Meal Tickets for Life? The Perennial Question of Post-Separation Equality in New Zealand

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"Once when I was about 12, I read a story in a boy's paper about a big dance to which people were invited by huge posters with the announcement, 'No Entrance Fee'. Many went, danced and enjoyed themselves then, on leaving, they were stopped at the door and requested to pay. 'What do you mean? We were told there was no entrance fee'. 'That's quite true', was the answer, 'there was no entrance fee, but there is an exit fee'. I considered that story at the time silly. Silly indeed it was, but impossible? Look at the marriage laws of modern civilised countries, especially in the Anglo Saxon ones. There is no entrance fee but there is a terrific exit fee— financially as well as emotionally."

George Mikes *Wisdom for Others* (Wingate, 1950)

"Divorce is a redrawing of the boundaries. Emotionally. Psychologically. Economically. I've heard it described it as open-heart surgery whilst you're still awake, with no reassurances that everything will be put back in the right place."

Hannah Stern to a client in the BBC drama, *The Split.*

Introduction

Separation creates problems. When a relationship comes to an end, empirical evidence suggests that both parties will be financially worse off.[1] With a rise in divorce and separation rates over the last century, jurisdictions have grappled with the challenge of how best to deal with the economic consequences of a relationship breakdown.[2]

In New Zealand, the Property (Relationships) Act 1976 ('PRA') sets out a rules-based regime for the equal division of relationship property. This was a turning point in limiting judicial discretion and providing certainty for parties in relationship property matters.[3] The outlier, however, is s 15. This is a compensatory provision to be used where equal sharing does not result in substantive equality. For example, where one partner foregoes a career in order to be the primary caregiver or undertake domestic tasks, they are at a disadvantage when the relationship comes to an end. In these circumstances, the other partner has been freed up to forge ahead in their career and has a potentially enhanced earning capacity. Where economic disparity exists as a result of the division of functions within the relationship, s 15 permits a court to award the disadvantaged partner an increased share of relationship property.[4] There is a widespread view s 15 has not lived up to

[1] See a recently completed PhD thesis which enquires into the economic consequences of separation for married couples with children. This suggests total incomes for men and women decline substantially in the immediate years after separation. For example, in the first year after separation, women experience a reduction of 41 per cent in family income, as compared to 39 per cent for men: Michael Fletcher "An Investigation into Aspects of the Economic Consequences of Marital Separation among New Zealand Parents" (PhD Thesis, Auckland University of Technology, 2017).

[2] Jens Scherpe and Joanna Miles "The Legal Consequences of Dissolution: Property and Financial Support Between Spouses" in John Eekelaar and Rob George (ed.) *Routledge Handbook of Family Law and Policy* (Routledge, Oxford, 2014) 138 at 138.

[3] Margaret Briggs "Which Relationships Should be Included in a Property Sharing Scheme" in Jessica Palmer and others (eds) *Modern Family Finances: Legal Perspectives* (Intersentia, Cambridge, 2017) 37 at 47. Additionally, the amendments included de facto couples (including same-sex) as having the same property rights as married partners.

[4] Property (Relationships) Act 1976, s 15(1).

expectations.[5] Put another way, the difficulty in establishing jurisdiction and uncertainty about quantum has "robbed this provision of much if its usefulness."[6]

In 2015, the Minister of Justice asked the Law Commission to review the PRA. One of the specific terms of reference was to consider "the ability to make adjustments to take account of economic disparity between spouses and partners".[7] The Commission has reached the preliminary view that s 15 has failed in its objectives and reform is needed.[8] This dissertation takes up this issue and contends the current response is conceptually misguided. Specifically, it explores whether compensation (situated in s 15) and maintenance (based on 'reasonable needs' and located in the Family Proceedings Act 1980) should be united in one regime. While need and disparity presently serve different purposes, any distinction is likely illusory. Both deal with an analysis of future income after separation.

To that end, Chapter I describes the historical evolution of relationships to be understood as a partnership of different, but equal, contributions. In Chapter II, the focus narrows to examine the interpretation of s 15. A difficulty in establishing jurisdiction and the absence of meaningful guidance on awards means the provision is not fit to address substantive equality.

Chapter III analyses the response in two comparable common law jurisdictions, England and Wales, and Canada. In England and Wales, compensation and need are dealt with together via generous spousal maintenance payments. Colloquially, these are known as 'meal tickets for life'.[9] The Matrimonial Causes Act 1973, while undeniably flexible, can be wholly discretionary. A

[5] *Scott v Williams* [2017] NZSC 185; [2018] 1 NZLR 507 at [279] per Arnold J.
[6] Nicola Peart (ed) *Brookers Family Law – Family Property* (looseleaf ed, Thomson Reuters) at [PR15.01].
[7] Law Commission *Diving Relationship Property: Time for a Change?* (NZLC IP41, 2017) at 866.
[8] Law Commission, above n 7, at 391. The Commission will release its Preferred Approach Paper in October 2018, with a final recommendation to be made to the Government early next year.
[9] This phrase is widely used to describe the situation where a claimant can be awarded long-term, generous maintenance payments: see, David Burrows "Meal Ticket for Life?" (2018) 168 NLJ 7807.

potentially more satisfactory approach is found in Canada, where there has been a retreat to more rule-like provisions. The Canadian experience offers important direction and lessons for New Zealand. The Divorce Act 1985 connects need and compensation, but a pioneering set of guidelines has been developed to advise the expectations of parties and practitioners.

Finally, Chapter IV considers the Law Commission's preferred option for reform: 'financial reconciliation orders'. Generally, this would unite disparity and need as a more conceptually coherent means of remedying economic inequality. While ambitious, the alternative argument suggests this regime would create more unpredictability and perpetuate dependency. This dissertation suggests no single approach by itself is satisfactory. It will investigate whether an amalgam of removing jurisdictional hurdles and using formulae to calculate an award is more appropriate. This framework would operate within clear rules, giving each party an "equal start on the road to independent living".[10] This means in some circumstances longer term support will be necessary, but a clean break must occur at some stage.

[10] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618 at [144].

Chapter I: Historical Developments

A. Introduction:

This chapter charts the changing understanding of relationships in New Zealand. Historically, married women were *feme-coverts* with few property rights. Beginning in the late nineteenth century, Parliament enacted legislation recognising both parties to a relationship as equal. Yet, there remained tension as to how a separation regime should operate. Specifically, whether division should be discretionary, or subject to fixed rules. This culminated with the passing of amendments to the PRA in 2001. Section 15 of the Act was introduced in an attempt to not only ensure an equal division, but an equitable one. As the Attorney-General argued, the provision was an attempt to "marry equality with difference".[11]

B. Marriage as a 'Partnership'?:

The notion of marriage as a 'partnership' is a relatively modern concept. Traditionally, the legal position of married women was one of inferiority. As Blackstone observed, in marriage a husband and wife were legally one.[12] As a *feme-covert*, a married woman was incapable of owning or disposing of property.[13] In circumstances where a marriage ended, spouses were prevented from making legal arrangements with one another. The common law, however, did provide for the important remedy of the dower.[14] Generally, dower rights meant a widow was entitled to a life interest in

[11] See Joy Liddicoat "The Politics of Difference: A Feminist Perspective on the History of the Property (Relationships) Act 1976" (2001) 3 BFLJ 273 at 273, where Hon. Margaret Wilson discusses the intent behind the legislation.
[12] William Blackstone *The Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765) at 363.
[13] Blackstone, above n 12, at 363.
[14] Rosalind Atherton "New Zealand's Testators Family Maintenance Act of 1900 – the Stouts, the Women's Movement and Political Compromise" (1990) 7 OLR 201 at 202.

one-third of her husband's real estate. This was a valuable acknowledgement of the legal and moral implications of coverture.[15] To an extent, dower rights were an early attempt to address the economic consequences of marriage. This limited security on death did not extend to the provision of maintenance in the event of separation. Instead, the few women who did separate from their husbands faced a bleak future. In the truest way, this was a clean break for the parties, although only in the husband's favour. The end of the nineteenth century saw the decline of dower rights across the common law world.[16] Instead, jurisdictions began to ameliorate the legal difficulties faced by women.

In New Zealand, the Married Women's Property Protection Act 1884 was a major landmark in the property emancipation of women. This Act gave married women a legal existence, in allowing them to hold property and enter into contracts.[17] However, the Act failed to treat marriage as a partnership of equals. The reform did little for many ordinary women who did not own property, and in marriage performed a traditional role.[18] Private maintenance obligations also proved insufficient.[19] In an effort to enforce responsibilities, the Destitute Persons Act 1910 introduced attachment orders on a husband's wages. Enforcement was determined on the basis of matrimonial fault and were not granted without sufficient cause.[20] This meant many women were forced into a precarious economic position where husbands were unable, or unwilling to support them.

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[15] Nancy Wright "Local Policy and Legal Decisions about Dower in Colonial New South Wales" (2005) ANZLH E-Journal 226 at 226.
[16] Wright, above n 15, at 232.
[17] See Married Women's Property Protect Act 1884, s 3: "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by deed, will, or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole,* without the intervention of any trustee."
[18] For example, to claim a share in the matrimonial home, some form of financial contribution had to be show: A. M. Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E.6 at 4
[19] Bill Atkin (ed) *Family Law Service* (online looseleaf ed, Lexis Nexis) at [5.0].
[20] See, for example, the Destitute Persons Act 1910, s 17: Fault included persistent cruelty to the wife or children; the husband was an "habitual inebriate"; or the husband had been convicted of violence towards the wife or children.

It was not until the late 1950s that a more liberal approach began to be promulgated. In 1956, a Royal Commission on Marriage and Divorce in the United Kingdom contended "marriage should be regarded as partnership of equals".[21] Invariably, marriages consisted of one spouse, usually the husband, working and earning an income. Whereas the other spouse, typically the wife, would remain at home. The Royal Commission noted these domestic undertakings were "just as valuable" as financial contribution.[22] This idea was first recognised in New Zealand with the passing of the Matrimonial Property Act 1963. The legislation provided that, when dividing property, contributions of "money, services, prudent management, or other" must be considered.[23] As Professor Mark Henaghan notes, the expression "other" was used to recognise the intrinsic value of domestic work.[24] For example, in *Hofman v Hofman*,[25] Woodhouse J considered marriage was an institution of "different, but equal contributions".[26] The new statutory wording enabled courts to give due emphasis to the "domestic responsibility of a housewife" in "freeing her husband to win income".[27]

This progressive interpretation was not shared by all. In *E v E*,[28] a majority of the Court of Appeal took a narrow reading of the Act. The mere fact a housewife remained at home during the marriage, did not justify her a share in her husband's business. This was further supported in *Haldane v Haldane*,[29] where domestic chores were considered "relatively unimportant" contributions and "certainly insufficient" to support a claim under the Act.[30] When *Haldane*[31] was

[21] Royal Commission on Marriage and Divorce (UK) *Report of the Royal Commission on Marriage and Divorce* (London, 1956) at 644.
[22] Royal Commission, above n 21, at 644.
[23] Matrimonial Property Act 1963, s 6.
[24] Mark Henaghan "Sharing Family Finances at the End of the Relationship" in Jessica Palmer and others (eds) *Modern Family Finances: Legal Perspectives* (Intersentia, Cambridge, 2017) 293 at 299.
[25] *Hofman v Hofman* [1965] NZLR 795 (SC).
[26] *Hofman,* above n 25, at 800.
[27] *Hofman*, above n 25, at 800.
[28] *E v E* [1971] NZLR 859 (CA).
[29] *Haldane v Haldane* [1975] 1 NZLR 672 (CA).
[30] *Haldane,* above 29, at 676.
[31] *Haldane v Haldane* [1977] AC 673 (PC); [1976] 2 NZLR 715.

appealed to the Privy Council, the sense of change was in the air. The Board rejected the Court of Appeal's conservative stance and revived the "concept of marriage as an equal partnership of free equals".[32] A wife, in "performing her function as home-minder", released her husband to earn an income.[33] In those circumstances, it would be unsatisfactory for a woman to survive on "crumbs".[34] Henaghan explains this disconnect in decision-making illustrated the necessity for express statutory language to give effect to the social policy behind the legislation.[35]

C. Matrimonial Property Act 1976 – A New Era:

The Matrimonial Property Act 1976 was seen as radical legislation. Section 14 provided the matrimonial home and chattels were to be divided equally, unless "extraordinary circumstances repugnant to justice" existed. The Act reiterated it should not be presumed a monetary contribution was more significant than one of a non-monetary nature.[36] The Minister of Justice, Hon A. M. Finlay said, at the heart of the legislation was a "conviction that marriage is a partnership of equals".[37] Following on from the failure of the previous legislation, the purpose of the new reforms was to formally establish the idea that matrimonial property was "ours", rather than separately owned.[38] The 1963 Act had given women obscure property rights, requiring proof of contribution. Rather than transitioning to independent living, a wife would leave a marriage with few resources.[39] The new legislation attempted to overcome this by providing a general rule of equal division.

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[32] *Haldane*, above n 31, at 721.
[33] *Haldane,* above n 31, at 721.
[34] *Haldane,* above n 31, at 721.
[35] Henaghan, above n 24, at 300.
[36] Matrimonial Property Act 1976, s 18(2).
[37] A.M. Finlay (3 October 1975) 402 NZPD 5116.
[38] A.M. Finlay (23 November 1976) 408 NZPD 4110.
[39] A.M. Finlay, above n 38, at 4110.

