship property issues for CAB clients**

We are regularly approached by people who are navigating issues relating to relationship property. This includes people asking questions about the impacts of entering a relationship as well as those who are in the process of separating from their partner and dealing with all the related issues.

People approach CAB with property related enquiries at various stages of their relationship. These include:

- People who are entering a relationship and want to know the legal implications of this in terms of their property. A common trigger for seeking information and advice is the

decision to move in together. Often concerns about 'protecting property' come from anxious parents or other family members who are keen to protect family assets.

- People who want to contract out of the Property (Relationships) Act 1976 (PRA), ie, to write a 'pre-nup' to agree to an arrangement that differs from the equal sharing required under the PRA.
- People thinking about leaving a relationship who want to know about their rights and obligations before they make a final decision.
- People who need assistance immediately after the break-up of their relationship. This is sometimes in circumstances where quick action is required to protect property that one partner is attempting to remove without regard to the other partner's rights.
- People who are in the midst of negotiations with their partner and are wanting help with the process – this may be on a particular issue, or because they have reached an impasse, or they have come to an agreement and want to know how to formalise this.
- People who are some months or years down the track after the end of the relationship and are only now addressing the division of property from the relationship. This is often in circumstances where the property has remained intertwined to support the ongoing care of children eg, maintaining joint ownership in the family home. It can also be because one person wishes to keep their share invested in the joint property for a period of time, possibly because the purchase of an affordable home is not viable at the time of separation.

Clients raise issues about the division of a range of items of property or about protecting this property against a claim from their partner. While this is often the shared family home it can also include chattels, vehicles, joint business ventures, items of technology such as phones and gaming consoles, pets, pre-paid holidays, savings and bank accounts, overseas bank accounts and inheritances. With the increased number of people now living in rental accommodation, some couples are also facing challenges in working out how to resolve issues around separating and exiting from a joint tenancy.

While people come to us in a range of circumstances, a consistent theme in the situations faced by our clients is that they want information and advice, and they want support to take the next steps in a process. This can be that one or both partners want to do one or more of the following:

- contract out of the Property (Relationships) Act,
- try to work through an agreed settlement with their partner,
- assert their rights to property that is in dispute,
- formalise an agreed settlement.

The information collected in the *PRA Review* indicates that relatively few relationship property issues are decided by a court and that the number of PRA applications filed in the Family Court has been declining. Meantime we note that over the past four years CAB has experienced a 44% increase in the number of enquiries relating to relationship property. Consistent with the view presented in the *PRA Review*, our enquiries reflect that separating couples usually want to resolve matters without the involvement of the court, and in many



cases are trying to navigate issues without the assistance of lawyers, or are trying to work out whether it is possible to do so.

The following comments we have made reflect issues we see that may impact on whether the appropriate information and support is available to these people. In particular, whether adequate support is available to ensure that outcomes reached are informed by knowledge and understanding of legal entitlements and are able to as much as possible reflect the wishes and priorities of the affected parties, and to provide a degree of certainty moving forward.

### **Accessing appropriate information and support**

The CAB is a common starting point for people seeking to resolve legal issues. This reflects the role of the CAB in civil society – ensuring people are aware of their legal rights and responsibilities and can access the support they need to act on those rights and fulfil those responsibilities. CAB volunteers play a significant role in giving people information about the law, providing guidance about available options, and in helping people explore avenues for accessing legal assistance, should such assistance be needed.

When a client approaches the CAB for help with relationship property matters, a CAB volunteer is able to help them access relevant information using the CAB's comprehensive knowledgebase. They can also help the client to identify appropriate options to enable them to take next steps. Empowering the client is at the core of our model of service delivery.

The *PRA Review* identifies that the lack of routine collection of information about the ways people resolve their property issues at the end of relationships means there is an incomplete picture of how the PRA is working in practice. While we are not able to bring to light the full journey of people going through the process of dividing relationship property, we have some particular insights into the issues faced by people seeking assistance to resolve matters outside of formal legal processes – which it appears from the research of the Law Commission is the route taken by the vast majority of separating couples.

