



**National Council of
Women of New Zealand**

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**Submission to the Justice and Electoral Reform Select Committee on the SOP:
Matrimonial Property Amendment Bill to be known as The Property
(Relationships) Bill**

Introduction

The National Council of Women of New Zealand (NCWNZ) is an umbrella organization representing 46 nationally organized societies. It has 36 branches spread throughout the country to which women of some 150 societies are affiliated. NCWNZ works to improve the quality of life for women, families and society.

This submission is prepared by the members of the Family Affairs Standing Committee, after consultation with the wider membership of NCWNZ through its national circular. The submission also follows from and reiterates points made in the NCWNZ submission made on the Matrimonial Property Amendment Bill 1998, and De Facto (Relationships) Property Bill 1998, which followed extensive canvassing of membership opinion.

NCWNZ Policy

The National Council of Women (NCWNZ), since its inception 104 years ago, has lobbied for *a just share of a wife's husband's earnings or income*. It is extremely heartening that the Government has incorporated provision for future earnings or career capital as a property asset of a relationship.

NCWNZ applauds the intention to treat married and de facto (including same sex couples) equally in the new legislation. In its 1974 Submission prior to the introduction of the Matrimonial Property Act, NCWNZ members considered there should be just treatment of the partners and offspring in all relationships, legal marriage or de facto, and was disappointed when the provision for de facto couples was not incorporated into the original Bill. The NCWNZ submissions on the De Facto Relationships (Property) Bill indicated that the membership supported the proposed amendment by Phil Goff to include same sex couples.

Executive Summary

1. Reform is Long Overdue

NCWNZ has long held that the 1976 Act is outdated as it does not provide adequate guidance and protection for married or de facto relationships. NCWNZ welcome the amendments to address economic disparities suffered by the non-career partner.

2. Title of the Bill

NCWNZ strongly supports the extension of the legal provisions of the matrimonial property legislation to include de facto and same-sex couples in the same Bill.





3. Widening the Pool of Matrimonial Property

NCWNZ supports the widening of the Relationship Property pool to include business property etc. NCWNZ supports the inclusion of provisions to address any disparity between the future income and living standards of partners where this is due to a division of functions within the relationship. NCWNZ supports lump sum compensation from the other partner's share of

relationship property in preference to spousal maintenance provisions, as the latter can create ongoing dependency. However, NCWNZ is concerned about the lack of certainty in the rules governing this matter, that is at present left to judicial discretion. NCWNZ is also concerned about enforcement of Orders.

NCWNZ supports the proposal to include business items and tools of trade in the pool of Relationship Property.

4. Separate Property

NCWNZ supports the provisions for departure from equal sharing where there are 'extraordinary circumstances which make equal sharing repugnant to justice'. This is a much tougher test than under the current Matrimonial Property Act and is welcomed. It is also appropriate to allocate a share of the increase in the value of a partner's separate property while the partners were living together.

5. Children's Interests

NCWNZ regards children's interests in the breakdown of their parents' relationships to be paramount. The appointment of a solicitor to represent the children's interests should be mandatory. Children's property should be considered their Separate Property.

6. Debt

NCWNZ supports proposals set out in the Bill regarding debt. However, NCWNZ has concerns relating to student debt. See Omissions No.9.

7. Second and Subsequent Relationships

NCWNZ recognises that there are very valid reasons where de facto couples in second and subsequent relationships may wish to contract out of the provisions of the Bill. NCWNZ welcomes the indications for extensive public education programme on the necessity for property agreements for people in these situations.

8. The issue of 'contracting in' vs. 'contracting out'

NCWNZ supports the preference for 'contracting out' rather than 'contracting in' contained within the Bill.

9. Consistency with benefit/tax law and other law

NCWNZ urges the government to give consideration to issues within tax and benefit law, and other law to be consistent with this Bill.