Unfortunately, the clear statement of legislative intent was lost on a cautious judiciary.[40] Instead, courts frequently used the "repugnant to justice" exception to dispel equality. In *Baddeley v Baddeley*,[41] it was considered unfair for a "bored and discontented" wife to leave her marriage, yet claim half the assets.[42] Justice Mahon was particularly persuaded by the apparent injustice of a wife claiming a "handsome dowry" and taking this to a new marriage.[43] Similarly, in *Reid v Reid*,[44] Cooke J asserted a comparison of different contributions was still relevant.[45] This line of thinking is mirrored in *Walsh v Walsh*,[46] where the Court reiterated household chores should be given little weight.[47]

The Matrimonial Property Act 1976 proposed a clear recognition of marriage as a partnership by providing a presumption of equal division, yet this was not delivered in the courts. Among practitioners and lawmakers there was a strong sense that what may have seemed reformist had failed.[48] This perspective was enforced by the indeterminacy of the Family Proceedings Act 1980 ('FPA'). In the face of increasing marriage breakdowns, spousal maintenance obligations were limited to "reasonable needs",[49] expiring a reasonable time after divorce.[50] As Richardson J noted in the leading decision of *Slater v Slater*,[51] ss 64 and 64A express "the legislative commitment to the social policy that maintenance obligations following dissolution of marriage should ordinarily be temporary, not life-long."[52]

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[40] Henaghan, above n 24, at 301.
[41] *Baddeley v Baddeley* (1978) 1 MPC 10 (SC).
[42] *Baddeley,* above n 41, at 12.
[43] *Baddeley,* above n 41, at 12.
[44] *Reid v Reid* [1979] 1 NZLR 572 (CA).
[45] *Reid,* above n 44, at 600.
[46] *Walsh v Walsh* (1984) 3 NZFLR 23 (CA).
[47] *Walsh,* above n 46, at 32.
[48] Working Group on Matrimonial Property *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, October 1988) at 4.
[49] See Family Proceedings Act, s 64: After the dissolution of the marriage or civil union, or after the de facto partners cease living together each spouse, civil union partner or de facto partner is liable to maintain the other, to the extent that such maintenance is necessary to meet their reasonable needs.
[50] See Family Proceedings Act, s 64A: Each spouse, civil union partner, or de facto partner must assume responsibility, within a reasonable period of time, for meeting their own needs. Section 64, above n 48, is subject to this provision.
[51] *Slater v Slater* [1983] NZLR 166 (CA).
[52] *Slater,* above n 51, at 106.

The Royal Commission on Social Policy in 1988 reiterated whilst the law had evolved, after divorce the living standards of women continued to decline, whereas men's rose.[53] As a result of these concerns, the Minister of Justice, Hon Geoffrey Palmer convened a Working Group to recommend what should form the basis of a new matrimonial property regime. The Working Group remarked that while equal division had become an accepted societal concept, the law failed to deliver.[54] Yet, the Group did not envisage matrimonial property law "as a feasible vehicle for securing equality of outcome between the sexes".[55] Moreover, new legislation should resist the temptation to instate long-term periodical maintenance payments.[56] Concern was expressed such a scheme would defeat the clean break principle and incentivise 'meal tickets for life'.[57] Alternatively, periodic maintenance does seem more satisfactory than an award of capital.[58] With maintenance comes the possibility of variation should circumstances change. The Group's proposed reforms were limited to the extension of equal sharing to more assets and the erosion of discretion.[59]

D. Property (Relationships) Act 1976 – "Opening Pandora's Box"?:

The limitations of the 1976 Act received consideration by the Court of Appeal in *Z v Z (No 2)*.[60] The Court noted the operative functions of the Act remained harsh on women who forewent participation in the workforce.[61] In managing the family home, wives freed up their husbands to

[53] Royal Commission on Social Policy (NZ) *Report of the Royal Commission on Social Policy* (Wellington, April 1988).
[54] Working Group on Matrimonial Property, above n 48, at 12.
[55] Working Group on Matrimonial Property, above n 48, at 12.
[56] Working Group on Matrimonial Property, above n 48, at 12.
[57] Working Group on Matrimonial Property, above n 48, at 12.
[58] John Caldwell "Case of *Z v Z*: Future Earnings, Matrimonial Property and Spousal Maintenance" [1996] NZ L Rev 505 at 515.
[59] Working Group on Matrimonial Property, above n 48, at 13.
[60] *Z v Z (No. 2)* [1996] 2 NZLR 258 (CA).
[61] *Z v Z (No 2)*, above n 60, at 275.

acquire new skills and expertise, thus enhancing their earning capacity. The Court unanimously agreed this increased earning capacity was a result of joint efforts.[62] Yet, after the dissolution of marriage the husband was free to recover from the division of assets by going on to earn a substantial income. Conversely, a wife would struggle to reenter the workforce and, in some cases, have to rely on the state.[63]

Z v Z (No 2) acted as a catalyst for the realisation something more was needed to achieve a 'just' result. This culminated in the introduction of two bills, the Matrimonial Property Amendment Bill and De Facto Relationships (Property) Bill in 1998.[64] However, a change of government in 1999 heralded significant changes. The amendments were combined into one Bill, renamed the Property (Relationships) Amendment Bill, and a Supplementary Order Paper was introduced to include same-sex de facto couples.[65] The Bill adopted the recommendations of the Working Group by embedding equal division and restricting when a departure could be made.[66]

The most surprising change to the Bill was Clause 15. This was an economic disparity provision permitting a departure from equal sharing where it was necessary to give effect to justice. It was envisaged this was to be used by a party who had undertaken the majority of domestic duties in the relationship. As the Attorney-General, Hon Margaret Wilson, argued, this amendment was fundamentally about "fairness".[67] Clause 15 was a remedy for the injustice "acutely experienced by women", who having devoted their lives enhancing their partner's career, were left desolate when the relationship ended.[68] Wilson contended that, although equal division was important, it had to

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[62] *Z v Z (No 2)*, above n 60, at 275.
[63] *Z v Z (No 2)*, above n 60, at 275.
[64] Briggs, above n 3, at 48: The De Facto Relationships (Property) Bill 1998 gave de facto couples similar rights as married couples, but within a different statute. See also the Family Proceedings Amendment Act 2001, this extended spousal support to cover de facto relationships.
[65] Law Commission, above n 7, at 353.
[66] Henaghan, above n 24, at 304.
[67] Margaret Wilson (29 March 2001) 591 NZPD 8625.
[68] Margaret Wilson, above n 67, at 8625.

be paired with difference.[69] Expressed another way, an equal result was not always an equitable one. Clause 15 would operate on a discretionary basis for claimants whose income and living standards were significantly lower than their former partner. Causation would be satisfied where the disparity was attributable to the division of functions in the relationship.[70] Should this be established, compensation would be limited to an increased share of relationship property.

In Parliament, the proposed legislation was not universally supported, with some labelling it an attempt at "nanny-state social engineering".[71] In a minority report of the Justice and Electoral Select Committee, the National and ACT Parties asserted that the provision would require judges to predict the future by comparing hypothetical situations.[72] There was an apprehension this new power would result in overall uncertainty and an uptake in litigation. Rather than disturbing the rules on equal division, the opposition contended a more compelling approach would be to strengthen maintenance provisions.[73] This would reflect reality by assessing actual need, rather than speculation.

Although there was dissent, the Property (Relationships) Act 1976 received Royal Assent on 3 April 2001. It continues to provide the regime for relationship property division in New Zealand.

E. Conclusion:

Over a century, there has been a revolution in the treatment of relationships. Traditionally, women were legally one with their husband. This inferior position meant women had few legal recourses

[69] Liddicoat, above n 11, at 273.
[70] Property (Relationships) Amendment Bill 1998 (109-4), cl. 15.
[71] Anne Tolley (29 March 2001) 591 NZPD 8626.
[72] Matrimonial Property Amendment Bill (109-3) (Select Committee Report) at 34.
[73] Select Committee Report, above n 72, at 39.

should the marriage end. Subsequent parliamentary interventions began to reform these legal disabilities, although they were pushed back by a cautious judiciary. The current regime, the PRA aims to provide a just outcome when couples separate. The legislation provides a mechanism for to compensate for economic disparity. This is an attempt to secure substantive equality for each party as they move on with their lives.

Chapter II: The Current Regime

A. Introduction:

This chapter discusses the current mechanism to compensate for economic disparity upon separation in New Zealand. Section 15 of the PRA gives courts the discretion to increase the share of relationship property should certain jurisdictional hurdles be satisfied. Unfortunately, these thresholds have restricted those eligible for an award. Furthermore, an absence of guidance on the calculation of an award has meant the section has little real compensatory effect. The significant issues with the provision illustrate that it was inappropriately designed to achieve substantive economic equality.

B. Jurisdictional Hurdles:

Section 15 provides:

> **15 Court may award lump sum payments or order transfer of property:**
>
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
>
> (2) In determining whether or not to make an order under this section, the court may have regard to —
>
> (a) the likely earning capacity of each spouse or partner:
>
> (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
>
> (c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

As Professor Bill Atkin observes, s 15 is drafted in a demanding way.[74] The provision only applies "on the division of relationship property".[75] In *de Malmanche v de Malmanche,*[76] the first case to give s 15 high-profile consideration, Priestly J noted jurisdiction turns on a significant disparity in income and living standards and whether this was caused by the division of functions within the relationship.[77] With this drafting, disparities that having nothing to with the relationship, such as bad business decisions, will not come under the purview of s 15.[78] Put another way, the provision was not introduced to confer a "broad and unfettered" discretion to redress all disparities nor to achieve social justice.[79]

i. Income and Living Standards:

This threshold requires economic disparity be established as between the claimant and their former partner. Under the provision, the disparity must relate to both income and living standards.[80] This is a prospective inquiry, meaning a court must have clear evidence of what the likely future

[74] Bill Atkin "Family Property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (3rd ed, Lexis Nexis, Wellington, 2007) 197 at 216.

[75] Property (Relationships) Act 1976, s 15(1). This suggests a claim cannot be made independent of an application to divide the relationship property under Property (Relationships) Act 1976, s 25(1). This can be compared with some overseas jurisdictions: see, for example, in England and Wales, the Matrimonial Causes Act 1973, s 24 allows for property adjustment orders to be made before a divorce is made absolute.

[76] *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC). This jurisdictional test has since been cited with approval by the Court of Appeal in *M v B* [2006] NZLR 660 (CA) and *X v X [Economic Disparity]* [2009] NZCA 399.

[77] *de Malmanche*, above n 76, at [151].

[78] See *de Malmanche*, above n 76, at [178]: Priestly J paid particular attention to the husband's poor business decisions. The resulting economic disparity was more related to these decisions, rather than the division of functions.

[79] *de Malmanche*, above n 76, at [157]. Priestly J considered in enacting s 15, Parliament has "stipulated tight jurisdictional parameters."

[80] Property (Relationships) Act 1976, s 15(1).

situation of the parties will be.[81] In *X v X,*[82] the Court of Appeal acknowledged there is an overlap between the two concepts.[83] For example, where the income disparity is great, a corresponding disparity in living standards will "inevitably" be found.[84] This position does seem at odds with what was decided in *de Malmanche*. In that decision, although there was significant income disparity between the husband and wife,[85] this did not necessarily mean disparity in living standards.[86] Nevertheless, there is a symbiotic relationship between the concepts, although both must be satisfied, it is not always necessary that separate analyses be carried out.[87]

a. Income:

The PRA fails to define income. As Henaghan contends, this makes it difficult to ascertain what ought to be considered income.[88] In *X v X,* Robertson J described it as something "considered in the round, [and] includes all periodic streams of money".[89] This fairly broad approach seems to have been altered by the Supreme Court in *Scott v Williams*. Justices Glazebrook and Arnold contend any income derived from property in the relationship property pool should not be taken into account.[90] As the s 15 analysis is conducted after the division of property, where both parties equally benefit, any advantage ought to be considered as "neutral".[91] Conversely, William Young J argues the arbitrary exclusion of some sources of income is without merit.[92] As Atkin notes, the question of what is income remains a "live" issue.[93] Given the discretionary nature of s 15, a more

[81] Bill Atkin *Relationship Property in New Zealand* (3rd ed, Lexis Nexis, Wellington, 2018) at 105.
[82] *X v X [Economic Disparity]* [2009] NZCA 399.
[83] *X v X*, above n 82, at [79].
[84] Bill Atkin, above n 81, at 107.
[85] *de Malmanche*, above n 76, at [172]. In this case, the wife commanded a substantial income of $100,000 per annum, whereas the husband had a current income of only $3000 per annum.
[86] *de Malmanche*, above n 76, at [185]. The wife's standard of living was not significantly higher than her former husband's because she had the responsibility of servicing a $200,000 mortgage and paying child support.
[87] *X v X*, above n 82, at [81].
[88] Henaghan, above n 24, at 312.
[89] *X v X*, above n 82, at [88].
[90] *Scott v Williams*, above n 5, at [254] per Glazebrook J; [329] per Arnold J.
[91] *Scott v Williams*, above n 5, at [254] per Glazebrook J.
[92] *Scott v Williams*, above n 5, at [452] per William Young J.
[93] Atkin, above n 81, at 108.

desirable view is not to restrict what is income. The lack of a legislative definition suggests a wide approach was favoured.[94]

b. Living Standards:

In addition to income, significant disparity in living standards must also exist. In *X v X,* the Court of Appeal defined standard of living as including the "possession, facilities and services" to which a party has access.[95] This is a broad inquiry assessing the range of future choices for each party.[96] Atkin suggests this does not invite courts to inquire into parties' financial choices.[97] If this was the case a party may subvert s 15's operation by minimising expenditure and living a frugal life.[98] This is at odds with some of the case law. For example, in *PEL v FFB,*[99] the Family Court paid close attention to financial choices made since separation. As Henaghan observes, this has the result of penalising the already disadvantaged and incentivising those with high incomes to make decisions that detrimentally impact their living standards.[100]

ii. "Significantly":

To satisfy jurisdiction, an applicant must show their former partner's income and living standards are "significantly higher".[101] As Robertson J observed in *X v X*, 'significant' "denotes a more than trivial disparity".[102] This is a factual inquiry between the parties, and not the community at large.[103] As a result, there is no reason why low-income parties would fail the "significant" test. For

