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DIVORCING RHETORIC FROM REALITY

**A LAW REFORM AND POLICY PERSPECTIVE ON
SECTION 15 OF THE PROPERTY (RELATIONSHIPS) ACT
1976**

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Abstract

Section 15 of the Property (Relationships) Act 1976 was passed in 2001 as a substantial and controversial reform to New Zealand's relationship property regime. Despite the laudable ambition of remedying significant economic disparities between separating spouses, civil union and de facto couples through s 15, this has failed to materialise. Section 15 has introduced uncertainty and inconsistency into what is otherwise a clear, rules-based regime.

This paper provides a law reform perspective on how s 15 came to be an illustration of poor law reform. It argues the substance of the provision cannot be critiqued in the abstract, as the difficulties of s 15 are directly linked to deficiencies in its reform process. It unravels the procedural, conceptual and judicial challenges to this reform. Key players in s 15's reform were constrained by the political environment, and were required to make trade-offs to effect reform in the circumstances. Section 15's policy direction created conceptual tensions with the broader statutory scheme. The courts have struggled to play an effective role in the application and development of s 15 due to inadequate guidance and a reluctance to depart from the imbedded foundational principles of the Act. It is argued that these challenges to s 15 reveal broader impediments to law reform in New Zealand. Many of the identified challenges ought to be taken into consideration if s 15 is to be the subject of further reform in the future.

Key words: "Economic Disparity"; "S 15 Property (Relationships) Act 1976"; "Relationship Property"; "Law Reform"; "Policy".

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I Introduction

Law is a means, a specific social means, not an end.¹

—Hans Kelson (1941)

Law reform is an important discipline. It operates as part of the “stable machinery of modernity”,² ensuring that the law is proactive and responsive rather than static. But law reform is not always successful. The Property (Relationships) Act 1976 (“the Act”) was plagued by poor law reform practice in 2001 when Parliament passed s 15, a controversial amendment to the Act.³ Section 15 constituted a philosophical departure from the equal sharing, rules-based relationship property regime towards discretionary justice aimed at achieving substantive equality. It compensates for significant disparities in earning power and living standards between parties, caused by the division of functions throughout the relationship.⁴

While s 15 represents a laudable social idea, it was compromised by its inept execution.⁵ The provision’s conceptual incoherency has destabilised the core of certainty previously provided by New Zealand’s relationship property regime.⁶ As a result, s 15 has been applied inconsistently and unpredictably. Courts have failed to set awards at appropriate levels. Significant economic disadvantage upon the breakdown of relationships continues to subsist. In recognition of these problems, the Law Commission has undertaken to assess s 15 as part of its comprehensive review of the Act.⁷ No doubt, s 15 ought to be further reformed if it is to properly fulfil its potential.

¹ Hans Kelson “The Law as a Specific Social Technique” (1941) 9 U Chi L Rev 75 at 80.

² Michael Kirby “Are We There Yet?” in Brian Opeskin and David Weisbrot (eds) *The Promise of Law Reform* (The Federation Press, Sydney, 2005) 433 at 445.

³ The Property (Relationships) Act 1976 regulates the division of relationship property between married, civil union and de facto couples.

⁴ Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (2nd ed, LexisNexis, Wellington, 2002) at 177.

⁵ Robert Fisher “Relationship Property – Should New Zealand’s Regime Be Mandatory or Optional?” (paper presented to Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 2.

⁶ Henaghan and Atkin, above n 4, at 2.

⁷ The Law Commission commenced its project in May 2016. At the time of writing the Law Commission is researching issues. It will report to the Minister with its recommendations by November 2018.

The purpose of this paper is not to extensively critique the substance of s 15. Rather, it provides a law reform perspective on *how* s 15 came to be an illustration of poor law reform. It is argued that s 15's problems are the result of deficiencies in its reform process. This paper identifies these deficiencies and unravels the challenges to s 15's reform. Part IV analyses the procedural challenges, including the political context and the swift legislative process followed by s 15. It argues that the hasty passage of the provision led to an unsubstantiated problem definition and policy aim, and compromised the level of pre-legislative scrutiny. Part V identifies the conceptual challenges to devising s 15 in a way that was coherent with the broader statutory scheme. Tensions with the underlying principles of the Act have added to the provision's uncertainty. Part VI evaluates the impact of the courts on this reform. The level of discretion conferred on the courts, inadequate guidance from the purposes and principles of the Act, combined with an imbedded culture of equal sharing have adversely influenced the way in which s 15 is applied in court. These challenges indicate broader impediments to law reform in New Zealand. Finally, Part VII considers 'what could have been' in respect of s 15, had the law reform process been better effected.