10. Property Acquired by Succession

Inherited or gifted property should be kept entirely separate and should not be deemed to become Relationship Property unless a Section 21 Agreement has been entered into. Separate Property should be kept separate.



11. Death of a Partner

NCWNZ supports the extension of the 'equal sharing regime' contained in the new legislation to apply where a relationship is ended by the death of one of the partners.

12. Women's Access to Justice

Women have a right to fair and just legal and Court processes as set out in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). There is no justice without access to justice. NCWNZ recommends a gender analysis of this SOP, with education for judges in gender issues. Training for law students on feminist jurisprudence is also important.

13. Education

NCWNZ welcomes the indications that there will be extensive public education about the law changes.

14. Omissions (summarised)

- (i) Statement of Principles, establishing
 - clarity and certainty, minimizing the need for judicial discretion.
 - the interests of children as paramount.
 - Principles set out by Ministry of Women's Affairs (See Appendix 1)
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- (ii) Disputes Tribunal
NCWNZ considers that the Disputes Tribunal should be the first jurisdiction available to parties if within the Tribunal's financial limits.
- (iii) Mandatory timeframes for speedy resolution of property settlements with penalties for breaches.
- (iv) Speedy resolution of post-separation issues to alleviate hardship in the first few weeks and months after separation.
- (v) Delay in Family Court Procedures -adequate resourcing of Family Courts are needed.
- (vi) Property of children should move with the children and considered their Separate Property.
- (vii) Family Violence: NCWNZ members indicate that the impact of family violence ought to be taken into account in the consideration of the division of property.
- (viii) Regarding chattels excluded from equal division, a definition heirlooms is needed to avoid litigation.
- (ix) Student Debt should be considered as Relationship Debt unless repugnant to justice.
- (x) Trusts and Companies: a thorough audit of the provisions is requested. NCWNZ also recommends a requirement that independent legal advice be obtained when Trusts or Companies are set up during a relationship.



(xi) Property Overseas

NCWNZ supports the Labour Minority Report recommendations that the New Zealand Court ought to be able to take judicial notice of the expressed intentions of the parties with respect to overseas owned property in determining the division of Matrimonial Property. NCWNZ urges immediate action rather than waiting for future Trans-Tasman initiatives.

(xii) Houses Built on Maori Land

NCWNZ considers that the exemption for Maori land needs to be taken into account the value of any house built on that land. If there cannot be any exception to the rules against alienation of Maori land, NCWNZ proposes that this is an area about which there is extensive education.

(xiii) Gifts/Loans

NCWNZ considers that a gift is a gift and cannot later be referred to as a loan unless it is initially acknowledged in writing as a loan, set out in a Deed of debt. This would limit costs and increase certainty. This provision should also bind gifts/loans from family members.

General Comments

1. Title of the Bill

NCWNZ approves the inclusion of de facto and same sex relationships under the same Bill. In so doing, this Bill takes a human rights approach to the treatment of relationship property, in that it regards de jure marriage, de facto and same-sex relationships equally.

Some members have expressed concern that this Bill erodes the “sanctity” or higher level of commitment presumed of a marriage, and therefore poses a threat to the institution of the family. However, the majority believes that this Bill is about property, not marriage per se. If it achieves equity and increased security for mothers and children, by increasing their chances of keeping a roof over their heads; by preventing their falling into the ‘poverty trap’; and by having their contribution as primary caregiver (with the concomitant career sacrifices) recognised, then it will serve to enhance rather than erode the institution of the family. Some members would even go so far as to suggest that, by lessening the opportunities for exploitation of partners in de facto relationships, the Bill may well have the affect of encouraging a commitment to marriage.

2. Reform is Long Overdue

It has long been accepted that the 1976 Act is in need of reform if it is to provide an equitable solution to the issues that arise on relationship breakdown. The 1976 Act is clearly outdated and does not provide adequate guidance and protection for any of the types of relationships, de jure, or de facto, both of which are now commonplace.