[94] In reviewing Hansard, when the PRA was debated no definition of income was mentioned.
[95] *X v X*, above n 82, at [56].
[96] Henaghan, above n 24, at 315.
[97] Atkin, above n 81, at 108.
[98] Atkin, above n 81, at 108.
[99] *PEL v FFB* [2012] NZFC 9534.
[100] Henaghan, above n 24, at 315.
[101] Property (Relationships) Act 1976, s 15(1).
[102] *X v X*, above n 82, at [77].
[103] *X v X*, above n 82, at [83].

example, if both parties' income is low, then even a small difference in income may be significant.[104] Correspondingly, for former partners with large incomes then a significant disparity would require a large gap in income. There may be some instances where two parties' income and living standards are so high, any disparity may be insignificant.[105]

iii. Causation:

Provided disparity is established as to income and living standards, the court must be satisfied it is a result of the division of functions within the relationship.[106] As Henaghan points out, this is related to s 15's purpose.[107] Specifically, it aims to protect economically vulnerable claimants, who have left the workforce to undertake domestic duties.[108] Early decisions contended the division of functions must be the "principal cause" of the disparity.[109] This was rejected by the Court of Appeal in *M v B*.[110] Rather, causation is satisfied where the division of functions is still a cause of the disparity, rather than the primary cause.[111] President William Young observed earlier decisions had set the bar "too high".[112] This approach is similar to eligibility for maintenance under the FPA.[113] In *Slater*, the Court of Appeal, when assessing the term "division of functions" for maintenance, held there may be more than one operative cause of disparity.[114]

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[104] Law Commission, above n 7, at 364.
[105] *X v X*, above n 82, at [84].
[106] Property (Relationships) Act 1976, s 15(1).
[107] Henaghan, above n 24, at 315-316.
[108] Henaghan, above n 24, at 315-316.
[109] See, for example, *Southall v Southall* (Family Court, North Shore, Fam 2002-044-1347, 21 October 2004, Judge Clarkson) and *G v G* [2003] NZFLR 289 (FC).
[110] *M v B* [2006] 3 NZLR 660 (CA).
[111] *M v B*, above n 110, at [201].
[112] *M v B*, above n 110, at [201].
[113] Recall, under the Family Proceedings Act 1980, ss 64 and 64A, for a maintenance claim, the court must consider the ability for a partner to become self-supporting, with regards to the effects of the division of functions within the relationship.
[114] *Slater,* above n 51, at 174.

In *X v X,* Robertson J referred to a spectrum of causation.[115] For example, a strong connection will be found in the "classic case" where one partner forsakes their career to undertake a domestic role.[116] Conversely, there are cases at the other end of the spectrum where there is no causal connection. For instance, where the disparity is solely attributable to pure talent or inherited wealth.[117] In such a case the economic disparity is a result of external factors and would not meet the jurisdictional requirements.

As the Law Commission point out, there is inconsistency in how causation is judicially considered.[118] In *CH v GH,*[119] the parties married at 16 years old and had two children. The husband became a successful electrician, whilst the wife committed herself to the management of the household. The Family Court decided because the parties had married at such a young age, the wife had had no opportunity to pursue a career. Although there was significant disparity, the necessary causal corollary was not found.[120] The Court held the way the relationship was organised did not have detrimental impact on the wife's career, because "she did not have one in which to develop".[121]

The High Court in *H v H [Economic Disparity]*[122] encountered a similar set of facts to *CH v GH*, yet came to different result. In *H v H,* the parties formed a relationship at 15 years old and soon after had their first child. The husband went on to be an accomplished fisherman while his wife remained at home. In this example, the causation was "overwhelming".[123] Over the course of the relationship the husband forged ahead with his career, while his wife "exclusively looked after"

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[115] *X v X*, above n 82, at [108].
[116] *X v X*, above n 82, at [99].
[117] *X v X*, above n 82, at [99].
[118] Law Commission, above n 7, at 370.
[119] *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008.
[120] *CH v GH*, above n 119, at [50]. Since separation, the husband had accumulated almost $1 million, whereas the wife had gone into debt.
[121] *CH v GH,* above n 119, at [49].
[122] *H v H [Economic Disparity]* [2007] NZFLR 711 (HC).
[123] *H v H*, above n 122, at 711.

the household.[124] These two approaches illustrate an inconsistency within s 15. Claire Green rightly observes such examples indicate the judicial caution at not unduly restricting meritorious claims, while ensuring the jurisdictional bar is not rendered meaningless.[125] This results in like cases not being decided alike and no certainty for claimants. Proving causation has created a "distracting and unnecessary level of analysis".[126] A high evidential burden is required, which may render the section unattractive to some.[127] As such, an unknown number of claimants may have chosen to settle out of court, lest vast sums be spent on litigation and expert witnesses.[128]

iv. Discretion:

Should each hurdle be satisfied, a court can still decide not to make an order.[129] Vivienne Crawshaw argues as a matter of justice, this "discretion must of necessity be limited."[130] Yet, in a review of the case law, the Law Commission note there a number of examples where this discretion is exercised.[131] For instance, in *L v B,*[132] the Family Court took into account the respondent's ongoing spousal maintenance and child support obligations to determine an award would not be just.[133] This suggests in some situations an order for maintenance under the FPA may obviate the requirement for a s 15 award.[134] Broadly, this may reveal courts are conflating compensation and need.

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[124] *H v H*, above n 122, at 711.
[125] Claire Green "The Impact of Section 15 of the Property (Relationships) Act 1976 on the Vexing Problem of Economic Disparity" (PhD Thesis, University of Otago, 2013), at 55.
[126] Law Commission, above n 7, at 373.
[127] Law Commission, above n 7, at 373.
[128] Law Commission, above n 7, at 387-388. In the Law Commission's preliminary findings, it is observed a s 15 claim can incur significant legal fees and costs for expert evidence from actuaries and forensic accountants. This practice is at odds with one of guiding principles of the Property (Relationships) Act 1976, s 1N(d). This provides that questions under the Act ought to be resolved as "inexpensively, simply, and speedily as is consistent with justice."
[129] Property (Relationships) Act 1976, s 15(3).
[130] Vivienne Crawshaw "Section 15 – A Satellite Overview" (2009) 6 NZFLJ 155 at 159-160.
[131] Law Commission, above n 7, at 377.
[132] *L v B* [2012] NZFC 9534.
[133] *L v B*, above n 132, at [70].
[134] *JES v JBC [Costs]* [2007] NZFLR 905 (CA) at [12].

C. Quantum:

If jurisdiction is satisfied, an order can be made to increase the claimant's share of relationship property.[135] This means the court's reach does not extend to separate property or property alienated to another entity, such as a trust. The PRA gives no guidance how compensation should be calculated. In the years since enactment this has been extensively considered.

As several cases reveal, the general approach is to treat compensation as falling into one of two categories.[136] The first, is "personal disparity", which compensates a claimant for the lost opportunity to develop a career.[137] Secondly, cases to recompense a claimant for enhancing their former partner's earning capacity.[138] From a practical viewpoint, it is easier to causally link the loss of a career and a relationship.[139] Enhancement cases can often be explained by reference to a variety of other factors, such as the respondent's natural talent and flair.[140] In *Scott v Williams*, the Supreme Court suggest these categories ought to be discarded. Justice Glazebrook contends the premise of s 15 is to provide compensation for disparity in human capital; that is, the court's inquiry should be on the differential between the parties.[141] As Elias CJ explains, s 15 gives little in the way of direction, but the legislative pointers on quantum do not mention loss or enhancement.[142]

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[135] Property (Relationships) Act, s 15(3)
[136] *M v B*, above n 110, and *X v X*, above n 81.
[137] *X v X,* above n 82, at [118].
[138] *X v X*, above n 82, at [118].
[139] Atkin, above n 81, at 117.
[140] See *Jack v Jack* [2014] NZHC 1495, where an enhancement claim succeeded. Goddard J considered the division of functions in the marriage had conferred an actual economic advantage on the husband. Mrs. Jack's indirect contributions, caring for the children and networking for the benefit of his medical practice, provided the foundation for financial success.
[141] *Scott v Williams*, above n 5, at [197] per Glazebrook J.
[142] *Scott v Williams*, above n 5, at [357] per Elias CJ.

To date, calculations of awards "have not been exactly a model of clarity".[143] In *X v X*, a majority of the Court endorsed a methodology that aimed to provide structure for judges and enhance the predictability of awards.[144] The model set down by O'Regan and Ellen France JJ is as follows:[145]

1. Calculate the difference between the income the disadvantaged partner would have been earning, but for the division of functions and what the disadvantaged will actually earn. This is the "but for income";
2. Make deductions to the "but for income" to reflect unforeseen future incidents, like reduced time in the workforce because of death, ill-health or change in personal circumstances; and
3. Halve the resulting net value.

This methodology has proved contentious, in particular the final step. Academic opinion is divided on whether the resulting value should be halved or not.[146] Atkin argues that where one injustice is being remedied, courts must be careful another inequity is not created.[147] The halving step ensures the parties meet half way. For example, if there is a resulting disparity of $100,000, only $50,000 would be deducted from the earner-partner's share of the relationship property. As Professor Shelley Griffiths concludes, if one party has to pay the whole value of the disparity "there is a real risk of over-compensating".[148] Conversely, John Caldwell asserts an adherence to halving may preserve any existing disparity.[149] Since *X v X*, only two cases have halved an award.[150] The general

[143] *M v B*, above n 110, at [271].
[144] *X v X*, above n 82, at [175].
[145] *X v X*, above n 82, at [184].
[146] Law Commission, above n 7, at 384.
[147] Bill Atkin "The Disparity in Economic Disparity: The Need for a Full-Scale Overhaul of ss 15 and 15A and Maintenance" (paper presented to New Zealand Law Society Family Law Conference, October 2005) at 220.
[148] Shelley Griffiths "The Past, the Present, or the Future?" [2004] 2 NZLJ 55 at 56.
[149] See John Caldwell "The Various Disparities of Section 15" (paper presented to Family Court Judges' Conference, Gisborne, 24 October 2008).
[150] The Law Commission's Issues Paper identifies only two decisions that have followed the halving method: *E v E* [2012] NZFC 830 and *Scott v Williams* [2016] NZCA 356; [2016] NZFLR 499.

consensus appears the primary consideration must be a 'just' award, and it is not always necessary to halve.[151]

In a minority decision, Robertson J considered compensation is a matter of impression and should not be locked into a particular prescription.[152] This "broad-brush" approach is endorsed by Goddard J in *Jack v Jack*.[153] In that decision, a wife received 70 per cent of the relationship property for reasons Atkin describes as "impressionistic".[154] The Supreme Court in *Scott v Williams* impliedly repudiates this viewpoint and argue a rational outlook is needed.[155] In Arnold J's judgment a full statement of the new methodology is found. This is expressly agreed to by Glazebrook and O'Regan JJ, while Elias CJ and William Young J do so by implication.[156] Justice Arnold's quantification model is as follows:[157]

1. Identify the extent of the disparity resulting from the division of functions;
2. Consider for how long the disparity should be compensated. Here, the clean break principle is preserved. Compensation does not extend to the potential working life of either party. The non-career partner will be expected to undertake work and the career party has the autonomy to move on with their lives;
3. Apply the necessary deductions to cover the contingencies of life, like ill-health and retirement;
4. Calculate a present value for the income and the contingencies to give a particular sum;
5. Halve that sum so as to avoid transferring the disparity to the career partner.

[151] See, for example, *J v J* [2014] NZHC 1495.
[152] *X v X*, above n 82, at [125]. Robertson J cites his reasoning in *M v B*, above n 110, at [147].
[153] *Jack v Jack*, above n 140, at [73].
[154] Atkin, above n 81, at 119.
[155] *Scott v Williams*, above n 5, at [265] per Glazebrook J; [385] per O'Regan J; [357] per Elias CJ; [450] per William Young J.
[156] Atkin, above n 81, at 122.
[157] *Scott v Williams*, above n 5, at [326(a)-(e)].

There is some crossover between the methodologies adopted by the Supreme Court and Court of Appeal, yet there is significant divergence at all levels of the judicial hierarchy. This is testament to the unfortunate fluidity of economic disparity.[158] As Henaghan correctly explains, the Supreme Court was limited in what they could do; the final appeals court is not a legislature and can only make a decision on the facts before it.[159] *Scott v Williams* is yet another graphic illustration of the competing attitudes towards s 15. This does nothing for the certainty of parties.[160]

D. Conceptual (Mis)Understanding:

As discussed in the preceding chapter, the enactment of s 15 was not without controversy. Some opposition members expressed concern the provision was too discretionary.[161] In the majority report of the Justice and Electoral Select Committee, government members attempted to dispel these worries by arguing any problems would be overcome by the case law.[162] This has not eventuated. Rather, open-ended discretion has resulted in multiple interpretations as to qualifying circumstances and how compensation ought to be calculated. As Caldwell observes, the moral foundations of s 15 are not particularly contentious.[163] Most New Zealanders would agree remedying economic inequality post-separation is something the law should seek to redress.[164] The issue is how this should be done.

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158 Atkin, above n 81, at 121.
159 Mark Henaghan "Family Law: Achieving Equality of Outcome" [2018] NZ L Rev (forthcoming).
160 Recall, Property (Relationships) Act 1976, s 1N(d) notes that claims under the Act ought to be "resolved as inexpensively, simply, and speedily as is consistent with justice." Section 15 claims seem to abrogate from this principle.
161 Select Committee, above n 72, at 17. The Committee considered the submission of the Family Law Section of the New Zealand Law Society. In this submission, the Law Society observed while the premise behind s 15 was laudable, the drafting may lead to unpredictability.
162 Select Committee, above n 72, at 17.
163 John Caldwell "Maintenance – Time for a Clean Break" in Jessica Palmer and others (eds) *Modern Family Finances: Legal Perspectives* (Intersentia, Cambridge, 2017) 393 at 406.
164 See a study led by Professor Mark Henaghan, Associate Professor Nicola Taylor and Dr. Megan Gallop, sponsored by the Borrin Foundation, concerning societal attitudes. A telephone survey suggests a majority of those interviewed thought an individual, who had given up their career to look after children and assume domestic responsibilities, should receive additional financial support after separation: Nicola Taylor "Family Law Reform in New Zealand: Research Insights" (paper presented to New Zealand Law Society Family Law Conference, September 2018) at 137.