II Examining Section 15

When a qualifying relationship ends, parties must determine how to meet the ongoing financial needs of those involved and how to divide relationship property. The former inquiry is guided by the law on adult maintenance under the Family Proceedings Act 1980, which provides for maintenance payments to meet the recipient's ongoing financial needs for a transitional period. The Property (Relationships) Act 1976 determines the latter. This scheme is premised on formal equality through a presumption of equal sharing, guided by the clean break and no fault principles.

Difficulty arises where an equal division of relationship property leads to economic disparity between parties, due to the different roles the parties have played throughout the relationship. 'Economic disparity' refers to the financial inequality, or economic discrepancy, suffered between parties on the breakdown of their relationship. Under the equal sharing rule, the higher income earner will be better off financially compared to their spouse or partner. Section 15 aims to compensate the party who has contributed to the relationship in important, less tangible ways such as caring for the children and undertaking domestic duties.⁸

⁸ (29 March 2001) 591 NZPD 8625.

A Elements to a Section 15 Claim

Sections 15 and 15A are two discretionary powers available to the court to remedy economic disparity.⁹ Section 15 is invoked once a qualifying relationship has ended and relationship property has been valued and provisionally divided in accordance with ss 11-14A.¹⁰ Section 15 is the focus of this paper, as it is more frequently relied upon and contains a more general power to award a sum of money or property out of one party's share of the relationship property pool in order to compensate for economic disparity. In contrast, s 15A aims to compensate for the wealthier party's actions that increased their individual separate wealth.¹¹ Economic disparity provides a threshold test before the court will consider an award.¹²

It is worthwhile to set out s 15 in full:

- (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:

⁹ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (Butterworths, Wellington, 2001) at 93.

¹⁰ *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [151].

¹¹ Atkin and Parker, above n 9, at 112-113.

¹² At 112-113.

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

(4) This section overrides sections 11 to 14A.

Section 15 comprises a jurisdictional test and a broader discretionary component.¹³ Jurisdiction to make an award hinges on the claimant proving both the requisite economic disparity – likely significant disparity in income *and* living standards – and causation.¹⁴ The reference to “likely” means that the court must have regard to clear evidence of what the probable future situation will be.¹⁵ The Act does not elaborate on the meaning of “significant”, but the courts have defined it as something “noteworthy” or “important”.¹⁶ The division of functions must have been a “real and substantial” cause of the economic disparity,¹⁷ but it need not be the sole or principal factor.¹⁸

The final exercise under s 15 is discretionary. After establishing the first two jurisdictional hurdles, the court then turns to s 15(2) in deciding whether to make an order. It is not mandatory that the courts have regard to these factors. Other relevant circumstances the court may consider include the age of the parties, length of the relationship, and how long the disparity is likely to endure.¹⁹ The court has an overriding discretion to make an award if it considers it “just”.²⁰ But the concept of “just” is not fixed, and the discretionary assessment is “not amenable to a prescribed formula”.²¹ If compensation is justified, the court must then determine the quantum. The provision does not stipulate how to determine quantum. Orders are subject to some constraints. Compensation can only be paid as a one-off lump sum or by transfer of property.²² This payment can only be met from property derived from the relationship or marriage.²³

¹³ See generally Joanna Miles “Dealing With Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976” (2003) 5 NZ L Rev 535 at 538.

¹⁴ *S v C (JES v JBC)* [2007] NZFLR 472 (HC) at [30].

¹⁵ *Atkin and Parker*, above n 9, at 96-97.

¹⁶ *P v P* [2003] NZFLR 925 (FC) at [172].

¹⁷ *Atkin and Parker*, above n 9, at 99. See also *S v C (JES v JBC)*, above n 14, at [31]; and Carol Peters “Economic Disparity – Practical Implications” (2002) 5 NZLJ 460 at 462.

¹⁸ Brinsley Donald Inglis “New Zealand Family Law in the 21st Century” (Thompson Brookers, Wellington, 2007) at 1081.

¹⁹ Claire Green “The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (Doctor of Philosophy (PhD) Thesis, University of Otago, 2013) at 60.

²⁰ Section 15(3).

²¹ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [115].

²² Section 15(3)(a) and (b).