NCWNZ supports the 1988 Working Group on Matrimonial Property and Family Protection recommendations for changes to the Act including property rights for de facto couples and measures to ensure a fairer division of property to address the economic disadvantage experienced by non-earning spouse.

3. Children’s Interests

NCWNZ avows that regard for children’s interests in the breakdown of their parents’ relationships must be paramount. Where there are dependent children, the clean break principle is impossible. In 1998, the NCWNZ Submission suggested that Section 26(2) ought to be amended so that the appointment of a solicitor to represent the children's interests be mandatory.



The Submission strongly urged that the on going needs of children had to be specifically addressed; their housing, additional health needs as they arise, (for example optometry, dental), extracurricular activities, and care arrangements including the cost of childcare. In regard to the latter, where a custodial parent of younger children wishes to keep their career path open through employment, the costs of out-of-school care and holiday childcare should be shared between both employed parents.

Consideration of the needs of disabled and special-needs children for extra support from the non-custodial parent - given that the custodial parent's employment opportunities are often severely curtailed long term. For example, a father earning a six figure income only has to pay \$10 000 a year for the support of two children, even though one child may need a great deal of medical and hospital care. NCWNZ suggests that these provisions should work in conjunction with the Child Support Act.

NCWNZ supports the proposal that the custodial parent, caring for children of the relationship, be entitled to receive a greater share of the property in consideration of on-going child care responsibilities.

Provision should be made that, wherever possible, children should be able to remain in the family home, thereby reducing the disruption to their lives effected by breakdown of a relationship.

Generally, greater certainty needs to be built into provisions for children. Specific terms for calculating costs should be determined actuarially according to number of children and their special needs.

4. Widening the Pool of Matrimonial Property

NCWNZ applauds the changes that related to widening the Relationship Property pool.

NCWNZ approves of the mechanisms proposed to move away from equal division to account for the different economic position of ex-partners. The mechanisms could include:

- A lump sum payment of one party's share of relationship property to the other partner
- Awarding a contributing partner a share of any increase in separate property of the other partner according to their contributions
- Lump sum maintenance payments
- Periodic maintenance payments

Tools of trade and other business items are often purchased out of matrimonial property. They are often of significant value and should form part of the pool of Relationship Property. NCWNZ supports proposals to have these included.

5. Separate Property

NCWNZ supports the provisions for departure from equal sharing where there are 'extraordinary circumstances which make equal sharing repugnant to justice'. This is a much tougher test that under the current Matrimonial Property Act and is welcomed.

NCWNZ supports the proposed changes to Separate Property rules, where there are significant disparities between the partners after relationship breakdown; and the non-owner partner has increased the value of the separate property through their direct or indirect actions during the relationship. The Court should then be able to award the non-owner partner compensation for the increase in value of the Separate Property.



However, NCWNZ urges the tidying up of remedies which have developed in Case Law in the areas of Separate Property. Accepted practice developed by Case Law has generally worked against women.

The distinctions that came to our members' attention indicated there was no logic in the Case Law. For example, it is unfair that contributions to a Mortgage (which increase the equity) do not count as improving the value of the property. Similarly, Relationship Property is sometimes dissipated by an aggrieved partner in the pre-settlement period. NCWNZ seeks assurance that this would be remedied by the provisions in the SOP (18B and 18C).

It is also unfair that a family, struggling on limited drawings from a business only in one spouse's name, (where the profits are ploughed back into the business), that on separation, the business is held to be Separate Property. The Law Society, concerned about these issues, in 1998 ran a Seminar '*Blurring the Boundaries*'. NCWNZ notes its view was supported by the Labour Minority Report. The legislation must be made clearer for ordinary New Zealanders to understand and arrange their affairs accordingly.