Most of the issues stemming from s 15 arise from the understanding compensating for financial inequality has more in common with maintenance, rather than relationship property law. The PRA is principally designed to ensure an equal division of capital built up during the relationship. Put another way, it is the enjoyment of the 'fruits of the partnership' on separation. Whereas, economic disparity is largely about future income or intangible notions, like career advancement.[165] As Atkin contends, this appears to be the province of maintenance.[166] Yet, the case law reveals that the interplay between s 15 and spousal maintenance is far from clear.[167] At present, the FPA is firmly grounded in "needs" and it is difficult to fit a compensatory model within the relevant provisions.[168] The real answer to reform seems to be an extension of maintenance to properly alleviate economic inequality arising from a relationship.

In its current form s 15 is awkwardly grafted on to the PRA in the hope of achieving equalisation.[169] After *Z v Z (No 2)*, Parliament perceived a problem. The facts there vividly illustrated disparities in income, where a husband earned around $300,000 per annum as an accountant, yet the wife was left to rely on a $7000 per annum social security benefit. For policymakers, this provided the impetus for change. Unfortunately, the response was the "putting together of some vague words" and leaving it to the courts to "pick up the pieces".[170] Parliament failed to address the most significant issue arising in *Z v Z (No 2)*; that is, courts were incapable of treating future earnings as 'fruits of the relationship'. Rather, in clinging to the clean break ideal, the legislature failed to secure a more effective way of addressing disparity. This position is at odds with other common law

[165] Bill Atkin "Economic Disparity – How Did We End Up With It? Has it Been Worth It?" (2007) 5 NZFLJ 299 at 305.
[166] Atkin, above n 81 at 131.
[167] Atkin, above n 81, at 129.
[168] Caldwell, above n 58, at 515.
[169] See Property (Relationships) Act 1976, s 1M(c). One of the purposes of the Act is to "provide for a just division of relationship property". However, economic disparity has more in common with differences in income, rather than capital.
[170] Atkin, above n 147, at 211.

jurisdictions, which tie compensating for the past with future need.[171] As will be discussed in more depth in the next chapter, the international response is a more conceptually coherent, as well as precise, method of redressing disparity.

In limiting compensation to an increased share of relationship property, the provision acts fortuitously.[172] For example, there may be a large disparity between the parties yet it cannot be adequately compensated for if there is a small amount of capital.[173]As Lord Nicholls opined in *McFarlane v McFarlane,* it would be "most unfair" to cancel obligations to compensate in the absence of capital assets.[174] This problem is even more acute in New Zealand with the widespread use of trusts. As the Law Commission notes, this alienation means assets that would otherwise be in the relationship property pool are removed.[175] This negatively impacts the extent to which s 15 is effective and means otherwise established claims are left uncompensated. Given these flaws, New Zealand should examine whether a model of uniting compensation and future needs is best to address economic disparity.

E. Conclusion:

When s 15 was introduced it was hoped that the case law would develop so as to define its jurisdictional and quantum parameters. Unfortunately, this has not happened. Across the judicial hierarchy, the provision is applied differently. This results in little certainty for parties and increased litigation in an attempt to clarify the law. Section 15 is failing to achieve an equitable result and reform is needed.

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[171] For example, in England and Wales, and Canada applications for maintenance combine compensation with future need. This is discussed in more depth in Chapter III.
[172] Atkin, above n 165, at 305.
[173] Atkin, above n 165, at 305.
[174] *Miller; McFarlane*, above n 10, at [32].
[175] Law Commission, above n 7, at 390.

Chapter III: International Comparisons

A. Introduction:

This chapter compares attempts in other common-law jurisdictions to create post-separation equality. Specifically, the Matrimonial Causes Act 1973 ('MCA') in England and Wales[176] and the Divorce Act 1985 in Canada. Since the early 1970s, England has embarked on a path of sharing the 'fruits of the joint labour'. This includes the provision of generous payments for future need. In contrast to New Zealand, the English path has been paved by judicial development, rather than legislation. These differences make it more difficult to draw guidance for New Zealand. Nonetheless, discussion of concepts like the clean break, compensation and need are worth assessing. Canada may provide direction for New Zealand. This jurisdiction has increasingly relied on rules. Federally, an ambitious scheme of informal guidelines has been implemented to assist in calculating the amount and duration of spousal support.[177] This process has been done practically by analysing patterns in the case law and is considered successful.

B. England and Wales: Clear as Mud?

i. Matrimonial Causes Act 1973:

The starting point for the modern law of divorce in England is the MCA.[178] Unlike New Zealand, England does not confer property rights upon unregistered cohabitants.[179] The English Law

[176] Subsequently, referred to as 'England'.
[177] As will be discussed further in this Chapter, although these guidelines are voluntary, they have received judicial approval.
[178] The rules in this Act are replicated in the Civil Partnership Act 2004 for couples in a civil partnership.
[179] Briggs, above n 3, at 41.

Commission rejected any suggestion that cohabitants should be entitled to the same remedies as married couples and civil partners.[180] Moreover, while New Zealand's relationship property rules have been relatively codified since 2001, the opposite is true in England. Courts in this jurisdiction have considerable discretion in the sort of financial orders that can be made.[181] For example, a court can order the transfer of any property connected to the marriage.[182]

For the purposes of this dissertation, discussion will be limited to orders of spousal maintenance.[183] Under s 23 of the MCA, a court may order a lump sum or periodical payments to be made. This is done to adjust the financial position of the parties and contribute towards reasonable maintenance.[184] Thus, compensation is combined with meeting need by sharing income. This is in contrast to New Zealand where compensation and need are dealt with separately. When deciding to make an order, courts are required to consider all relevant circumstances.[185] As Miles discerns, the lack of an overarching objective indicates judges are afforded a wide degree of flexibility.[186] For instance, it is unclear for how long such orders may be made for. Under s 28(1)(a) of the MCA, spousal maintenance cannot extend beyond the death of either party or the remarriage of the recipient. This leaves open the possibility for a joint lives order, which would tie the parties for the foreseeable future. Although, when evaluating an order, the court has a duty to consider whether there is an opportunity for a clean break.[187] Yet, this is not a mandatory consideration, just something to have regard to.[188]

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[180] Law Commission (England and Wales) *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No. 307, 2007).
[181] For example, the Matrimonial Causes Act 1973, s 21A provides for shareable rights in pension schemes.
[182] Matrimonial Causes Act 1973, s 24.
[183] This is done because these orders have more in common with the Property (Relationships) Act 1976, s 15 and the relevant provisions of the Family Proceedings Act 1980.
[184] Matrimonial Causes Act 1973, s 23(1)(a) and (b).
[185] See, for example, Matrimonial Causes Act 1973, s 25: The first consideration of the court must be to any children of the relationship. Section 25(2) provides a range of factors a court can have regard to. For example, the income and earning capacity of each of the parties and any foreseeable financial needs.
[186] Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer and others (eds) *Modern Family Finances: Legal Perspectives* (Intersentia, Cambridge, 2017) 261 at 279.
[187] Matrimonial Causes Act 1973, s 25A.
[188] Elizabeth Cooke "*Miller/McFarlane*: Law in Search of Discrimination" (2007) 19 Child&Fam LQ 98 at 106.

In contradiction to New Zealand, the MCA ensures insufficient capital is no barrier to proper redress. Expressed another way, just because a couple are capital-poor does not mean future obligations are cancelled.[189] As Henaghan correctly observes, periodic maintenance does go against the clean break principle, but it may more of a 'precise' method of sharing the 'fruits of the marriage'.[190] Recently, the Family Justice Council concluded ongoing financial remedies are justified because marriage is a relationship of interdependence, where the effects persist beyond dissolution.[191] The decision to discharge domestic obligations often comes at the expense of the development of career potential. Therefore, when a marriage breaks down an obvious imbalance is created. As such, it is only 'fair' for these relationship generated imbalances to continue to be met.[192]

It is uncertain to what extent compensation and needs are interrelated under the MCA. For many years, judges exercised their jurisdiction on a pure needs-only basis.[193] Financial provision was only awarded for "reasonable requirements". Like the FPA in New Zealand, English awards were assessed on a reasonable basis, adjudged by the marital standard of living. Yet, there was no practical prospect of requirements been met on a lifelong basis.[194] As Gibson LJ stated in *Dart v Dart,*[195] this universal standard was inappropriate.[196] This was particularly so in 'big-money' cases, where the inequity was felt more keenly.

[189] *Miller; McFarlane*, above n 10, at [32].
[190] Henaghan, above n 24, at 326.
[191] Family Justice Council "Guidance on 'Financial Needs' on Divorce" (Judicial Office, London, 2018) at 14.
[192] Family Justice, above n 191, at 15.
[193] Miles, above n 186, at 278.
[194] Law Commission (England and Wales) *Matrimonial Property, Needs and Agreements* (Law Com. 343, 2014) at 14.
[195] *Dart v Dart* [1996] EWCA Civ 1343.
[196] *Dart*, above n 195, at [36].

The conservative approach was brought to an end by the House of Lords in *White v White*.[197] Their Lordships reasoned that when the assets of the earner-party exceed the financial needs of the disadvantaged party, the surplus should not solely belong to the wealthier individual.[198] The direction of English law evolved with the tentative introduction of an overarching purpose: the "yardstick of equality".[199] When considering financial remedies on divorce, a court should always consider whether the result is fair in the circumstances. As Lord Nicholls remarked, this requires that the division of labour during the marriage should not prejudice or advantage either party come the relationship's end.[200]

ii. *Miller v Miller; McFarlane v McFarlane*: The High Judicial Watermark:

In *Miller v Miller; McFarlane v McFarlane*, the House of Lords revisited the issue of financial ancillary relief. This joint appeal represented an opportunity for the Court to make the law of maintenance more consistent and predictable.[201] *Miller* involved a marriage of short duration and a remarkable pool of matrimonial assets; whereas, *McFarlane* concerned a long marriage with three children. Both parties were professionally successful, however the wife had given up a nascent legal career in the City to raise the children. This was done in order for her husband to focus on his accountancy role. Over 20 years of marriage, the couple built up assets totaling £3 million, which were to be divided equally. This was considered insufficient capital for a clean break to occur. Thus, the issue before the House of Lords was whether an order for periodic payments should be made, and in what circumstances.

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[197] *White v White* [2000] UKHL 54.
[198] *White,* above n 197, at [24].
[199] *White,* above n 197, at [25].
[200] *White,* above n 197, at [24].
[201] Mary Welstead "*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24: Fairness Remains an Elusive Concept" (2006) 18 Denning LJ 209 at 209.

In the courts below, there was confusion as to the purpose of spousal maintenance. In the District Court, Mrs. McFarlane was awarded £250,000 per year for the joint lives of the couple.[202] This award reflected the wife's needs and her right to some compensation for resulting economic disparity. Whereas, in the High Court (Family Division), Bennett J contended a spousal maintenance award should only consider future need.[203] As such the award was reduced to £180,000. In the Court of Appeal, the District Court's approach was favoured.[204] The Court restored the £250,000 per year order, but limited it to five years.

In the House of Lords, it was argued family law should be directed at the notion of "fairness".[205] The Court attempted to elucidate by pointing to three foundational stands. The first is sharing; a presumption the assets of the marriage are divided equally.[206] Secondly, ongoing financial needs should be met.[207] Finally, compensation,[208] this is labelled by the English Law Commission as the "most mysterious".[209] This strand reflects most closely what s 15 of the PRA is trying to achieve. Because of certain choices made as to the division of labour, one party is disadvantaged when the marriage breaks up.