B Purpose of Section 15

The purpose of s 15 was commendable. Section 15 was to “provide fair property division upon the breakdown of a relationship”.²⁴ It aimed to further the Act’s concept of equality by providing for a shift away from formal equality (reflected in the Act’s presumption of equal-sharing) to achieving equality of result. There was broad recognition that equal division of relationship property often resulted in residual economic disparity between parties.²⁵ Hon Margaret Wilson, Associate Minister of Justice at the time, spoke of the Bill as a response to current law that operates “unfairly and perpetuates injustice”.²⁶ The equal division of property did not necessarily ensure the partners each received a fair deal.²⁷

The insertion of ss 1M and 1N as part of the 2001 reforms reflected the Act’s shifting focus to equality of result.²⁸ Section 15 is read in light of s 1N(c) in particular, which states that “a just division of relationship property has regard to the economic advantages or disadvantages” arising from the relationship or its ending. This accords with judicial acknowledgement that s 15 can compensate for the loss of one party’s earning capacity and/or the enhancement of the other’s.²⁹ Further, all forms of contribution, whether financial or non-financial, are to be treated equally.³⁰ These principles reflect the scheme’s broader purpose of achieving equality through the equal recognition of different forms of contribution.³¹

Section 15 was aimed at mitigating a gendered issue. While the Act applies to men and women equally,³² proponents of the reform identified that the harsh operation of equal sharing rules disproportionately affected women. Sue Kedgley MP stated:³³

²³ Section 15(3)(a) and (b).

²⁴ (29 March 2001) 591 NZPD 8625.

²⁵ *M v B* [2006] 3 NZLR 660 (CA) at [123].

²⁶ (29 March 2001) 591 NZPD 8626.

²⁷ At 8625.

²⁸ See Appendix for the full text of ss 1M and 1N.

²⁹ *M v B*, above n 25, at [199] per William Young P. See also *X v X*, above n 21, at [49] and [118] per Robertson J; and *Miles*, above n 13, at 538.

³⁰ Section 1N(b).

³¹ Bill Atkin “What Kind of Property is ‘Relationship Property’?” (2016) 47(3) VUWLR 345 at 351.

³² (29 February 2000) 582 NZPD 833-834.

³³ At 839.

[Economic disparity] is a fundamental discrimination that goes to the heart of our society and discriminates against women, and it is primarily women because the facts are that only 4 per cent of men, compared with 61 per cent of women, stay at home full time with young children, and only ten per cent of mothers of preschoolers are employed full time in the workforce.

Section 15 was passed over one and a half decades ago. It is unclear whether the purposes of s 15 are still as pertinent nowadays because society has undoubtedly transformed. The historic demarcation in familial roles has become blurred. The increase in civil unions, same-sex couples, and stay-at-home fathers has changed the family dynamic. So has the increase of female participation in the workforce.³⁴ However, claimants of s 15 awards are still disproportionately female.³⁵ Section 15 is still a gendered issue, but perhaps less so than before. This problem is indirectly linked to a more systemic failure in society to address equality between men and women.³⁶

For the most part, the original purposes of s 15 are still relevant. This raises a fundamental question: why were these objectives necessary in the first place? The answer lies in the history of s 15's policy.

C Policy History

The motivation for s 15 derived from the defects in preceding legislation. An account of the provision's policy history goes some way to explaining the incongruity of s 15 and how it has come to be an illustration of poor law reform.

1 The impetus for equal sharing

Prior to the Matrimonial Property Act 1976, property division was governed by the Matrimonial Property Act 1963. The 1963 Act conferred broad discretion to judges, which gave rise to prejudicial judicial attitudes. For example, North P in *E v E* stated:³⁷

³⁴ Since 1986 female participation in the labour force has increased by more than 50 per cent. However, as at June 2016 the labour force participation rate of the female population was 64.6 per cent while the labour force participation rate of males was 75.2 per cent: Ministry for Women "Labour Force Participation" (6 September 2016) <www.women.govt.nz>.

³⁵ There are obviously exceptions to this. For example, the claimants were male in *Wills v Catsburg* [2016] NZFC 851; and *de Malmanche*, above n 10.

³⁶ For example, the gender pay gap sits at approximately 12.7 per cent as at the time of writing this paper. See Gail Pacheco, Chao Li and Bill Cochrane *Empirical Evidence of the Gender Pay Gap in New Zealand* (Ministry for Women, March 2017) at 7.

³⁷ *E v E* [1971] NZLR 859 (CA) at 855.

The mere fact that a wife has been a good wife and looked after her husband well domestically, cannot possibly, in my opinion, justify an order being made in her favour in respect of a business owned by the husband in the running of which the wife had no share.