6. Debt

NCWNZ supports proposals set out in the Bill regarding debt where debt is deemed to be shared where it is incurred :

- jointly by both the parties
- in the course of a common enterprise
- for the purpose of acquiring, improving or maintaining the relationship property
- for the benefit of both the partners in the course of managing the affairs of the household
- for the purpose of bringing up any child of the relationship.
- All other debt is personal to the debtor. However, NCWNZ has concerns relating to student debt. See Omissions No.9.

7. Spousal Maintenance

NCWNZ considers that, generally, the SOP takes a positive step forward in linking the provision of spousal maintenance as a means of redressing post-relationship inequity, although the preferred option should be for property or lump sum compensation since spousal maintenance can create ongoing dependency. However, NCWNZ does not think it goes far enough. Firstly, it mirrors to a significant degree the spouse maintenance provisions that already exist. These are not only too stringent, but face judicial reluctance to use them. A strong message to the contrary is needed. This applies to children's interests and occupancy as well.

Secondly, the provisions extend the old ones in two important ways. They include the likely earning capacity of each party. This is a good way to compensate a partner for a lack of future earning power due to, for example, many years out of the paid workforce while caring for children. Further, the standard of living that existed while the parties lived together is a relevant consideration. This may help judges get beyond the current approach to what amounts to 'reasonable need' (a concept that has been tied to benefit levels).

These changes show promise, but they still leave large amounts of judicial discretion. NCWNZ believes tighter guidelines for judges are necessary.

NCWNZ thinks the amendments to spousal maintenance (by amending the Family Proceedings Act) could go a lot further. For example, in Australia, the age and state of health of the parties is a relevant consideration. (In NZ age or ill health cannot be taken into account in assessing the quantum of maintenance, although these are relevant factors when considering the length of time that maintenance should be payable for.) Across the Tasman,



the physical and mental ability to obtain meaningful employment is also relevant. Access to maintenance must be grounded in reality - that is, the actual chances of being able to support oneself and access the labour market are relevant. It must also accommodate the differing needs of women in different life stages.

While strengthening the provisions will go some way to improving the situation, the real work lies in education - of judges and lawyers. NCWNZ knows that because the chances of getting an award of spousal support are low, currently lawyers advise clients not to pursue the claim. Around the world there is a trend to use maintenance to alleviate post-separation hardship and a growing recognition that it provides a solution where the pool of property is small. But spousal support, even in Australia, is described as "rare, minimal and brief". NCWNZ accepts that maintenance should no longer be a lifelong entitlement. Having said that, it has an

important role to play in the initial post-separation period. And importantly, it must work effectively (i.e. over a longer term) for the group of women in their 50s and 60s for whom employment is not a realistic option. The provisions in the proposed s 64A provide the basis for this to occur - depending on how they are put into effect by the judiciary.

Enforcement of orders is another significant issue. The abysmal collection rates for child support signal that this is likely to be a problem. However, as with child support, using a government agency as a go-between is a useful idea.

8. Second and Subsequent Relationships

Repartnering is a growing trend in New Zealand society. For example, a quarter of all marriages are remarriages. NCWNZ recognises that there are very valid reasons where de facto couples in second and subsequent relationships may wish to contract out of the provisions of the Bill. People who may have been divorced or built up assets while single, or may have some property (which for many women is their life savings) and do not want this to be at risk if a second or late-life relationship ends, may fit this category. This applies equally to later life or second marriages/de facto/same-sex relationships where one partner could lose 50% of the house they own if it becomes the couple's home.

Similarly, NCWNZ is aware that many partners in later life relationships are concerned about protecting the interests of their separate children of their first relationship.

In order to protect their own or their separate children's interests in the event of a break up or death after a second (or subsequent relationship), the proposed legislation would make it imperative that partners contract out of the legislation. NCWNZ is concerned that lack of awareness of the necessity to do so may mean some people are caught out by the new legislation. NCWNZ welcomes the indications that there will be extensive public education on the proposed changes to the law.