As Lord Nicholls opined, nothing in the MCA limits an award to a needs-only basis.[210] Equally, an award may have a compensating component in situations where one party earns a high income, but there is insufficient capital to achieve a clean break. As reflected in s 25A,[211] a clean break may

[202] *McFarlane v McFarlane* [2003] EWHC 2410.
[203] *McFarlane v McFarlane* [2004] 1 FCR 709.
[204] *McFarlane v McFarlane; Parlour v Parlour* [2004] EWCA Civ 872; 2004] 3 All ER 921.
[205] *Miller; McFarlane*, above n 10, at [4].
[206] *Miller; McFarlane*, above n 10, at [16].
[207] *Miller; McFarlane*, above n 10, at [11].
[208] *Miller; McFarlane*, above n 10, at [13].
[209] Law Commission (Eng&W), above n 194, at 16.
[210] *Miller; McFarlane*, above n 10, at [31].
[211] This section provides, when a court is deciding to order periodic maintenance, it must consider whether it should for a secured period of time, which is sufficient to enable the party, in whose favour the order is made to transition without undue hardship.

be socially desirable, but it is not a reason to further deprive a disadvantaged party.[212] In the circumstances of *McFarlane*, a joint lives order for £250,000 was appropriate. If a time limit was imposed it would be unfair for Mrs. McFarlane for that time to arrive and the disparity not rectified. The Court did leave open the possibility for Mr. McFarlane to apply in the future for the payments to cease. Conversely, this means Mrs. McFarlane could apply for the order to be varied should her former husband's income increase.[213]

In *McFarlane,* the discrepancy in the financial positions was a result of the choices made during the marriage. Thus, their Lordships determined Mrs. McFarlane was entitled to compensation for losses sustained, rather than mere payment of her needs. It could be argued what *McFarlane* tries to achieve is similar to the social policy aims of New Zealand legislation. The difference is an English court has no prescribed jurisdictional hurdles to work through. In New Zealand, whether economic disparity exists is assessed on a "pernickety, quasi-formulaic" basis.[214] Whereas, English financial remedy law operates on a discretionary footing, structured by judge-made principles. Yet, the discretion to tailor relief enables a significant degree of uncertainty.[215] As Lord Nicholls observed in *White,* "fairness, like beauty, lies in the eye of the beholder".[216] Having a legal system based on such an elusive concept raises the question, fair for whom? A generous maintenance order has the potential to shift the disparity; specifically, in circumstances where the earner party re-partners and has to maintain two households on one income. It is because of these concerns in

[212] *Miller; McFarlane*, above n 10, at [20].
[213] See *McFarlane v McFarlane* [2009] EWHC 891 (Fam): some years after consideration in the House of Lords, Mr. McFarlane was earning over £1 million and had remarried. Mrs. McFarlane had obtained employment, but was unlikely to be a high earner. Because of the change in circumstances, she sought an increase in the amount of maintenance. The Court arrived at an award expressed in percentages of the husband's annual salary, depending on the amount earned in a particular year. Namely, 40 per cent up to £750,000, 20 per cent between £750,000 and £1 million and 10 per cent over £1 million. Additionally, Charles J ordered the payments to cease in May 2015.
[214] Miles, above n 186, at 285.
[215] Law Commission (Eng&W), above n 194, at 28.
[216] *White,* above n 197, at [1].

the years since *McFarlane* that courts seem to have adopted a more orthodox stance. Rather than striving for more substantive equality, the practice tends towards independence.[217]

iii. The (Lower) Courts Strike Back:

Among some practitioners and judges there is a worry the "pendulum has swung too far".[218] Specifically, in 'big-money' cases, there is a worry one party will walk away with a 'meal ticket for life'. This has led to an evolving jurisprudence that questions the morality of imposing an obligation to pay maintenance until the death of the payee. In *SS v NS (Spousal Maintenance)*,[219] Mostyn J observed there are a number of principles to be considered when assessing an application:[220]

1. A spousal maintenance award is properly made where the evidence shows the choices made during the marriage have generated future needs;
2. An award is made only by reference to need, save in exceptional cases where the compensation principle applies;
3. In each case, the court must consider a transition to independence as soon as it is just and reasonable;
4. Where the choice between a fixed term and a joint lives order is finely balanced, the steer should be in favour of the former;
5. For quantum, the marital standard of living is relevant, but not decisive.
6. This is a global task, asking in the circumstances is it fair for a proportion of the respondent's available income to go to the claimant.

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[217] Law Commission (Eng&W), above n 194, at 23.
[218] Sarah White "A Meal Ticket for Life?" (2013) New Zealand Lawyer 26 at 27.
[219] *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam); [2015] 2 FLR 1124 at [25].
[220] *SS v NS*, above n 219, at [46].

In *B v S*,[221] Mostyn J distinguished *McFarlane* as an exceptional case.[222] In general, spousal maintenance is adjudged with reference to need alone, unless the case is of an unusual nature.[223] In 2018, the English Court of Appeal, in *Waggott v Waggott*,[224] has taken a significant step in affirming the *SS v NS* standards. This case involved a 21 year marriage, where the husband earned almost £4 million per annum as the finance director of a travel company and the wife cared for the children. In the court of first instance, a joint lives order was issued. This resulted in Mr. Waggott paying £175,000 per annum to his former wife. On behalf of the Court of Appeal, Moylan LJ espoused several important conclusions as to the current state of the law of spousal maintenance in England. First, earning capacity is not matrimonial property to be shared.[225] Practically, the sharing principle can only apply to property. The determination of earning capacity is properly a theoretical exercise, meaning it is excluded from the definition of "property". Earning capacity results in the generation of property after the marriage has ended, meaning any causal link with the marriage is extinguished.[226]

An award for compensation can be made for the "disadvantage sustained" by a party in giving up a potential career.[227] This involves a factual inquiry to determine whether an applicant's career would have resulted in them having more resources than those awarded by the need principle.[228] The Court seems to decisively dispose of any suggestion compensation is based on whether an earner-party has been advantaged by the actions of a stay-at-home spouse. Mr. Waggott was ordered to pay £175,000 per annum until 2021, when payments would cease. In response to

[221] *B v S* [2012] EWHC 265; [2012] 2 FLR 502.
[222] *B v S*, above n 221, at [73].
[223] *B v S*, above n 221, at [79].
[224] *Waggott v Waggott* [2018] EWCA Civ 727; [2018] 2 FLR 406.
[225] *Waggott*, above n 224, at [121]. This reflects the same approach taken in New Zealand in *Z v Z (No.2)*, where the Court of Appeal held earning capacity is not property.
[226] *Waggott*, above n 224, at [123].
[227] *Waggott*, above n 224, at [139].
[228] *Waggott*, above n 224, at [139].

concerns of hardship past 2021, the Court pointed out the capital Mrs. Waggott received was sufficient to be invested and interest gained on it.

iv. Future Clarity?

Waggott represents a hardening of maintenance in England. Yet, it is not a surprising decision. It is merely the most recent authoritative decision to contend separated parties cannot be indefinitely tied. Put simply, a clean break has to be effected, save in exceptional cases. This is more in line with what is trying to be achieved with s 15 of the PRA, but in a more nuanced way. The MCA allows for future income to be used to remedy the economic disparity, whereas, the PRA limits compensation to an increased share of relationship property. New Zealand puts a priority on a clean break, the English courts seems to be coming closer to this ideal.

The English Law Commission perceive, post-*McFarlane* that there has been a trend towards independence.[229] Of interest, is recent legislative attention by the House of Lords. The Divorce (Financial Provision) Bill, introduced by Baroness Deech, represents a fundamental modernisation of divorce law.[230] Among other things,[231] the proposed legislation seeks to limit periodic payments to five years, unless exceptional hardship would result.[232] This reflects a concern over "financial injustice" with the potential for 'meal tickets for life'.[233] It is noteworthy in *McFarlane* a time-limit was considered. Counsel for Mr. McFarlane contended English law should conform with the Scottish standard by imposing an arbitrary time limit of three years.[234] However, Lord Hope

[229] Law Commission (Eng&W), above n 194, at 23.
[230] Divorce (Financial Provision) Bill 2017 (HL Bill 26-19).
[231] This Private Member's Bill seeks to bring a more prescribed approach to the division of assets. Furthermore, it attempts to clarify the position in England and Wales as to the status of pre and post-nuptial agreements.
[232] Divorce (Financial Provision) Bill 2017 (26-19), cl 5(1)(c).
[233] See Frances Gibb "Family Matters: Overhaul divorce to protect children, say MPs and peers" *The Times* (online ed, London, 17 September 2017). This is part of *The Times'* "Family Matters" five-point plan for change. This includes scrapping fault-based divorces; ending 'meal tickets for life'; giving pre-nuptial agreements the backing of statute; extending civil partnerships to heterosexual couples; and creating rights for long-term de facto couples.
[234] *Miller; McFarlane*, above n 10, at [102].

reasoned such a limit would "override the criterion of fairness".[235] Regardless of these comments, England may be best advantaged by looking north of the border for inspiration. The Family Law (Scotland) Act 1985 gives support to disadvantaged parties and ensures the disparity is not wholly shifted to the earner party with infinite orders.[236]

At the Bill's second reading, Baroness Shakleton,[237] a Conservative peer, argued that the 1973 framework is in need of significant amendment so as to produce a more predictable outcome.[238] Presently, when parties separate it is impossible to predict whether spousal maintenance will be awarded on a fixed term basis, or a joint lives order will be issued. As Baroness Shakleton notes, there is anecdotal evidence to suggest the MCA is not being applied uniformly across the jurisdiction.[239] For example, courts in the north of England prefer a clean break, whereas in the south judges seem to be more indulgent.[240] The Bill, from an outside observer's perspective, represents a refreshing change for a system that appears excessively discretionary. The Bill, however, is not universally supported. In *Wyatt v Vince,*[241] Lord Wilson criticised those who favour more predictable outcomes as "compounding a dangerous fallacy".[242] Speaking extrajudicially, Lady Hale has contended that, while the phrase 'meal ticket for life' is demeaning, the reasons for such an award are not.[243] This suggests a concern the Bill would compromise the overarching aim of giving "each party an equal start on the road to independent living".[244] The comments from

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[235] *Miller; McFarlane*, above n 10, at [121].
[236] A recent study published by the University of Glasgow found the Family Law (Scotland) Act 1985 was "built to last" and there was no desire for substantial reform in that jurisdiction. Practitioners and judges alike found the use See a recent study out of the University of Glasgow where a team of researchers found the Scottish legislation is "built to last" with no desire for substantial law reform. Practitioners and judges alike found the use of time limits offered the right amount of flexibility and certainty: J Mair, E Mordaunt and F Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 Years of Financial Provision on Divorce* (Nuffield Foundation, Glasgow, 2016).
[237] Baroness Shackleton is a solicitor with extensive experience in high-value divorce cases. She has represented such clients as Charles, Prince of Wales and Prince Andrew, Duke of York in their respective divorce proceedings.
[238] Baroness Shackleton (11 May 2018) 791 GBPD HL 382.
[239] Baroness Shackleton, above n 238, at 382.
[240] Baroness Shackleton, above n 238, at 382.
[241] *Wyatt v Vince* [2015] UKSC 14; [2015] 2 All ER 755.
[242] *Wyatt*, above n 241, at [33].
[243] Brenda Hale, President of the Supreme Court of the United Kingdom "Keynote Address" (Resolution's 30th National Conference, Bristol, 20 April 2018).
[244] Hale, above n 243, citing her judgment in *Miller; McFarlane*, above n 10, at [144].

members of England's highest court may symbolise a push-back against the potential encroachment of their jurisdiction.

In a description of outcomes under the MCA, Miles coins the phrase "individualised justice".[245] It is probably better described as 'big-money justice'. The large proportion of high value cases mean English family law has become distorted.[246] This provides lessons for New Zealand to resist any temptation to revert to traditional discretion. A lack of guidance in the MCA has resulted in costly litigation and a steer towards inconsistent results.[247] These issues have led the English Law Commission to tentatively discuss a more formulaic approach for maintenance.[248] As the Commission observe, separation should not be a clean break from responsibility.[249] A disadvantaged party cannot immediately revert to their pre-marriage position.[250] Rather, a more balanced approach needs to be found. As Miles considers, with formulae, compensation and need would be clear complementary concepts.[251] Currently, English courts seem to treat compensation awards as rare. This means claimants are treated as "needy" and the true impact of economic sacrifices are not captured.[252]

As will be discussed in the next part of this chapter, direction may be found in Canada. At the federal level, maintenance laws have been recalibrated around a framework of rules. As the English Law Commission discern there seems to be two principal barriers to the development of a like system in England. First, past experience with the Child Support Act 1991 has scarred practitioners.[253] The original scheme was plagued with administrative shortcomings and a

[245] Miles, above 186, at 289.
[246] For example, in *White v White* the value of the couples assets exceeded £4.5 million; in *McFarlane v McFarlane* assets exceeded £3 million; and in *Waggott v Waggott* the capital was greater than £15 million.
[247] White, above n 218, at 27.
[248] Law Commission (Eng&W), above n 194, at 52.
[249] Law Commission (Eng&W), above n 194, at 31.
[250] Law Commission (Eng&W), above n 194, at 31.
[251] Law Commission (Eng&W), above n 194, at 35.
[252] Scherpe and Miles, above n 2, at 138.
[253] Scherpe and Miles, above n 2, at 138.

complicated formula, leading to the potential for unreasonably high awards.[254] Secondly, the conceptual framework of English family law does not lend itself for formulaic rules. In Canada, spousal support is only relevant for income. Whereas, in England, maintenance encompasses an assessment of capital and income.

C. Canada: Why Guidelines?

As Professor Ira Ellman explains, the duty to continue to support after separation is difficult to explain.[255] Obligations seem to arise out of a mixture of contractual and restitutionary theories.[256] Ellman's theory takes maintenance and economic disparity away from need towards a compensatory argument.[257] Because one party has made career sacrifices to undertake domestic or childcare obligations, they should be recompensed. This approach rests on more formulaic methodologies for calculating support.

The English experience illustrates the struggle with 'individualised' justice. Rather than battle with open-ended discretion, Canada has gone further than other common law jurisdictions by instituting Spousal Support Advisory Guidelines (the 'Guidelines') from 2008. This accords with Ellman's compensative theory based on clear formulae. The Guidelines are informal, advisory standards with a national scope. They attempt to inform parties and practitioners in an effort to calculate the extent and scope of support.

[254] Carol Rogerson "Child Support, Spousal Support and the Turn to Guidelines" in John Eekelaar and Rob George (ed.) *Routledge Handbook of Family Law and Policy* (Routledge, Oxford, 2014) 153 at 158.
[255] Ira Ellman "The Theory of Alimony" (1989) 77 CLR 3 at 5.
[256] Ellman, above n 255, at 7.
[257] Scherpe and Miles, above n 2, at 146-147.

i. The Legal Landscape:

In Canada, the division of relationship property is dealt with separately from maintenance.[258] Each province or territory has its own legislation addressing the division of matrimonial property. Since the 1980s, most have incorporated provisions for a presumption of equal division.[259] Whether or not the legislation applies to de facto couples varies. For example, in Alberta and Québec "common-law" couples are not granted property sharing rights.[260] Spousal support is dealt with under federal legislation, but eligibility is still governed by provincial or territorial rules. For instance, in Ontario, de facto couples have the same right to spousal support as married couples, provided they have been living together for at least three years.[261]

The Divorce Act 1985 provides that an order can be made requiring a spouse to pay a lump sum, or periodic payments, as is reasonable for the support of the other spouse.[262] Under s 15.2(6), there are four statutory objectives that a court must have regard to:

> (a) recognise any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

[258] This split regime is the same in New Zealand: property division is dealt with by the Property (Relationships) Act 1976 and maintenance is considered under the Family Proceedings Act 1980.
[259] For example, in British Columbia each party to the marriage is entitled to equal share of the family property: see the Family Law Act 2011 (BC), s 81.
[260] In these jurisdictions, common-law couples have to rely on the doctrine of unjust enrichment to receive a share of the relationship property. However, this does not presume an equal share of the property.
[261] See Family Law Act 1990 (Ontario), s 29: "spouse" is defined as including two persons not married, but have cohabited for a period of more than three years.
[262] Divorce Act 1985 (Canada), s 15.2(1).