Wide discretion resulted in unfairness due to the entrenched views of a number of judges who lagged behind in community attitudes.³⁸ As Lord Simon characterised the dilemma of unequal bearing of non-financial contributions, “[t]he cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it”.³⁹

The Matrimonial Property Act 1976 was necessitated by the difficulties inherent in its predecessor statute. It was a pioneering piece of legislation for its time. The Act received cross-party support but was publicly opposed by numerous senior judges with entrenched prejudicial views.⁴⁰

The 1976 Act introduced a clear and comprehensive rules-based approach to matrimonial property division. This stood in marked contrast to the previous discretionary approach, making the decision to resort back to a broad discretion under s 15 all the more interesting. The Act represented a deferred community property regime, as it applied community-type rules at the end of a marriage.⁴¹ The 1976 reforms aimed to achieve economic equality between spouses upon the end of a marriage through a strong presumption of equal division of marital property.⁴² This presumption was based on the philosophy of marriage as a partnership of equals.⁴³ Other principles imbedded in the Act were the clean break principle and the retrospective nature of the law.⁴⁴ The Act altered the concept of “contribution”, so that contributions were those made to the marriage, which included, but was not limited to, the property of that marriage.⁴⁵ Financial

³⁸ Sian Elias, “Separate Property – *Rose v Rose*” (paper presented to Family Court Conference, Wellington, August 2011) at 4. For example, in *E v E*, above n 37, North P referred to the “wife who may be able to go into the arms of her lover well equipped with worldly possessions”.

³⁹ Jocelyn Simon “With all my Worldly Goods” (Presidential Address to the Holdsworth Club, Holdsworth Lecture 1964, Birmingham) cited in Report of a Special Committee “Matrimonial Property” (presented to Minister of Justice, June 1972) at 11.

⁴⁰ Elias, above n 38, at 4.

⁴¹ Bill Atkin “Reforming Property Division in New Zealand: From Marriage to Relationships” (2001) 3 EJLR 349 at 351.

⁴² Miles, above n 13, at 536.

⁴³ Henaghan and Atkin, above n 4, at 184.

⁴⁴ Atkin and Parker, above n 9, at 4.

⁴⁵ At 3.

contributions were not to be considered of greater importance than non-financial contributions. Part of the Act's wider legislative purpose was assisting the equal status of women in society.⁴⁶

2 *Recognition of residual economic disparity*

The reconceptualisation of marriage as a partnership of equals was initially well received, but discontent with the 1976 Act began to emerge in the 1980s. An equal division of assets often resulted in inequality of outcome, as it did not account for the unequal earning potential of spouses caused by the different roles undertaken throughout the marriage. The 1976 reform occurred at a time where New Zealand society was undergoing rapid transformation.⁴⁷ Social forces quickly overtook much of the substance of the Act.⁴⁸ Further adaptation of the Act was required.

In 1988, the Report of the Working Group on Matrimonial Property and Family Protection and the Report of the Royal Commission on Social Policy were produced.⁴⁹ Both reports identified the problem of economic disparity. The Royal Commission noted that the receipt of half of the matrimonial home or assets did not leave the parties on equal footing.⁵⁰ The Working Group also noted that the continued care of children often increased economic disparity following separation.⁵¹ The Working Group made a number of recommendations to mitigate unfairness, such as widening the base of matrimonial property, tightening the equal division rule, and making it easier to access property held by trusts and companies. However, it was reluctant to make recommendations on economic disparity and de facto couples, opting for a relatively conservative approach of encouraging the award of lump sum maintenance at the same time as winding up the property.⁵² Bringing future needs into the calculation of shares in property was considered too complex.⁵³

⁴⁶ Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at 1.

⁴⁷ Elias, above n 38, at 4.

⁴⁸ At 4.

⁴⁹ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988); and Royal Commission on Social Policy *The April Report Vol IV* (April 1988).

⁵⁰ Royal Commission on Social Policy, above n 49, at 18-19 and 217-223.

⁵¹ Department of Justice, above n 49, at 5-6.

⁵² Henaghan and Atkin, above n 4, at 185.

⁵³ At 185.