4. The issue of 'contracting in' vs. 'contracting out'

NCWNZ supports the preference for 'contracting out' rather than 'contracting in' contained within the Bill. NCWNZ recognizes that either way, people are vulnerable, and may be "caught out". However, NCWNZ believes that the provisions of the Bill will in fact protect those most vulnerable, while those who need to 'contract out' are more likely to be in a position of power and knowledge to do so. Nevertheless, NCWNZ reiterates again the importance of extensive public education and that those wishing to contract out must agree in writing, and get independent legal advice.



If, 'after a three year relationship, a de facto (including same-sex) couple signs an "opt out" contract, they are not necessarily opting out of having the relationship considered a de facto one altogether. They may only opt out of aspects of the property sharing regime, and may yet retain the right to 50% on the death of one partner.' This would depend upon how their contracts were constructed. Whatever the content of their contracts, the consequences would become more transparent by the process, and vulnerable partners are placed in a better position to make decisions about the relationship.

In many cases, such 'vulnerable partners' are younger women who do not wish to upset their partners by insisting they opt-in, and are unlikely to consider the consequences in the future a decade or so hence. It is a commonly held belief amongst de facto women [an entrenched urban myth] that they had the same property rights as married couples. An 'opt-out' regime would ensure these women are protected.

Consistency with benefit/tax and other law

An issue raised by some members is consistency with tax and benefit law. People assume there to be consistency, and are concerned that the Bill would affect the treatment of same-sex couples in regard to their eligibility for a benefit such as unemployment, sickness, or the DPB. Today same sex couples are not considered to be couples living in a relationship in the nature of marriage, though, of course, de facto couples are.

This concern is in fact based on a fallacy that the Property (Relationships) Bill would affect benefit or tax law for couples while they are together. It would not; the bill is only about property upon separation, not while the couple are together. Yet there is a valid concern about the lack of consistency, and calls into question the "presumption of financial sharing", which is used to preclude non-employed [heterosexual] partners an income in their own right, but is not applied to same-sex couples. The issue concerns the independent economic status of partners in a relationship, and while this is not directly related to the Bill before this Committee, it is one that needs further consideration.

Another issue, concerning consistency with other law is the right of same sex couples to marry, or be considered closest kin if one partner became seriously ill. There must be many others that require further investigation.

11. Property Acquired by Succession

Inherited or gifted property should be kept entirely separate and should not be deemed to become Relationship Property unless a Section 21 Agreement has been entered into. Although the clause was redrafted in the Matrimonial Property Amendment Bill 1998, the NCWNZ Submission was that there was no change to the meaning. Change is required because the Case Law that has developed around Section 10 of the Matrimonial Property Act is complicated and conflicting. Ordinary New Zealanders have a right to understand the implications of such an important part of the proposed legislation.

The commendable proposals (sought in this area) for extensive public education about this legislation will assist people to become more likely to consider the consequences of their relationships and the need to keep Separate Property separate.

12. Death of a Partner

NCWNZ supports the extension of the 'equal sharing regime' contained in the new legislation to apply where a relationship is ended by the death of one of the partners. Partners may contract out of the rules that apply on death in the same way they can contract out of a regime that applies on separation. NCWNZ supports the proposal that a surviving partner's claim over relationship property should have priority over other claims, including a third party's entitlement under a will, or a claim under the Family Protection Act.



13. Women's Access to Justice

Women have a right to fair and just legal and Court processes. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), to which New Zealand is a signatory, affirms that right. If fair outcomes are not being delivered to women, then the system must be redesigned.