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

To achieve these objectives a court must consider the condition, means, needs and circumstances of each spouse.[263] These statutory objectives seem to take a comprehensive approach to disparity and need by focusing on the actual economic conditions of the parties. From a New Zealand perspective, this appears to be an amalgamation of what can be found in s 15 of the PRA and the FPA. As noted in Chapter II, this appears to be more conceptually coherent. Professors Carol Rogerson and Rollie Thompson observe, the Divorce Act is "profoundly compensatory in nature".[264] It presumes the financial needs after separation are caused by past domestic roles; the effects of which persist.

ii. Judicial Interpretation:

In the 1980s, a series of spousal support cases came before the Supreme Court of Canada.[265] These cases were decided under the earlier Divorce Act 1968 but have guided future decisions. In each case, the wife had signed a separation agreement limiting rights to future support. As such, the Supreme Court refused to set aside the agreements and an application for support was dismissed. These cases prioritised the importance of independence and the role of courts in promoting a clean break. In the immediate wake of this, spousal support was seen as a transitional remedy.[266] The Supreme Court confronted this issue again in *Moge v Moge*.[267] Here, the Court emphasised

[263] Divorce Act 1985, s 15.2(4). Factors include the length of time the spouses cohabited; the functions performed by each spouse during cohabitation; and any order, agreement or arrangement relating to support.
[264] Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 FLQ 241 at 256
[265] See *Pelech v Pelech* [1987] 1 S.C.R. 801; *Richardson v Richardson* [1987] 1 S.C.R. 857; and *Caron v Caron* [1987] 1 S.C.R. 892.
[266] Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, Ottawa, 2008) at 7.
[267] *Moge v Moge*, [1992] 3 S.C.R. 813.

spousal support should be primarily understood as a form of compensation for a loss of economic opportunity.[268] In *Bracklow v Bracklow,*[269] the Court held, along with the compensation principle, there is also a basis for spousal support based on "need alone".[270] Marriage is a relationship of interdependence involving social responsibilities, just because parties separate does not mean all obligations are abandoned and support rests on the state.[271] These separate decisions of the Supreme Court in *Pelech, Moge* and *Bracklow* introduced competing theories, leaving the law in a state of "rulelessness".[272] For parties and practitioners, it was difficult to identify in what circumstances liability would arise and in what form.

iii. American Inspiration:

A concern over unpredictability and increased discretion led to a project by Rogerson and Thompson, sponsored by the Department of Justice, to develop guidelines for spousal support. As the authors note, such formulaic guidelines are no longer an abstract concept.[273] Most recently, the American Law Institute (ALI) have prepared recommendations for alimony that has informed the Canadian experience.[274] The ALI provide a substantive reconceptualisation of the law in the United States around compensation, rather than relief or need.[275] As the Principles propose, this is because financial losses arising on dissolution ought to be allocated to account for how the marriage was conducted.[276] The ALI recognise two major compensable losses; first, a basic claim in all marriages lasting longer than five years where there is an income differential of at least 25

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[268] *Moge*, above at n 267, at 861.
[269] *Bracklow v Bracklow*, [1999] 1 S.C.R. 420.
[270] Rogerson, above n 254, at 160.
[271] *Bracklow*, above at n 269, at [32].
[272] Rollie Thompson "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 CFLQ 25.
[273] Rogerson and Thompson, above n 266, at 10.
[274] American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002). The recommendations with respect to spousal support can be found in Chapter Five: "Compensatory Spousal Payments."
[275] American Law Institute, above n 274, at 5.02(1).
[276] American Law Institute, above n 274, at 5.02(1).

per cent. Secondly, in cases where there are children, an additional claim may be based on loss of earning capacity because of a disproportionate responsibility for childcare.

In its Report, the ALI sets out an example for an average marriage of 10 years where the income of one party is 30 per cent greater than the other. The ALI hypothesise an award of 10 per cent of the income difference should be granted to the less well-off party.[277] This would mean where one party earns $100,000 and the other $70,000,[278] the party with the lower income would be entitled to $3,000 award per annum. As to duration, the Principles set a general presumption of one year of support for every two years of marriage.[279] The Principles suggest there should be a cap on an award, falling somewhere between 40 and 50 per cent of the income difference. Expressed another way, no more than 50 per cent of the income difference can be awarded.

A primary caregiver claim for loss of earning capacity can be made alongside a basic claim. Entitlement for this would be presumptively established where the marriage is one with children and the claimant's earning capacity is substantially less than that of the other spouse. As with the basic claim, quantum is calculated by according a percentage of the income difference to the disadvantaged party. The Principles are theoretical, yet some American states, such as Arizona, have used the ALI's proposals as a basis for reform.[280] Over 160 Arizona Superior Court[281] decisions have cited or used the ALI guidelines.[282] Application of the guidelines is purely discretionary and, as the Arizona Court of Appeals held in *Ramsay v Ramsay*,[283] they are "informal

[277] This figure is arrived at by multiplying the years of marriage by a durational factor of 0.01.
[278] Thus, a 30 per cent income differential.
[279] It is contemplated the duration presumption may be rebutted in cases of a long marriage.
[280] Mary Kay Kisthardt "Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance" (2008) 21 J Am Acad Matrimonial Law. 61 at 74.
[281] The Superior Court is the court of first instance in Arizona.
[282] Kishardt, above n 280, at 74.
[283] *Ramsay v. Ramsay*, 224 Ariz. 467, 232 P3d 1249 (Ariz.App. 2010).

reference materials" that may be disregarded.[284] This recent analysis perhaps indicates a minimalisation of such resources.

iv. Canadian Action:

Differences in substantive law meant the ALI guidelines were not directly transferrable to Canada, although they have provided a useful template.[285] The Canadian Guidelines were developed through intensive consultation with judges and practitioners, and identifying patterns of outcomes in the case law.[286] Rather than a precise figure, the Guidelines generate a wide range of figures for quantum and duration.[287] This means a fact-specific determination is still required in each case.[288] The Guidelines have no legal force and are merely advisory. They are intended to be a starting point for negotiation between parties.

Dependent on whether there are children, the Guidelines take one of two approaches. The 'without children' formula relies on two main factors: the length of the marriage and the income difference between the parties.[289] This approach is described as reflecting the premise of "merger over time".[290] The longer that parties are married the more it is assumed economic lives become intertwined. In the case of a case of a 15 year marriage without children, the Guidelines suggest a range of 22.5 to 30 per cent of the income difference should be afforded to the lesser paid spouse.[291] For example, if the income difference was $30,000, between $6750 and $9000 per annum

[284] *Ramsay*, above n 283, at [17].
[285] For example, there is a state/federal distinction between the jurisdictions. In the United States, all aspects of divorce law are delegated to state legislatures. Whereas, in Canada aspects of divorce law is split between provincial/territorial law and federal legislation.
[286] Rogerson, above n 254, at 160.
[287] Rogerson and Thompson, above n 266, at 252.
[288] Rogerson and Thompson, above n 266, at 252.
[289] Rogerson, above n 254, at 161.
[290] Rogerson, above n 254, at 161.
[291] Rogerson, above n 254, at 161.

would be awarded to a financially weaker spouse. This should be done for a period of between seven and 15 years.[292]

As the Guidelines concede, the 'with child' formula is more complex.[293] The primary priority is given to child, rather than spousal, support. This means the ability to pay spousal support is reduced.[294] The formula works by pooling the net parental incomes after removal of child support. This remaining income is allocated to the lower income spouse with primary care of the children, such that they are left with 40 to 46 per cent of the net income.[295] In a typical case, with two dependent children living with the disadvantaged party, the amount of support generated would, when combined with child support, leave the custodial parent with between 52 to 57 per cent of the parties' combined incomes.[296]

v. Effective?:

The Guidelines were first published in 2008 and are regularly updated. This was done most recently in 2016.[297] When the initial development process was undertaken there were concerns the Guidelines would be a 'cookie-cutter' response to a fact-specific area of law.[298] The contemporary evidence suggests the Guidelines are now widely accepted, and used, by practitioners to temper clients expectations and assist in out of court settlements.[299] As previously noted, although the Guidelines are only advisory, they have received judicial endorsement.[300] In two provincial Court

[292] Rogerson, above n 254, at 161.
[293] Rogerson and Thompson, above n 266, at 156.
[294] Rogerson and Thompson, above n 266, at 255.
[295] Rogerson, above n 254, at 161.
[296] Rogerson, above n 254, at 161.
[297] Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines: The Revised User's Guide* (Department of Justice Canada, Ottawa, 2016).
[298] Rogerson, above n 254, at 162.
[299] Rollie Thompson "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012) 31 CFLQ 355.
[300] Rogerson and Thompson, above n 266, at 1. The authors explain, from the period 2008 to 2016, the Guidelines have been cited in 2900 trial decisions and 230 appellate decisions.

of Appeal decisions,[301] it was recognised the Guidelines act as an important litmus test that does not completely eliminate individualised analysis.[302] What is provided is contentious in that it aims to reconceptualise Canadian family law beyond intuitive estimates of fairness. As Ellman argues "crude approximations" of what is fair is better than a system lacking in any established principles.[303]

The Guidelines offer useful lessons for New Zealand. Canada has firmly shifted from the clean break to the compensatory model.[304] This likely arises because of differences in the statutory language between the jurisdictions. Section 64A of the FPA directs that a partner "must assume responsibility" for their needs within a reasonable period time. Whereas, s 15.2(6)(d) of the Divorce Act 1985 promotes economic self-sufficiency only "so far as is practicable". The New Zealand legislation seems to prefer an overriding clean break, in contrast Canada treats it as just another consideration. In advice given to the New Zealand Law Commission, Rogerson and Thompson highlight an ongoing obligation to support is perhaps more of a culturally accepted concept in Canada than other common-law jurisdictions.[305]

Whether New Zealand should adopt something akin to the Guidelines will be discussed in more depth in the next chapter. Broadly, New Zealand may be best served by a continuing of the equal division of relationship property, but meeting substantive economic equality via other rules. A financial reconciliation regime, similar to that used in Canada, could combine s 15 of the PRA and the relevant provisions of the FPA in one overall statutory scheme. The next chapter attempts to answer how this could be done.

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301 The British Columbia Court of Appeal in *Yemchuk v Yemchuk* [2005] BCCA 406 and the Ontario Court of Appeal in *Fisher v Fisher* [2008] ONCA 11.
302 *Yemchuk*, above n 301, at [62]; *Fisher*, above n 301, at [94].
303 Ellman, above n 255, at 79.
304 Law Commission, above n 7, at 419.
305 Law Commission, above n 7, at 419.

D. Conclusion:

The chapter has shown the different journeys taken by two similar jurisdictions. In England, a lack of legislative guidance and large proportion of 'big-money' cases have distorted the law. In Canada, after conflicting approaches a pragmatic solution was found. The Guidelines are not perfect, but they do provide predictability for parties, practitioners and judges. Remedying disparity and meeting future need is a highly-contested area of law, with no prescribed view of what is 'fair'. What is clear is a set of developed guidelines is fairer for parties than the 'gut-instinct' of a particular judge.

Chapter IV: Where to Next?

A. Introduction:

This chapter assesses an alternative framework for addressing economic disparity in New Zealand. The Law Commission indicate their preferred option for reform is a financial reconciliation regime. This would permit lump sum payments to be made, where a clean break is possible, or ongoing periodic payments from future income, where a break is not possible. This would bring together compensation and need under one statutory umbrella. Such a reconceptualisation would likely overcome many of the challenges currently experienced by parties, such as costly litigation.

The aims of this chapter are three-fold: first, to assess the three possible areas of change outlined by the Law Commission. Secondly, to discuss New Zealand's attachment to the concept of a clean break. Finally, to suggest no single approach by itself is satisfactory. Rather, an amalgam of removing the jurisdictional hurdles and utilising formulae to calculate an award is more appropriate. This would go some way to giving each party an equal start in their new life.

B. The Law Commission's Review:

In 2016, the New Zealand Law Commission commenced a review of the PRA. One of the specific terms of reference was to consider "the ability to make adjustments to take into account of economic disparity between spouses and partners".[306] To that end, the Commission considered

[306] Law Commission, above n 7, at 866.

whether s 15 is achieving post-separation equality. The preliminary view is the provision has failed and reform is needed. In their review, the Law Commission put forth three options for reform:

i. Reform Section 15:

This option involves retaining s 15 but making significant amendments. As was discussed in Chapter II, the effect of the provision is undermined by the difficulty in establishing causation between the division of functions and resulting disparity.[307] The Commission considered that the jurisdictional hurdle be removed, and replaced by a rebuttable presumptive entitlement to compensation whenever there is financial inequality in income.[308]

This option also involves broadening the pool of property available for compensation, to include a share of the earner-party's future income. As has been criticised throughout this dissertation, in limiting compensation to only an increased share of relationship property, some deserving claimants are deprived of a satisfactory remedy. Periodic payments would address situations where a capital sum is not possible due to a limited relationship property pool. Yet, this approach undermines the concept of a clean break. Future payments create an ongoing tie, leading to the potential for broadened resentment.