The real impetus for a legal remedy for economic disparity came from the Court of Appeal in *Z v Z (No 2)*.⁵⁴ Mr and Mrs Z were married for 28 years. Prior to marrying, Mrs Z was on a higher income than her husband. During the marriage, Mrs Z gave up work to focus on raising their three children and looking after the home. Upon separation, her expected income was \$7000 from the social security benefit. Mr Z's income was over \$300,000.⁵⁵ The value of the matrimonial property totalled \$900,000. The Court was asked to determine whether a spouse's earning capacity was "property" within the meaning of the Matrimonial Property Act 1976, following the Family Court's decision to award the wife a share of her husband's future earnings. Whilst considering that "such an outcome cannot be easily reconciled with the objectives of equality and justice underlying the Act", the Court could not treat enhanced earning as "property" even though it would be in line with the policy and spirit of the Act.⁵⁶ The Court acknowledged the harsh operation of the equal-sharing rule on women who had forgone participation in the workforce to care for children and the household.⁵⁷ The Court highlighted the "need for a concept of property which is capable of reflecting the contribution of the non-career wife to the income earning capacity of her husband".⁵⁸

3 *The passage of section 15*

Section 15 was a late addition to an otherwise drawn-out reform of the Matrimonial Property Act 1976. A description of s 15's journey through Parliament will inform the analysis of the provision's procedural challenges in Part IV.

The reform process began in 1998 under the National Government when the Minister of Justice, Douglas Graham, introduced two related Bills into Parliament. The Matrimonial Property Amendment Bill amended the existing matrimonial property legislation to deal with marriages ending upon death. The De Facto Relationships (Property) Bill provided for the inclusion of heterosexual de facto couples within the ambit of the relationship property regime, subject to some differences.⁵⁹

⁵⁴ *Z v Z (No 2)* [1997] NZLR 258 (CA).

⁵⁵ Mrs Z's health problems precluded her from resuming full time work, so the \$7000 was based on her benefit entitlement.

⁵⁶ *Z v Z (No 2)*, above n 54, at 30.

⁵⁷ At 29.

⁵⁸ At 42.

⁵⁹ The National Party placed significant importance on the institution of marriage, so introduced a weaker presumption of equal sharing for de facto couples.

The Matrimonial Amendment Bill did not address economic disparity. In considering the two Bills, the Government Administration Committee reported on the many submissions from those concerned with the economic disparity issue.⁶⁰ However, the majority of the Select Committee thought that economic disparity could be dealt with through pre-existing maintenance provisions. The two Bills then languished due to other priorities on the Government's agenda.⁶¹

The economic disparity issue was finally dealt once the Labour Party took office in 1999. Faced with two Bills that had already come before the Select Committee, Cabinet decided to combine them into one Bill and incorporate some new provisions via a Supplementary Order Paper ("SOP").⁶² The new Labour Government pushed for more radical change with its policy commitment both on economic disparity and the inclusion of same-sex couples.⁶³ It was out of this setting that the Property (Relationships) Amendment Act 2001 came to be. The amendments implemented many of the Working Group's recommendations from 13 years earlier, but went further through its inclusion of s 15 and de facto couples.

D Section 15 as an Illustration of Poor Law Reform

Section 15 has been heralded as an example of poor law reform. While people's views on the quality of reform will inevitably diverge,⁶⁴ and a 'perfect' provision is not the threshold that ought to be met, s 15 does not meet the yardstick of an adequately drafted provision. Section 15 disappoints when assessed against the criteria of legislation that is clear, accessible and not excessively burdensome in operation.⁶⁵ Section 15's high jurisdictional threshold and broad discretion has adversely affected the provision's practical application both in court and in out-of-court settlements. As a result, s 15 has not resolved the economic disparity dilemma.

⁶⁰ (29 February 2000) 582 NZPD 832.

⁶¹ Henaghan and Atkin, above n 4, at 181.

⁶² Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 2000 (109-3). See Margaret Wilson "The New Zealand context – setting the legal and social scene" (paper presented to Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 11.

⁶³ Henaghan and Atkin, above n 4, at 181.

⁶⁴ Geoffrey Palmer "Law Making in New Zealand: Is There a Better Way?" (2014) 22 Waikato L Rev 1 at 3.

⁶⁵ At 3.

1 Practical difficulties in application

There is a large divergence in opinion of practitioners and judges as to the correct interpretation and application of s 15.⁶⁶ The jurisdictional foundation is unclear and difficult to surmount.⁶⁷ The provision does not elaborate on the meaning of key terms such as “likely” and “significant”. These problems were anticipated by Parliament. The Select Committee received submissions pointing out that professionals diverged in views on what they considered to be “significant” economic disparity.⁶⁸ Many of the fears about s 15 during its reform process have materialised.⁶⁹

The ambiguity of the causation requirement presents further difficulties. The courts have used a variety of approaches in establishing the requisite causal nexus. Some judges have adopted a “but for” test, while others have used a spectrum of causation with “natural flair at one end and division of functions at the other”.⁷⁰ This requirement has also erroneously precluded many claims from succeeding, as the courts have willingly found economic disparity to be the result of personal characteristics of the financially stronger party, rather than the division of functions.⁷¹ It is harder for the claimant to establish causation for a redistributive award (an award for enhanced earnings) rather than a compensatory award.⁷²

The evidentiary burden of proving these requirements is also onerous.⁷³ Claims often fail because there is no evidence as to the potential income the claimant could have earned but for the division of functions.⁷⁴ As stated in *Sparks v Prescott* “it is one thing to take a broad-brush approach to inherently imprecise calculations, but there has to be some financial and employment evidence on which to base such findings”.⁷⁵

⁶⁶ Green, above n 19, at 273

⁶⁷ Atkin, above n 31, at 356.