NCWNZ is very perturbed to note that a large percentage of the Submissions received about the Matrimonial Property Amendment Bill expressed concern about procedural matters relating Court processes. The Report noted "*The main concerns related to delays in the Court system, costs and ensuring disclosure of information*". This was one of the major concerns raised by NCWNZ members and the organisation cannot accept that the Department of Courts modernisation programme and the recent Practice Notes will sufficiently address the issue as stated in the Government Administration Committee Select Committee Report. There has been no strengthening of the provision for costs because of delaying tactics and/or unreasonableness and nothing in the original Bill appeared to assist with either the limitation of the cost or the achievement of certainty. The National and Act parties have consistently referred the delays and uncertainty due to Judicial Discretion that this new legislation will create. Although NCWNZ supports the tenor of the proposed legislation NCWNZ shares these concerns and seek firmer rules.

NCWNZ membership determined at the end of last year that Women's Access to Justice was one of the six key issues for concern for women in this country. It is disturbing that *Women's Access to Legal Services: Women's Access to Justice He Putanga Mo Nga Wahine Ki Tiki March 1994 to March 1999* by Joanne Morris, OBE has been widely overlooked. It is clear from that Report as well as nearly half the Submissions that much more needs to be done in this regard.

As a first step, NCWNZ recommends that the Ministry of Women's Affairs undertake a gender analysis of this Bill to ensure visibility of gender issues. Gender analysis of the legal and family Courts processes are also recommended, with education for judges in gender issues, since it is important that judges recognise power imbalances and controlling behaviours of some men that disempower women. Training for law students on feminist jurisprudence is also important.

Throughout the NCWNZ 1998 Submission it suggested substantial costs based on one-third for the Court to meet its costs and two-thirds towards the successful party. NCWNZ members are very firm that such costs/fines/ penalties ought to be much more readily used than they are at present. This was a significant portion of the submission and obviously a concern for many other New Zealanders.

In collating membership responses to the proposed legislation it was an obvious concern (anecdotal evidence was often referred to) that women agree to inadequate or speedier settlements or discontinue legal proceedings in the face of escalating costs. The Women's Access to Legal Services Report by Joanne Morris, after her extensive research, reported similarly. One of the Report's final recommendations was "increasing by statutory change the Family Court's power to punish for contempt of its procedures". To remedy this situation NCWNZ reiterates the need for mandatory timeframes for settlement of property.



14. Education

NCWNZ welcomes the indications that there will be extensive public education about the law changes. Education is needed for couples contemplating a long-term relationship, those already in one, the legal profession and the family court judges. Consideration of the need for the judiciary to be more representative of the society they serve is also important. Education is the key to effective implementation of the new law, especially for the 90% of separating couples who resolve their property disputes without going to court.

OMISSIONS

1. Statement of Principles

Including principles to guide judges when they make decisions was a suggestion of the Ministry of Women's Affairs. It was dropped from the 1998 bill. NCWNZ thinks inclusion of principles is a good idea. Our experience with judicial discretion tells us that judges do need encouragement and firm direction to arrive at decisions that are fair. Also, a broad set of guidelines should assist judges early on in the development of case law. These next few years are when the benchmarks will be set and therefore they are very important.

NCWNZ concurs with the guidelines set out by the Ministry of Women's Affairs in 1994, which were: equality of outcomes, equity, fairness, accessibility, affordability, consistency, resolution to avoid delays. These principles are set out more fully in Appendix 1.

Furthermore, NCWNZ wishes to add the following principles:

- a) That the legislation establish clarity and certainty, minimizing the need for judicial discretion.
- b) That the interests of children are paramount.
- c) That no person, after the death of their partner, should be worse off than if they had separated before the death of their partner.

2. Disputes Tribunal

The Government Administration Committee's Report made no change to its proposal that the Family Court have sole originating jurisdiction. NCWNZ supports the Family Court rather than the High Court having originating jurisdiction but strongly urges that the Disputes Tribunal should be the first jurisdiction available to parties if within the Tribunal's financial limits.

For many New Zealanders the property for division may only be chattels and/or for many couples their assets do not exceed the jurisdiction of the higher monetary limits of the Disputes Tribunal. It could also be useful where all other matters have settled and the remaining matter at issue comes within the Tribunal's limits.