### ***A principled approach***

We support the principle under the PRA that relationship property issues “should be resolved as inexpensively, simply, and speedily as is consistent with justice.”<sup>1</sup> Research indicates that this will most often be achieved when the parties can reach an agreed settlement outside of the court process. Avoiding the involvement of the court can result in quicker, less expensive, and more workable outcomes.<sup>2</sup>

While this may be the case, there are still a number of challenges and barriers faced by people trying to resolve property matters outside the court. In our experience these relate to:

- Access to information about rights and responsibilities

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<sup>1</sup> Property (Relationships) Act 1976, s1N(d).

<sup>2</sup> Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at p 40.



- Support to navigate the process
- Cost as a barrier to accessing legal advice and assistance
- Options for resolution without the involvement of lawyers or the court

### ***Understanding legal entitlements***

We support the statements in the *PRA Review* about the importance of people having access to information about their rights and responsibilities so that they can make informed decisions. This strongly correlates with the first aim of the CAB. As highlighted in the *PRA Review*, there are currently a range of sources of information available that provide guidance about the PRA. These include information available through CAB, Community Law, and the Ministry of Justice.

While access to information is important, our clients often also want help to understand and navigate this information. This may not be because there is a dispute as such, but because people are wary of making decisions without the certainty that they are meeting legal requirements. The nature and extent of the person-to-person support needed will vary depending on circumstances; however, we believe that at a minimum the support available should help to achieve a resolution that reflects the principles in the PRA – ie, that it be speedy, simple and inexpensive. Increasingly people are looking for this kind of support outside of the court system and often through trusted community organisations such as the CAB. If organisations like the CAB are fulfilling this role, it is important that they are appropriately resourced and equipped to do so.

Currently the PRA places a specific requirement on separating couples to access independent legal advice when they want to ensure an agreement they reach is legally binding and enforceable. This applies to a contracting out agreement and is also necessary if partners want certainty about the legal enforceability of a settlement agreement. This provides an important protection for the parties because it means they are made aware of the effect and implications of their agreement before signing. However, given the statement that many people are resolving property issues without the involvement of lawyers,<sup>3</sup> we think it is worth exploring the barriers to people accessing lawyers and also options for providing people with greater certainty about their entitlements when they choose not to engage a lawyer.

The *PRA Review* states (at p.512) that “The need to ensure people understand their legal entitlements also emphasises the importance of clear and straightforward rules of classification and division in the PRA that people can apply to their property without the need to go to court”. We would take this further and say that these clear and straightforward rules of classification and division in the PRA should also mean people can apply these rules to their property without the need to involve lawyers, particularly where the mutual intent of the parties is to divide their property in equal shares as per section 11 of the PRA.

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<sup>3</sup> Law Commission *IP41 Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (2017) at para 23.31, p.520.

### **Cost as a barrier to accessing legal advice and assistance**

While the PRA promotes inexpensive resolutions, one of the reoccurring concerns – actual or perceived – of our clients is the cost of the process. Clients who are dealing with the breakdown of their relationship are often anxious about the costs of engaging a lawyer to assist them to sort out issues with their relationship property. Some clients very clearly want to avoid the use of a lawyer, whereas others want to access legal advice but are hopeful they can get free advice through a legal clinic or a community law centre.

While CAB volunteers will often refer people on to a legal clinic or community law service so that they are able to access legal advice, these options are constrained in the services they provide. In some cases this will be a time limit (eg, 15-30 minutes of free advice), or in the case of community law centres it is also about the financial eligibility of the client and the nature of the enquiry. Community law centres generally don't assist with relationship property issues beyond preliminary information (in some cases comparable to what is accessible through the CAB) and many community law centres cannot witness contracting out agreements.<sup>4</sup> Some of these referrals will mean the client gets some very preliminary legal information and advice before being referred on again to a private practice lawyer on a paid basis.

As a result of the limitations of free legal services, access to tailored legal advice and ongoing support are limited to those who can afford to instruct a lawyer in private practice or to those who are eligible for legal aid. Legal aid, however, is limited, is a loan, and lawyers have indicated that the fees are not economically viable. As a result many lawyers do not offer to act on PRA matters under legal aid and so availability of legal aid lawyers for these issues is another barrier to accessing legal advice and support.