⁶⁸ (14 November 2000) 588 NZPD 6519.

⁶⁹ Bill Atkin “Economic Disparity – How Did We End Up With It? Has It Been Worth It?” (2007) 5 NZFLJ 299 at 299.

⁷⁰ *M v B*, above n 25, at [201] per William Young P and [254]-[255] per Hammond J.

⁷¹ For example, see *Douglas v Douglas* [2013] NZHC 3022, [2014] NZFLR 235 at [23]-[24], where the High Court rejected the finding of a causal nexus because the parties would have carried out their respective roles had they not entered into the relationship.

⁷² *M v B*, above n 25, at [244].

⁷³ Green, above n 19, at 207.

⁷⁴ *Sparks v Prescott* [2016] NZFC 275 at [86].

⁷⁵ At [86].

The broad discretion conferred by s 15(3) has led to unpredictability. Even if a claimant satisfies s 15's jurisdictional requirements, there is no certainty that the Judge will exercise discretion in their favour or award a satisfactory quantum. Courts have adopted different approaches to assessing quantum because the provision does not specify how to calculate the appropriate level.⁷⁶ Originally, courts adopted a set methodology in assessing quantum.⁷⁷ The difficulties in a precise quantification of financial advantage led the courts to adopt a broad-brush approach,⁷⁸ based on the view that "no rote formulae can reliably throw up award sums that are just".⁷⁹ But this approach has also proved problematic. Courts have been inconsistent in deciding what factors and contingencies to account for and opinion is divided on whether to half awards.⁸⁰ The approach taken on halving awards depends on whether the court considers a s 15 award as an item of relationship property, or a unique compensatory award.

2 Overall effect of section 15 on the economic disparity problem

During s 15's passage, Members of Parliament ("MPs") used compelling rhetoric when describing the mischief this reform would solve. MPs talked of the distress and disadvantage suffered by many women and their dependent children,⁸¹ the sacrificing of career development that remained uncompensated for,⁸² and the profound anomalies in society.⁸³ Section 15 has provided value to a small number of successful claimants who otherwise would have received an unfair share of relationship property. It has also potentially had an indirect bearing on private settlements. In this respect, passing s 15 was desirable when compared to the alternative of no remedy at all. However, substantive inequality of the type described throughout s 15's reform process still exists. The difficulties inherent in the provision have significantly affected its capacity to remedy economic disparity to the extent (perhaps optimistically) envisaged by Parliament.

⁷⁶ Nicola Peart (ed) *Relationship Property & Adult Maintenance: Acts & Analysis* (Thomson Reuters, Wellington, 2013) at 201.

⁷⁷ See *X v X*, above n 21.

⁷⁸ A broad-brush approach to the assessment of quantum was accepted in *Jack v Jack* [2014] NZHC 1495.

⁷⁹ See *X v X*, above n 21, at [129] per Robertson J.

⁸⁰ Peart, above n 76, at 201.

⁸¹ (29 February 2000) 582 NZPD 832.

⁸² At 833.

⁸³ At 839.

Prior to the passage of s 15, Patrick Mahoney, the Principal Family Court Judge, submitted that the new broad discretion would engender litigation,⁸⁴ causing as many as 80 per cent of cases in this area to go to court.⁸⁵ Section 15 has engendered more litigation than would have occurred without the reform, but not nearly to the extent projected.⁸⁶ The uncertainty and unpredictability of s 15 has deterred claimants from going to court. Only “big money” cases have been litigated. Section 15 is not a “panacea for poverty” because awards are limited to the respondent’s share of relationship property.⁸⁷ The high cost of bringing a claim, largely due to the need for expert witnesses, means that the potential award needs to be sizeable enough to warrant the effort.⁸⁸ In any case, courts would be reluctant to award compensation from smaller asset pools as this would deprive the financially stronger party of most of their half share in the property.⁸⁹ The way the law currently stands prevents couples with lower property pools accessing the courts as a means to resolve their disputes, even where one party is significantly economically disadvantaged.