NCWNZ understands that the Disputes Tribunal often now deal with property in de facto relationships (including same sex) on a relationship breakdown. The Tribunal is understood to be working on developing protocols to provide for the situation when a Protection Order is place. Further safeguards for litigants could include specific training in the relevant Property Relationships Legislation.

It is ridiculous and a waste of legal aid for property that fits into the Disputes Tribunal jurisdiction to have to come into the sole jurisdiction of the Family Court. NCWNZ notes that in the Interim Report on the De Facto Relationships (Property) Bill, other submissions also suggested that relationships subject to the legislation should have access to Disputes Tribunal for claims within the Tribunal's financial limits.



3. Mandatory timeframe

NCWNZ urges the inclusion of a mandatory timeframe for settlement of property issues, with sanctions for non-compliance with the timeframes to counter deliberate delaying tactics to frustrate interests of the claimant. Ownership and possession of chattels, for example, should be sorted out within six to eight weeks of separation.

4. Immediate post-separation issues

This proposal does not deal with the immediate needs of separating partners. Provision needs to be made for the alleviation of hardship in the first few weeks and months after separation.

5. Delay in Family Court Procedures

Delays in getting a hearing add greatly to the distress and abuse experienced. There are two related issues here – timetabling provisions within the Act itself, and the resourcing of the Family Court.

The time it takes to get a hearing date for a range of family court matters varies greatly from centre to centre. NCWNZ is aware that delays are longer in certain provincial centres. This is an unacceptable situation and it means that the court is not able to meet its own Practice Management Guidelines, approved in 1998. This may not be a popular suggestion, but the point needs to be made that there is no justice without access to justice.

6. Property of children as Separate Property

The property of children, for example, furniture, books, toys and computer, should move with the children and be considered as their Separate Property. The current situation, where the children's property is included in the general pool, makes the division unfair to the children and to the caregiver (85% of caregivers still are the mothers). The Commissioner for Children and a number of other submitters made similar proposals, and NCWNZ notes that the Labour Minority report registered misgivings about the omission of this issue in the 1998 Select Committee recommendations

7. Family Violence

Generally, the conduct of the parties is not considered when dividing property, except in cases of fraud or deliberate dissipation of joint property. This is a positive step, but it is very limited in allowing spousal violence to be considered. NCWNZ members indicate that the impact of family violence ought to be taken into account.

8. Chattels excluded from equal division

Heirlooms: A definition of heirlooms needs to be included. The lack of one invites litigation.

9. Student Debt

Student loan debt is omitted from the definitions of shared debt. It looms large as a future problem of some significance. Currently the courts treat debt incurred to pay for tuition and books as personal debt, irrespective of when it was incurred. They consider debt covering the cost of living allowance to be joint debt, but only if it accrued during the relationship.

Because low-income earners are not required to pay back a student loan, a couple with one partner out of the paid workforce will usually only pay back the student debt of the earning partner. If, for example, both loans were taken out prior to the relationship, the burden of the unpaid debt would be carried by the non-earning partner after separation. Clearly this is unfair and provisions that specifically address student loan debt are needed.



10. Trusts and Companies

NCWNZ considers the changes are an improvement and attempt to stop diversion and concealment of property to trust and company structures. But in practice there may well still be ways of circumventing them. This is especially so since the 1993 Companies Act allowed for single shareholder companies. NCWNZ suggests a thorough audit of the provisions by experts should be requested. NCWNZ also recommends that where a trust or company is set up during a relationship, that this law requires that independent legal advice be obtained. This could be similar to the s 21 contracting out provisions.

11. Property Overseas

Albeit Orders cannot be made to bind property overseas, NCWNZ urges they be taken into account when making Orders in New Zealand. The Government Administration Committee's Report indicated a risk of conflicting judgements over rights of the same property. However, the reality is that in the New Zealand system, one party to the relationship can be significantly disadvantaged if overseas property is not taken into account. As more and more New Zealanders purchase property in Australia, further difficulties will become apparent.