Lack of clarity about costs causes people additional stress in circumstances where they are already under a lot of strain. We recommend that the legal profession be encouraged to provide greater transparency about fees with indicative pricing available for a range of standard services, eg, preparing and witnessing a contracting out agreement. We also recommend that tools be developed to support separating couples with the practical navigation of the process prior to or without the need to engage lawyers (discussed further below).

#### **Examples of client enquiries to CAB that reflect cost as a barrier to accessing legal advice and assistance**

Client's wife has left him and his young son and she wants the relationship property to be divided. He has had to quit his job and go on a benefit in order to manage the care of his son as his wife is not helping with any of the care. The client is aware that he needs a lawyer but wanted to know if there was a legal service that wouldn't charge much.

<sup>4</sup> <http://communitylaw.org.nz/free-legal-help/eligibility/>, refer *What legal problems can't we help with?*

Client is calling on behalf of his daughter. Her husband says he wants a divorce. Client is worried about the division of property, particularly his daughter's Kiwi Saver. The husband has been running up debts, and the client's daughter has been working long hours to make ends meet. She has been bankrupted previously, but had got herself back on track. She can't afford a lawyer.

Client wants assistance regarding relationship property. She and her husband have separated. She wishes to remain in the family home but he is trying to force a sale. She has employed a lawyer to act on her behalf but doesn't want to ask the lawyer any more questions due to the costs involved. She wants to know if she can see a lawyer at the CAB.

Client is thinking about divorcing her husband but has concerns about the finances. She wanted to know if she could resolve the financial and property issues without the matter having to go to Court, and what options were available. She had read the brochures about relationship property and was aware of the mediation process. She is reluctant to go to Court because of the costs involved.

Client wants the contact details of someone who could assist her with documentation around a relationship break up and the relationship property. She was reluctant to talk to her lawyer because of the costs.

Client is looking for a local property lawyer that's not too expensive. She and her husband are in the process of separating their property following a relationship break-up. They are going to sell their house and her husband's lawyer has presented her with the papers regarding the house value and their portions. She wants to discuss things with an independent lawyer to make sure the terms of the division of property are fair.

### ***Barriers to formalising agreements***

Client enquiries to the CAB indicate that it is not uncommon for people to reach a stage where they have come to an agreement (either a contracting out agreement or an agreement about the division of relationship property) but then feel stuck about how to formalise the arrangement so that it is legally binding.

As stated above, in order for a section 21 property sharing agreement to be legally enforceable, the agreement must be in writing and signed by both parties. Each party must receive independent legal advice before signing and the lawyer must witness the signing and certify that prior to signing the agreement, the meaning and consequences of the agreement were explained to each party.

There will of course be occasions when the involvement of legal professionals may be important because there is a power imbalance between the parties, or a dispute on a point of law, or a serious breakdown in communication between the partners; but in many cases it appears that it is not the lawyer's advice per se that the client wants or needs, but rather the certainty that the agreement they have reached is legally valid.

Given we have a law that presents a clear presumption of a 50/50 split as the starting point, and the supposition that the majority of people appear to be resolving their relationship property issues without any engagement with the legal system (be this the court or lawyers), we recommend that greater support be made available for people to work through their own processes and then to have a mechanism for 'signing off' the agreement they reach. This may not have the same robustness as an agreement that has been signed off by lawyers following independent legal advice, but could nevertheless have some weight if the parties found themselves in a dispute at a later stage. We discuss options for providing this additional support below.

**Examples of client enquiries to CAB that reflect barriers to formalising relationship property agreements**

Client wants to know if she and her ex-partner can make an agreement about dividing their relationship property without using a lawyer as they are in agreement about the division.

Client has had a "contracting out" agreement drafted by a lawyer. Her partner needs to get independent advice and have the document signed by a lawyer. Client says her partner is happy with the wording so would be happy for the document to be signed. He doesn't have any money for a lawyer.