On the anomalous occasion where the court makes an order under s 15, the claimant has often received meagre awards that have not gone all the way in addressing the full extent of the economic disparity. As Atkin states, “the extra dollop of compensation is cream on the cake, not the cake”.⁹⁰ Courts are reluctant to significantly depart from an equal division due to an imbedded and established culture of equal sharing. However, the Court of Appeal recently made a more promising award in *Scott v Williams* to the value of \$470,000.⁹¹

Court decisions are not the only record of how legislation operates in practice, particularly in family law where most disputes are settled outside of court.⁹² It is difficult

⁸⁴ (14 November 2000) 588 NZPD 6522.

⁸⁵ (21 March 2001) 591 NZPD 8438.

⁸⁶ Bill Atkin suggests that the power to award economic disparity has led to a lot of litigation. Although there has been more litigation than otherwise would have occurred, there has not been a mass influx of judicial decisions to the extent projected at the time of s 15’s passage: Atkin, above n 31, at 356.

⁸⁷ Atkin and Parker, above n 9, at 117.

⁸⁸ Nikki Macdonald “Do Our Relationship Property Sharing Laws Need a Radical Shake-Up?” *Stuff* (online ed, New Zealand, 11 February 2017).

⁸⁹ Atkin and Parker, above n 9, at 117.

⁹⁰ Atkin, above n 69, at 4.

⁹¹ *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499. Originally the Family awarded \$850,000: *Williams v Scott* [2014] NZFC 7616.

⁹² Margaret Casey “At the Coalface: A Practitioner’s Perspective” (paper presented to Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 1.

to ascertain the positive influence of s 15 in the private sphere, but arguably it has been minimal. Practitioners find the provision to be complex and ambiguous, impacting on the parties' ability to obtain consistent legal advice.⁹³ As a result, s 15 is most often used outside the courtroom as a strategic tool to bolster other claims that are 'easier to sell', such as maintenance. Spousal maintenance and s 15 awards are often blurred so it becomes an either or approach.⁹⁴ Assessed against the parties' respective legal positions, this results in unfair settlements.

Overall, s 15 has not altogether remedied the economic disadvantage contemplated by Parliament. The practical difficulties curtailed any prospects of this. Nonetheless, s 15 has mitigated some unfairness. The provision has relieved some pressure on the courts to innovatively interpret other parts of the legislation in order to produce fairer outcomes. Without s 15, it is likely that we would have seen growing judicial activism such as in *Z v Z (No 2)*, where the court acknowledged it would be in the interests of justice to interpret earning capacity as relationship property, though reluctantly refrained from doing so.

III Classifying the Relevant Law Reform 'Hazards'

Perfection is not the benchmark against which s 15 ought to be assessed. It is difficult to effect reform that introduces a new policy direction and addresses a complex social issue. But s 15's ineffectiveness was not unforeseen. The deficiencies in, and challenges to, its reform process explain how it came to be an example of poor law reform. Many of the difficulties in s 15's reform appear to be caused or enhanced by the decisions made by key players in Parliament and the courts. But this is too simplistic an analysis. It would fail to recognise that the "choices" made by actors in the reform process are often shaped by political and structural limitations, as well as the involvement of other actors. These 'hazards' are difficult to unravel. Section 15's reform process reveals a dynamic interaction between players and other influencing forces, as well as broader impediments to reform.

The following sections address the difficulties encountered in s 15's reform. The hazards have been classified as procedural, conceptual and judicial. An analysis of the procedural challenges reveals the impact of a rushed and politicised legislative process on the articulation of a clear policy justification and the level of pre-legislative scrutiny. Conceptually, it was difficult for s 15 to operate coherently within the existing statutory

⁹³ Green, above n 19, at 266.

⁹⁴ Casey, above n 92, at 2.

scheme. The function of the judiciary, and how the courts fit into the broader conception of law reform, is also important.

IV Procedural Challenges

A comprehensive legislative development process is crucial to good reform. It should involve the identification of a defined problem, development of a clear policy objective based on research, consideration of suitable mechanisms to achieve this objective, consultation within the government and the broader public, and scrutiny of the proposed provisions.⁹⁵ SOPs that make substantial amendments at the late stage of a Bill's passage should be avoided where possible.⁹⁶ Although this standard is an aspiration, rather than minimum criteria, s 15's reform process was deficient in several respects.

When matrimonial property reform was instigated by the National Government in 1998, the economic disparity issue went unheeded. The decision facing the new Labour Government in 1999 was two-fold: whether to proceed with the Bills and insert what became s 15 through a SOP and, if so, at what speed considering the number of policy commitments it had pledged to implement within its Parliamentary term?⁹⁷ The following analysis will closely examine these decisions to determine their bearing on the resulting reform.