What the Commission does not resolve is how quantum or duration should be calculated. In its present form there are a number of judicial considerations on the size of an award. Any legislative change has to include guidance on this determination. Moreover, this option does not address the theoretical conundrum that, no matter how it is disguised, s 15 has more in common with the law

[307] Law Commission, above n 7, at 397.
[308] Law Commission, above n 7, at 397. Unfortunately, the Commission make no attempt to explain what this would mean. It appears any analysis would be confined to any income differential between former partners. It is unclear whether any difference would have to be 'significant'.

of maintenance than it does with relationship property law. The PRA is social legislation dealing with the equal division of property; whereas resolving financial inequality concerns future income assessments and ongoing obligations.

ii. Enhanced Earning Capacity as "Property":

This recommendation concerns the classification of enhanced earning capacity as relationship property, subject to equal division.[309] At present, following the Court of Appeal's decision in *Z v Z (No 2),* the personal skills or attributes of an individual are not capable of being "property". As Henaghan argues, acknowledging earning capacity as "property" would recognise the reality of most cases that the most important asset is future earning capacity.[310] This capacity has been built up over the course of a relationship, in part because of the support and efforts of the other partner.[311]

It is likely treating enhanced earning capacity as "property" would create problems. Principally, there is no clear valuation framework.[312] For example, the Working Group in 1988 argued this was not a viable option because of potential inaccuracies in valuation.[313] Internationally, as considered in Chapter III, the English Court of Appeal in *Waggott,* concluded earning capacity cannot be an item of matrimonial property.[314]

[309] Law Commission, above n 7, at 400.
[310] Henaghan, above n 24, at 324.
[311] Henaghan, above n 24, at 324.
[312] Law Commission, above n 7, at 223.
[313] Working Group on Matrimonial Property, above n 48, at 9.
[314] *Waggott,* above n 224, at [121].

England is not alone in this view; until recently, New York state treated professional qualifications as divisible property.[315] In a review of state matrimonial property law, the New York City Bar Association contended this was a "difficult, imprecise and costly endevour" and recommended legislative change should follow.[316] To that end, the New York State Assembly in 2015 amended the Domestic Relations Law to prevent courts from considering the "value of a spouse's enhanced earning capacity arising from a licence, degree, celebrity goodwill, or career enhancement" as marital property.[317]

In New Zealand, a valuation exercise would require examination of purely speculative factors like imprecise estimations of projected career path, potential working life, among other contingencies. This determination would likely rely on the assistance of expensive forensic accountants and actuaries. As was noted in Chapter II, s 1N(d) of the PRA states relationship property issues ought to be "resolved as inexpensively, simply, and speedily as is consistent with justice". Commentators complain s 15 is designed in a way that prolongs litigation. This means cases become expensive and take time to go through the courts. It is difficult to foresee enhanced earning capacity as any different.

The task of identifying the relationship property component of earning capacity would likely be demanding.[318] It would involve the assessment of numerous variables that may negate any causal connection with the relationship. As the Commission observe, suggestions may be raised that enhanced earning capacity is solely attributable to innate talent or skills.[319] Additionally, in

[315] See *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985), where the concept of enhanced earning capacity as an asset capable of division was developed. The New York Court of Appeals in *DeJesus v. DeJesus*, 90 N.Y.2d 643, 647 (1997) approved this approach, noting "marital property" includes "a wide range of intangible interests which in other contexts might not be recognises divisible property at all."
[316] New York City Bar Association *Report to the New York State Law Revision Commission by the Domestic Violence Committee, Family Court and Family Law Committee, Matrimonial Law Committee and Sex and Law Committee* (November 2011) at 6–7.
[317] Domestic Relations Law (New York), s 236.
[318] Law Commission, above n 7, at 225.
[319] Law Commission, above n 7, at 225.

circumstances where a party is well entrenched in their career years before a relationship started, it would be unfair to deem the enhanced earning power an asset of the relationship. For these reasons, this option is not feasible.[320] In all likelihood the process would be plagued with imprecision, speculation and increased judicial discretion. The recent trends in family law value certainty and rules over imprecise provisions that are left to the courts to resolve.

iii. Financial Reconciliation Payments:

The Law Commission's preferred approach is to replace s 15 with 'financial reconciliation payments'. Although not detailed, this would mean a lump sum order could be made where there is enough property for a clean break, or where there is not enough property, periodic payments from future income.[321] The Commission have proposed this approach in recognition of the practical difficulties of trying to compartmentalise s 15 and maintenance.[322] Thus, financial reconciliation orders are a "hybrid of meeting needs and compensating for loss".[323]

Particular inspiration has been taken from Canadian Spousal Support Advisory Guidelines, and the success spousal maintenance has been in that jurisdiction. New Zealand cannot uplift the Canadian scheme wholesale, but it does provide important direction. Patently, it is beyond the comprehension of a dissertation of this size to develop like-guidelines. In Canada, the Guidelines were a mammoth effort, taking five years to complete and are subject to periodic review. Instead, this analysis will be confined to whether financial reconciliation payments are feasible in the New Zealand context, and how such payments might operate in practice.

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[320] Law Commission, above n 7, at 226.
[321] Law Commission, above n 7, at 402.
[322] Law Commission, above n 7, at 402.
[323] Law Commission, above n 7, at 414.

C. Is Separation Ever Really a Clean Break?:

The two feasible options for reform, an amendment to s 15 or a financial reconciliation regime, both cut across the concept of a clean break by allowing separate property to be used to remedy disparity. At the heart of this problem is a fundamental moral question of why one party should be liable to provide income support to an ex-partner after the relationship has ceased.[324] Caldwell explains, while the sharing of the 'fruits of a relationship' is justifiable, any imposed additional duty on an individual for a "failed sexual and emotional relationship" is more problematic.[325]

As New Zealand legislation illustrates, this country views a clean break as socially desirable. Section 15 was drafted in such a way that prevents ongoing compensation. In limiting awards to an increased share of relationship property, a financial break is always effected. Moreover, this statutory steer can be found in ss 64 and 64A of the FPA. Section 64(4) provides, following the end of a marriage or relationship, neither party is liable to maintain the other. Section 64A(1) stresses each partner "must assume responsibility within a period of time that is reasonable" for his or her own needs. Simply put, maintenance is a "temporary bridge…towards self-sufficiency".[326] In comparison to other jurisdictions, this legislation is framed in much more blunt terms. For example, in England a clean break is only a consideration under the MCA.[327] Further, Canada seems to have decisively shifted away from the concept of a clean break by recognising spousal support is a model grounded upon compensation and need.[328] In *Moge,* the Supreme Court of Canada concluded a clean break is not a model of support.[329] Instead, the "ultimate goal" must

[324] Caldwell, above n 163, at 412.
[325] Caldwell, above n 163, at 412.
[326] *Slater,* above n 51, at 176.
[327] Recall the Matrimonial Causes Act 1973, s 25A.
[328] Rogerson and Thompson, above n 264, at 242.
[329] *Moge*, above n 267, at 814.

be to "alleviate a disadvantaged spouse's economic losses as completely possible".[330] In *McFarlane,* Lady Hale expresses the goal of divorce settlements is "to give each party an equal start on the road to independent living".[331] This aspiration cannot be achieved without weighing up the economic advantages and disadvantages existing at separation.

When the PRA came into force in 2001, it was amended to include relationships other than marriage. As was discussed in Chapter III, England only allows married couples to have property rights and apply for ongoing support. Similarly in Canada, not all provinces or territories allow de facto couples to claim spousal support. These jurisdictions, culturally at least, seem to put a higher premium on marriage and its formal interdependence. Moreover, for a divorce to be petitioned under the MCA, fault can still be alleged.[332] In comparison, New Zealand operates on a "no-fault" basis.[333] Whereas, other countries have erected barriers for parties to move on with their lives, New Zealand has removed them. These differences may indicate a community thinking in this country that a clean financial and psychological break should always be preferred.[334]

The application of the clean break principle in New Zealand has compromised any aim of post-separation equality.[335] The lack of legislative mechanisms has meant claimants are left without appropriate remedies. This has meant relationship-generated imbalances are necessarily met by the wider community, rather than by a former partner.[336] Doing away with the strong attachment to a clean break may counteract the reliance on the state to remedy post-separation economic

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[330] *Moge*, above n 267, at 814.
[331] *Miller; McFarlane*, above n 10, at [144].
[332] See the Matrimonial Causes Act 1973, s 1(2): a petitioner for divorce must satisfy the marriage has broken down because of adultery; unreasonable behaviour; desertion; an uncontested divorce where the parties have lived apart for at least two years; and a contested divorce where the parties have lived apart for at least five years.
[333] See the Family Proceedings Act, s 39. This specifies an order for dissolution of marriage or a civil union may only be made on the ground the marriage or civil union has broken down irreconcilably and the parties have lived apart for two years. Note, this is the same as the third ground for a divorce in England and Wales see: Matrimonial Causes Act 1973, s 1(2)(d).
[334] Caldwell, above n 163, at 413.
[335] Henaghan, above n 159, at 26.
[336] Caldwell, above n 163, at 413.

disadvantages. Caldwell argues that for the past 30 years an individualist culture has been fostered in New Zealand.[337] Given this, it is likely citizens would not feel entirely comfortable with the idea of continuing streams of income from an economically stronger party to a former partner to make up for any income shortfall.[338] Yet, it is not particularly individualistic to have to rely on the state in a time of need, which is caused by separation. A better approach may be to recognise it is unrealistic to expect parties to immediately revert back to their pre-relationship position. This would reflect that relationships, whether formalised or not, are based on interdependence. This goes beyond emotional attachment and acknowledges economic lives become intertwined, such that untangling them is difficult.

Unlike other jurisdictions, it is doubtful New Zealand has the appetite to allow for the possibility for indefinite support orders. There is nothing to suggest societal thinking has changed to favour anything other than a clean break occurring between former partners.[339] What can be adapted, however, is extending the point when a clean break can be effected. To an extent, the law must strive as far as is "practicable to promote economic self-sufficiency within a reasonable period of time".[340] This means financial support must last longer than it currently does, but it cannot be indefinite. Financial reconciliation orders cannot be such that any disparity is shifted sideways, where an earner-party has the burden of supporting their former partner long after the relationship has ended. This is the primary reason why the Working Group in 1988 resisted any temptation to instate long-term periodic payments. These issues can be overcome by looking to Scotland or the proposed English changes, and imposing general time limits on orders. In Scotland, a three year limit is imposed; whereas in England, Baroness Deech's Bill seeks to limit spousal maintenance to five years, unless financial hardship would result. For most couples, five years is a sufficient

337 Caldwell, above n 163, at 413.
338 Caldwell, above n 163, at 413.
339 Caldwell, above n 163, at 413.
340 This reflects the language in the Divorce Act 1985 (Canada), s 15.2(6).

amount of time to transition onto the "road of independent living" with adequate support.[341] In some exceptional cases, longer support may be appropriate. For example, where there is a break-down of a long-term relationship the prospect of financial inequality may last longer. In these circumstances, continuing support may be appropriate.

D. Harmonising the Law:

It is not controversial to assume that after separation, parties will be in a worse financial position.[342] Separating partners face new costs, like the setting up a new home, increased childcare costs and the legal expenses associated after separation.[343] Where different functions are performed in a relationship, these financial costs will likely be heightened. As discussed in Chapter I, s 15 was enacted to remedy a decades long injustice "acutely experienced by women".[344] As the then Attorney-General explained, some women remained out of the workforce in order to support their spouse.[345] Section 15 purported to alleviate these concerns by specifically treating a relationship as an equal partnership, no matter the type of contribution made.

As was analysed in Chapter II, s 15 has failed to deliver on its objectives. The unclear language of the provision has led to a lingering uneasiness by the courts to give it wholehearted effect.[346] This resulting conservatism has meant maintenance is doing the job of s 15. In empirical studies carried out by Green, practitioners and judges reveal maintenance claims are more "worthwhile" because of the difficulties associated with s 15.[347] This results in the boundaries between the remedies

[341] *Miller; McFarlane*, above n 10, at [144] per Lady Hale.
[342] Recall a recent study conducted by Fletcher where he identified it to be rare for separation not to be associated with a significant financial impact for at least one of the partners. Further, this impact on incomes persists over a three-year, medium term: see Fletcher, above n 1, at 151.
[343] Law Commission *Relationships and Families in Contemporary New Zealand* (NZLC SP22, 2017) at 54.
[344] Margaret Wilson, above n 67, at 8625.
[345] Margaret Wilson, above n 67, at 8625.
[346] New Zealand Law Society *Re: Property (Relationships) Act 1976 review – Issues Paper 41* (February 2018) at 29.
[347] Green, above n 125, at 148.

becoming blurred, where it appears maintenance payments from future income are more satisfactory than a protracted economic disparity claim from a limited pool of property. While the PRA is portrayed as an equitable scheme, the compensation component lacks authority.

Section 15 has always been an odd fit with the PRA's primary functions.[348] Rather than being a rules-based provision, it confers a broad discretion on courts with little guidance on how it should be exercised.[349] This has resulted in "speculative, adversarial and costly" litigation.[350] A better approach is to remove the disparity analysis from the PRA and amalgamate it into the maintenance inquiry, under the FPA. Presently, economic disparity and maintenance serve different purposes. Section 15 is to compensate for disparity in human capital at the end of a relationship.[351] While maintenance is to provide for the reasonable needs of partner.[352] Yet, the distinction between the concepts is illusory. Put another way, maintenance and disparity are "broadly…dealing with the same question" of income differential on separation.[353] Questions arising under the PRA should be limited to the equal division of the 'fruits of a relationship', and the FPA should primarily be concerned with the effects of income disparity. This approach would preserve the parameters between income and capital.[354] Additionally, at present economic disparity claims can only be made on the division of property, which is at least two years after separation. Yet, it is immediately after separation these type of claims are most needed.[355] Reconceptualising disparity under the FPA, would have the practical benefit of immediately assisting a disadvantaged party.[356]

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348 *Scott v Williams*, above n 5, at [280] per Arnold J.
349 Sian Elias "Separate Property – *Rose v Rose*" (paper presented to the Family Court Conference, Wellington, August 2011) at 14.
350 Bill Atkin "Harmonising Family Law" (2006) 37 VUWLR 465 at 473.
351 *Scott v Williams*, above n 5, at [201] per Glazebrook J.
352 See the Family Proceedings Act 1980, ss 63 and 64. FPA.
353 Atkin, above n 350, at 467-468.
354 Atkin, above n 350, at 467-468.
355 Deborah Chambers "New Zealand Family Property Laws Continue to Fail Women" (paper presented to New Zealand Law Society Family Law Conference, September 2018) at 73.
356 The Family Proceedings Act 1980, s 63 allows for maintenance to be awarded during the marriage or civil union. This is directed at situations before dissolution is granted.