Client and partner signed a prenuptial agreement with a JP early on in their relationship. The agreement made it clear that the house he owns remains his separate property. He is now anxious about whether the agreement is legally enforceable and has been advised by a lawyer that they can assist and that it will cost him \$2000 to address all the issues relating to relationship property. The client doesn't want to pay this and wants to know what his options are.

Client called regarding relationship property. She and her ex-partner have ended their relationship. They have agreed to most aspects of the division of the property accumulated during their relationship. The client and her ex-partner are keen to minimise the use of a lawyer and the expenses.

Caller is going through an amicable separation from her husband. They have come to an agreement regarding property and care of their three children. However, when her husband went to the bank to sort out their finances, the bank advised him to consult a lawyer, in particular about the change of ownership of the property. The client is concerned about the legal expenses and wonders if it is necessary to get lawyers involved when they have actually agreed on the important aspects of the breakup, with no disagreements at all at this stage.

Client's relationship is breaking up after 16 years together. At the moment everything is agreeable. There are no children and no joint bank accounts. He wants to know if he needs a formal agreement. He owns the house and his partner has agreed to less than a 50% share of the assets.

Client has been in a relationship for 5 years. She and her partner have a young child. Her partner put their first home (which he owned) into a trust after the relationship began. They then moved into another house which they purchased together, but the mortgage is only in his name. Client is now worried that if they ever split up she will not get anything so she has asked him to make a property sharing agreement. Client wants to know what document is that they need and also how much it should cost. Her lawyer has said it will cost her between \$1500 and \$2500 and his lawyer has said it will cost about \$500. She feels her lawyer's costs are too high.

Client and his ex-wife have made an agreement about how they will divide their property but do not want to go through lawyers. They want to know if they can draw up a written agreement and have it signed by a JP and want to know if it will have legal standing.

### ***Information gaps and options for supporting resolution***

We believe there is sufficient information available to the public about the PRA – eg, its scope and application, the key principles, the rules of property division and the ability to agree to a division on a different basis – however, we think there is a gap in terms of tools that support people to apply the law to their own situation and then to navigate the process outside of the court system, with or without the involvement of lawyers.

We recommend that practical and process-oriented tools should be made available to better equip couples who are separating with information that allows them to apply the law to their own circumstances and to have greater certainty that any agreement they reach is likely to meet legal requirements. These tools could take the form of a workbook or step-by-step guide, and could use prompts and case studies to reflect the usual application of the law to the described circumstances.

'Self-help' tools will not be appropriate for all people, particularly when the relationship break-up is acrimonious, where there is a power imbalance between the partners, where there are major issues in dispute, or where there are complex property arrangements. Nevertheless, practical tools that help the partners to collect the necessary information about their assets and to identify areas of agreement and dispute could help people who do need to involve lawyers, or to take the matter to the court, to be as prepared as possible with the necessary information and clarity about what they see as an appropriate outcome. This could reduce the costs to the client and empower them to be an active participant in the resolution process. These kinds of tools could also be used as part of the process for preparing for engagement with dispute resolution services.

We think that having these kinds of resources available in an online format is important but recommend that paper-based resources should still be available (and not just as 'download

and print” options – not unless the organisations that are bearing the costs of printing resources for clients are provided with adequate support). We feel it is important to acknowledge that we are a world in a process of digital transition and there are many people who still do not have adequate access to the internet and / or are not digitally confident or competent. Having a workbook that you can lay out on a desk and work through alongside various other documents, or that you can complete in part and then pass on to your partner for their feedback, may be as or more useful than an online-only tool.

As stated above, we recommend that alongside these types of practical tools there are options for people to access person-to-person support. The extent of the support that is needed will depend on the particular circumstances of the case but the support should be available on terms that are consistent with the principles in the PRA – ie, inexpensive, speedy, and simple. This may not necessarily need to be support provided by lawyers and in many cases it may be community services such as the CAB that can be resourced to provide this type of process-navigation support.