NCWNZ notes that the Government Administration Committee's Report referred the Law Society sharing the concerns of other submitters. NCWNZ further notes that the Labour Minority Report considered the New Zealand Court ought to be able to take judicial notice of the expressed intentions of the parties with respect to overseas owned property in determining the division of Matrimonial Property.

Whilst there is an opportunity to change the legislation now, NCWNZ urges immediate action rather than waiting for future Trans-Tasman initiatives.

12. Houses Built on Maori Land

In its Submission on the Matrimonial Property Amendment Bill 1998, NCWNZ was of the view that the exemption for Maori land needed to take into account the value of any house built on that land. Often there may be no other property or asset, monetary or otherwise, to compensate an interest. NCWNZ proposed that, in such a situation, compensatory funds should be found from all owners of the Maori land, rather than the partner alone. NCWNZ appreciates the Government Administration Select Committee acknowledging our concern. However, the Committee still needs to address the issue which can, and has, resulted in one of the parties to the relationship (or their family) being unjustly enriched.

If there cannot be any exception to the rules against alienation of Maori land, NCWNZ proposes that this is an area about which there is extensive education. It is essential that all financial institutions who may be advancing funding to build such a home are required to fully advise the parties of the consequences and ensure that each of them receives independent legal advice.

13. Gifts/Loans

In the NCWNZ Submission on the De Facto Relationships (Property) Bill it noted one of the areas of great contention when relationships end is whether a gift was a gift or a loan. NCWNZ proposes that there ought to be a clause to state that a gift is a gift and cannot later be referred to as a loan unless it is initially acknowledged in writing as a loan. This would limit costs and increase certainty. This provision should also bind gifts/loans from family members.

NCWNZ urges consideration of this proposal and incorporation of it in the legislation. This must be followed by widespread education regarding the implications of making loans, for example, from a mother and father to son and daughter-in-law, without formalisation by a Deed of Debt.



CONCLUSION

Since its inception NCWNZ has actively campaigned for justice for women and children following the breakdown of relationships. It is a topic on which members have held strong views throughout its history. NCWNZ reiterates that NCWNZ seeks, above all, that the interests of children are held as paramount, and that the law must establish clarity and certainty. It is our firm hope and belief that the Bill will at last achieve changes that will make a significant contribution toward closing the gap between men's and women's economic status and well-being, and the well being of their children, who are often the victims without a voice on the breakup of a relationship. NCWNZ wishes to appear before the Committee to present this submission.

Barbara Glenie
National President

Christina Reymer
Convener, Family Affairs Standing Committee

APPENDIX 1

Principles

The principles developed by Ministry of Women's Affairs in 1994 were:

- Equality - for example, of outcome, access to and participation in the process;
- Equity - for example, in recognition of contribution and results after separation;
- Fairness - for example, fair hearing of the issues and fairness throughout the process;
- Accessibility - for example, processes should be as straightforward as possible;
- Affordability - for example, access to legal aid and representation;
- Consistency - for example, with child support, domestic violence legislation;
- Resolution - for example, incentives to resolve differences and avoid delay

As the law reform process developed, these principles came to be expressed as principles that:

- Recognise that a life relationship is an equal partnership to which both parties contribute equally although in different ways;
- Recognise that the equal sharing of property does not always take into account the differing responsibilities of the partners during or after the relationship and may therefore not result in equitable outcomes for both partners;
- Recognise that the 'clean break' principles can work against the interests of the custodial parent and may need to be modified where there are minor dependent children;
- Recognise that relationship property legislation plays a key role in improving the status of women;
- Ensure that disputes about relationship property are resolved as soon as practicable to reduce acrimony and allow the parties to start their lives afresh.

These principles should go at the front of the Act. The Domestic Violence Act and CYPF Act are recent examples of where this was done.