Financial reconciliation orders are not without risk. In 1988, the Working Group outlined some practical considerations, which continue to have relevance. As discussed, ongoing maintenance would cut across the concept of a clean break. Having one partner support two households on one income can lead to resentment as it is not always financially practicable.[357] Equally, there are enforcement concerns where a partner is unwilling to pay.[358] Lady Deborah Chambers QC suggests the New Zealand experience to date on this has been poor.[359] Currently, jurisdiction to enforce an order is limited to the District Court.[360] Should financial reconciliation payments be a success then changes to allow enforcement by the Family Court are required.[361]

E. Future Directions:

i. Jurisdiction:

The Law Commission's first option for reform involved significant changes to s 15's jurisdiction, it is proposed a similar threshold would be used for financial reconciliation payments. This would involve a rebuttable presumption entitling a disadvantaged party to support, where there is both "financial inequality and a division of functions".[362] Financial inequality would be assessed by reference to income only and any reference to living standards would be removed. In removing the causation test, deserving claimants would not be denied relief. Moreover, a rebuttable presumption:[363]

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357 Working Group on Matrimonial Property, above n 48, at 12.
358 Working Group on Matrimonial Property, above n 48, at 13.
359 Deborah Hollings "Of Gold Diggers and Possums – An Examination of the Limits of the Property (Relationships) Act"(paper presented to the New Zealand Law Society Conference, Auckland, October 2001) at 5.
360 New Zealand Law Society, above n 346, at 31.
361 It is recommended changes to the court rules are necessary, see: New Zealand Law Society, above n 347, at 31.
362 New Zealand Law Society, above n 346, at 29.
363 Law Commission, above n 7, at 397.

> …sends the clear signal that if partner A was responsible for the household management or made some other contribution to the relationship and at the end of the relationship there was financial inequality between the partners, then partner B must pay compensation.

This is comparable to Ellman's argument, which suggests the obligation to support is quasi-contractual or restitutionary in nature.[364] Put another way, post-separation support is justified in light of the ways parties order their lives during the relationship.[365] In many situations, one partner will forego all employment or other forms of demanding, higher paid jobs, in order to promote the welfare of the family by engaging in domestic activities. This 'quid pro quo' is the expectation their economic needs will be met by the earner-partner.[366] Despite the belief a relationship will last for the parties joint-lives, many come to a premature end. Maintenance is justified as a form of compensation, for the loss of continuing support that was expected to be received in the future.[367] This can be likened to a claim for 'estoppel'; in that, on separation a career-partner would be 'estopped' from abandoning their support obligations.

While removing the jurisdictional hurdles offers reward, there is a risk of 'floodgates'. If any 'financial inequality' or income differential would suffice, then awards may be rendered impractical. The inequality has to be specific to the circumstances of a case, otherwise it would permit a "broad and unfettered discretion to redress economic disparity simpliciter or to achieve social injustice".[368] Guidance may be founded in the ALI's Principles, where a threshold of at least 25 per cent income differential between the parties is proposed. This may be an attractive amendment to the New Zealand suggestions to ensure financial reconciliation is directed at real, not superficial, income disparity.

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[364] Ellman, above n 255, at 7.
[365] Anthony Dickey *Family Law* (6th ed, Thomson Reuters, Sydney, 2014) at 374.
[366] Dickey, above n 365, at 374.
[367] Dickey, above n 365, at 374.
[368] *de Malmanche*, above n 76, at [157].

ii. Formula?:

The calculation of quantum under s 15 lacks clarity. If reformed, clarification must be sought by reference to guidelines or formulae. In Canada, the Guidelines were determined by intensive consultation with practitioners and judges, and identifying dominant patterns across a range of typical cases.[369] Should New Zealand adopt a similar consultation process, it would likely find the case law has been quite "parsimonious".[370] The zealous pursuing of a clean break in all cases has meant a "relative meanness" in the assessment of both s 15 PRA awards and FPA claims.[371] Yet, it would likely not be beyond the expertise of policy-makers and digital programmers to devise a set of formulae that take into consideration the various subtleties of cases.[372] As Miles has pithily put it, if Canada can devise a scheme for over 36 million people, "conducting a similar exercise…for 4.6 million Kiwis must be feasible."[373]

A more pragmatic path may be 'income equalisation payments' proposed by Henaghan.[374] While this model is designed as a better way to quantify claims under s 15, it could be adopted for financial reconciliation orders.[375] Income equalisation involves determining the total combined income by adding the future income of partners for the 12 month period after separation. This figure is then divided equally between the parties, in much the same way relationship property is. This annual income equalisation payment is then multiplied by half the number of years the parties have been together, up to a maximum of 10 years. Once this is established, a court would exercise

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[369] Rogerson and Thompson, above n 266, at 252.
[370] Jo Miles "Financial Provision and Property Division of Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 267 at 301.
[371] Miles, above n 370, at 301.
[372] Atkin, above n 81, at 133.
[373] Miles, above n 186, at 291.
[374] Henaghan, above 24, at 325.
[375] In a timid discussion of the possible methodologies available for this regime, the Law Commission give the 'income equalisation' option tacit approval.

its discretion to make allowances for relevant contingencies such as the parties' age, length of time before retirement, health and stability of employment. The final figure could be awarded as a lump sum or paid on a periodic basis. While this model still needs more detail, it does provide an opportunity for consistency.[376] Further, it may eliminate, to some degree, the complexity and cost of expert witnesses. The case law on s 15 illustrates where there is a lack of legislative clarity, costly litigation will result.

To demonstrate how this would work, the following is a hypothetical example:[377]

> George and Hillary have been married for 10 years. They met at university where they both studied law. After graduating, Hillary joined a law firm, while George pursued his passion: art. They have a five-year old daughter, Laura. As Hillary works full-time, and George's employment is sporadic, George is Laura's primary-caregiver and maintains all the household duties. In 2018, the couple decide to separate. At the time of separation, Hillary is earning $100,000 and George is earning $30,000, meaning there is a $70,000 income disparity.

If Henaghan's model was used there would be total combined income of $130,000. Divided equally, this is $65,000 each. This has the effect of Hillary topping up George's income by $35,000. As the parties have been married for 10 years, the equalisation sum of $65,000 is multiplied by five to reach the figure of $325,000. At this stage, a court would need to make contingency deductions. It is unclear how this would be done and is likely tools or calculators would have to be developed to eliminate the need for expert witnesses.[378] Assuming at least a 10 per cent deduction is made, this

[376] Henaghan, above n 159, at 25.
[377] This hypothetical example is chosen as an attempt to create "average justice". The case law to date of big-money cases suggests a "…Rolls Royce regime", which has denied access to the majority of New Zealanders. For criticism of the 'outliers' see: Deborah Chambers, above n 355, at 79.
[378] Overseas jurisdictions have developed tools to assist in valuation issues in a range of cases. For example, in the United Kingdom litigants may refer to 'Ogden Tables'. These tables are published by the United Kingdom's Actuary's Department to allow lawyers and judges to assess loss of earnings in personal injury and fatal accident cases without the need for expert evidence: Government's Actuary's Department *Actuarial Tables with explanatory notes for use in Personal*

would result in a final support figure of $292,500 for George. Spread over five years, Hillary would have to pay $58,500 a year, or $4,875 a month to George. Such a large payment may render this proposal unworkable. As the Working Group speculated, long-term maintenance runs the risk of being a financial burden on a paying party. In the aforementioned example, should George continue to be the primary-caregiver of Laura, it is likely he would be entitled to child support. This would mean over 60 per cent of Hillary's yearly income going to her former partner. In these circumstances, this would be unsustainable and likely mean the financial inequality is shifted.

An alternative option may be to adapt the calculation of s 15 quantum proposed by Arnold J in *Scott v Williams*.[379] This method works in the following way:

1. Identify the extent of the disparity resulting from the division of functions;
2. Consider for how long the disparity should be compensated;[380]
3. Make any contingency deductions;
4. Calculate a present value for the income and the contingencies to give a particular sum;
5. Halve that sum so as to avoid simply transferring the disparity to the career partner.

In Hillary and George's example the income disparity is $70,000. In considering how long this disparity will last, it is relevant whether the claimant has responsibility for childcare. Assuming George will continue to care for Laura, the disparity may last for at least five years. Thus, a $70,000 disparity over five years is $350,000. Assuming at least a 10 per cent deduction is made, this would

Injury and Fatal Accident Cases (7th ed, The Stationary Office, London, 2011). In *Scott v Williams*, above n 5, a majority of the Supreme Court agree there is merit in New Zealand developing a version of these table, at [209] per Glazebrook J; [459] per William Young J; and [326](c) per Arnold J.

[379] *Scott v Williams*, above n 5, at [326] per Arnold J.

[380] Recall, this is not the same as the potential working life of either party.

leave the sum of $315,000. This figure is halved, providing for an award of $157,500 for George. Over a five year period, Hillary would pay $31,500 a year, or $2,675 a month, to George.

In contrast to the income equalisation model, Arnold J's suggestion produces a less generous award for a claimant. Principally, this is because of the halving of the final figure. Henaghan's proposal contains a halving step of sorts where the duration of the relationship is divided. Yet, as Arnold J's methodology shows it is more important the final figure is halved, rather than taking into the length of the relationship. Income equalisation produces a high award, which is beneficial to a disadvantaged party, but would likely reverse any financial inequality onto the paying partner. As Griffiths has written, if all, or a significant proportion, of the disparity is compensated for "there is a real risk of over-compensation".[381] A scheme generating high awards is likely to be unpopular and unsustainable. As already discussed, New Zealanders are uncomfortable at the idea of continuing income streams being transferred between separated partners.[382] This uncomfortableness may be accentuated by the prospect of over 50 per cent of a party's yearly income going to an ex-partner. A halving step would preserve the balance of paying a financially weaker party a sufficient degree of support, which does not come at the total expense of their former partner. After separation, it is important both parties have an equal start in the transition to independent living without financial disadvantage.

F. Conclusion:

The Law Commission has presented three options for reform. The preferred approach of 'financial reconciliation orders' offers the most reward for a number of reasons. Reconceptualising disparity law in the maintenance stage, would preserve the distinction that the PRA deals with relationship

[381] Griffiths, above n 148, at 56.
[382] Caldwell, above n 163, at 413.

capital and the FPA assesses income differential on separation. It is conceded the principal barrier to this approach is New Zealand's attachment to the clean break ideal. Yet, legislative options are available to ensure any support is time-limited.

While s 15 has been plagued with jurisdictional issues, a potential threshold of 'any financial inequality' is too broad. Any disparity awards must be relevant to the circumstances of the parties, not as a tool of social justice. New Zealand should look internationally for the utilisation of guidelines and formulas to determine appropriate calculations. The proposals put forward by Henaghan and Arnold J show a simpler way forward.

Conclusion

This dissertation has sought to critically analyse current efforts to create post-separation equality in New Zealand. Chapter I described the changing understanding of relationships. Historically, women were afforded few property rights, however, legislative amendments over the course of the nineteenth and twentieth century sought to correct this.

In Chapter II, the current response to economic disparity was analysed. While it was acknowledged the purpose behind s 15 of the PRA was laudable, the drafting of the provision was unsatisfactory. A difficulty in establishing jurisdiction and the lack of guidance for calculating an award has meant the section has been robbed of its usefulness. Instead, it was suggested the present distinction between maintenance and disparity is illusory. Both remedies are concerned with the difference in income between the parties on separation.

Chapter III considered the responses in two like-minded jurisdictions, England and Canada. Both countries treat compensation and need together, using 'spousal support' payments. The English approach, while generous, has the potential to be wholly discretionary. Rather, guidance for New Zealand may be found in Canada. At the federal level, an ambitious set of guidelines has being introduced to guide parties on the amount and time of support.

In Chapter IV, the Law Commission's three options for reform were outlined. It was proposed no one of these approaches is, by themselves, satisfactory. Rather than considering disparity within the PRA, it should be analysed at the maintenance stage, located in the FPA. Conceptually, disparity has little to do with the division of property, but more in common with differences in income. Further, New Zealand should remove the jurisdictional hurdles associated with proving a disparity claim. This should depend on whether any disparity is 'real' and is a result of the

relationship, rather than producing social justice. Finally, this chapter argued formulae should be developed so as to make it clear how an award should be calculated. The two proposals put forward by Henaghan and Arnold J, while not perfect, show a less demanding approach is possible.

As it stands in New Zealand, the primary barrier to reform is the attachment to the ideal of a clean financial and psychological break. Understandably, New Zealanders are uncomfortable with the idea of large streams of income being transferred between former partners. Unfortunately, the strict adherence to a clean break has come at the expense of setting each party on the road to independent living. In 1976, the concept of an equal division of property was considered radical. Yet, as a prominent practitioner observes, "…the notion of equal sharing has entered the social DNA and most people, not only understand that as a principle, but they accept it."[383] Possible changes to maintenance and post-separation needs have the same potential.

[383] Stephen van Bohemen "Future of Family Law – Relationship Property: The Practitioner's Perspective" (paper presented to New Zealand Law Society Family Law Conference, September 2018).

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