#### ***Client enquiries to CAB that reflect clients' desire for tools to assist with resolution of relationship property issues***

Client's marriage has recently come to an end. He and his wife don't want to get lawyers involved because of the cost. They want to write up a list of what each wants and once they have agreement, get a JP to witness their signatures and each take a copy of the list. The client wants to know where he could get a list like this to fill in and he wondered if lawyers have them and could he get one for free.

Client has bought a house and her boyfriend is moving in with her. They both want a written agreement about what should happen to their property in the event of a breakup and they are keen to minimise legal costs.

Client wants to know if there is an easy way to do a relationship property split eg, an online template.

Client and her partner have decided to separate after 10 years together. They are not married and have no children. They have agreed that he will buy her out of their house. They do not want lawyers to be involved as they think it is a simple arrangement and an amicable one. They want to know if they can draw up their agreement by themselves.

#### ***Providing certainty***

One of the areas where we think that resolution outside the court system could be better supported is in providing parties who are separating with greater certainty about the status of any agreement they reach – especially acknowledging that in many cases these agreements are reached without the involvement of lawyers. In the situations we see, it is to some extent the anxiety that an agreement can be overturned by the court that causes problems for

people, not the concern about whether the agreement adequately reflects their legal entitlements.

This could be something that builds on the workbook or online tool concept which has the outcome of producing a written agreement between the parties. Once an agreement is reached the parties could have the option of lodging this with the Family Court, similar to the current option of registering a separation agreement as a consent order, but without the specific legal advice requirements that currently apply if the agreement includes the division of relationship property. The absence of legal advice might be taken into account if there is a dispute at a later stage, but we think it is unnecessary and unhelpful for people to feel that that the agreement they reach without the involvement of lawyers has no legal standing.

### ***Access to dispute resolution services***

We support improved access to conciliation services for family issues, including issues relating to the division of relationship property. It seems clear that dispute resolution processes provide the opportunity for better outcomes for everyone involved, including children who are impacted by the relationship break-up.

We support the use of mediation and recognise the positives of this approach including the ability to be more responsive to Māori values and culture, to support self-determination, to be more flexible, less confrontational, and to focus on needs of the parties and any children of the relationship. The collaborative law model presented in the *PRA Review* similarly offers great potential to provide good outcomes based on mutual problem solving and good faith bargaining. The issue again, appears to be the barrier presented by the cost of these options.

We recommend that avenues for inexpensive, accessible dispute resolution processes be explored for the full range of family issues, including those relating to property division. Online dispute resolution may be one of the mechanisms for this, especially recognising that the support people are looking for is not always about resolving disputes – but may be about facilitating agreement.

### **Summary of recommendations**

- We recommend that the legal profession be encouraged to provide greater transparency in terms of costs associated with advising on and resolving relationship property matters, with indicative pricing available for a range of standard services, eg, preparing and witnessing a contracting out agreement.
- We recommend that practical and process-oriented tools be developed and made available to better equip people to navigate relationship property issues themselves, and specifically to apply the law to their circumstances, so that they are able to progress the division of their property (whether they involve lawyers or not), and to have greater certainty that any agreement they reach is likely to meet legal requirements. These tools could take the form of a workbook or step-by step guide, and could use prompts and case studies to reflect the usual application of the law to the described circumstances.



We recommend that any such tools be maintained in an accessible paper-based format in addition to being online.

- We recommend that the need for adequate person-to-person support for people navigating relationship property issues be acknowledged, and that this support is made accessible on terms consistent with the principles in the PRA – ie, inexpensive, speedy, and simple.
- We recommend that the government recognise the role of organisations such as the CAB in providing support to people dealing with relationship property issues and that such organisations are adequately resourced and equipped to carry out this role effectively.
- We recommend that parties have a way of formalising a relationship property agreement even when they have not sought independent legal advice.
- We recommend that avenues for inexpensive, accessible dispute resolution processes be explored for the full range of family issues, including those relating to property division.

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Thank you for the opportunity to comment on the Law Commission's review of Property (Relationship) Act 1976. Please feel welcome to contact us if you have any questions, or want any clarification about our submission.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Sacha Green'.

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