A "Whether to Proceed?"

The Government's intent was clear. It wanted to remedy economic disparity and move closer to achieving substantive equality. The Government Administration Committee had previously recognised the body of evidence indicating that equal sharing leads to "economic disadvantage for the non-career spouse when a marriage ends".⁹⁸ However, the Labour Government's decision to remedy economic disparity via lump sum awards was based on an unsubstantiated policy commitment "fraught with political difficulties".⁹⁹ Ms Wilson acknowledged that the policy commitment was not informed by a detailed political discussion on competing theories on how to effect appropriate

⁹⁵ Legislation Design Advisory Committee "LAC Guidelines on the Process and Content of Legislation 2014" at 8.

⁹⁶ The Law Society cautioned against the over-use of SOPs in their 2016 submission on the Standing Orders: New Zealand Law Society "Submission to the Standing Orders Select Committee on the Review of the Standing Orders 2014" at 5.

⁹⁷ Wilson, above n 62, at 11.

⁹⁸ Matrimonial Property Amendment Bill 1999 (109-2) (select committee report) at 14.

⁹⁹ Wilson, above n 62, at 13.

reform.¹⁰⁰ So what *was* the basis of the Labour Government's policy commitment considering the previous National Government had not addressed economic disparity in the reform package?

In deciding to address economic disparity, the Labour Government appears to have been motivated by ideology and the political need to fulfil the broader policy commitments made to its constituents. Upon the introduction of the SOP (containing what is now s 15), Ms Wilson stated "I am proud to say this Government has kept its election promise and has given priority to progressing legislation that promotes fairness for all New Zealanders".¹⁰¹ The Labour Party had campaigned on its wider focus on women and children. Its mandated women's policy agenda had appeared in every election manifesto since 1984.¹⁰² This policy contained a pledge to introduce legislation recognising the concept of communal property and establishing a procedure for claims.¹⁰³ The Government's policy commitments were inevitably going to be made in the context of a broader focus on inequality and injustice faced by women and children.

Ms Wilson commented that the Government was not prepared to leave these issues in the too-hard basket.¹⁰⁴ She commented:¹⁰⁵

...[T]he presumption of equal division and the clean cut [principle] has, over the years, acted to the detriment of many women and their children. Therefore, it was necessary for the law to take account of changing circumstances. We had hoped there would be an opportunity to do that through this Bill.

The representation of economic disparity as a gendered issue demonstrates how s 15 accorded with the Labour Government's ideology and policy pledges. The Opposition clearly had different priorities or, at least, did not characterise the problem in the same

¹⁰⁰ Wilson, above n 62, at 3.

¹⁰¹ (14 November 2000) 588 NZPD 6518.

¹⁰² Margaret Wilson "Impact of Women's Political Leadership on Democracy and Development in New Zealand" in Commonwealth Secretariat *The Impact of Women's Political Leadership on Democracy and Development: Case Studies from the Commonwealth* (Commonwealth Secretariat, London, 2013) 39 at 57.

¹⁰³ Wilson, above n 62, at 6.

¹⁰⁴ (14 November 2000) 588 NZPD 6517.

¹⁰⁵ (29 February 2000) 582 NZPD 832.

way. Some National MPs criticised the reform as being a “gold diggers” law.¹⁰⁶ Others saw the Bill as applying equally to men and women. Belinda Vernon MP stated:¹⁰⁷

People listening to the debate could think that this was solely an issue of women wanting to get a fair go through the legislation. That is not the case. This Bill applies equally to men and women. We are now in quite a different environment from when the Matrimonial Property Act was introduced 20 years ago. The status and role of women - that of women working in the community or in paid work - was at a level quite different from what it is today.

While it is accepted that policy-makers often use law to achieve their desired ends and carry out pledges made to constituents, heavily politically driven reform can be futile.¹⁰⁸ The policy commitment to s 15 was plagued by politics. The Labour Government wanted to be seen as acting, or reacting to the wishes of its constituents and the submissions on economic disparity previously made to the Government Administration Committee in 1999.¹⁰⁹ Passing s 15 was seen to be doing something; a clearer policy justification for the reform was of less importance.

B “At What Pace?”

Once the commitment to s 15 was made, the Government placed more importance on getting the reform through, rather than getting it right. The Government needed to implement all of the other policy commitments pledged within the three-year term.¹¹⁰ The inheritance of two Bills from the previous National Government, which could be fine-tuned to align with the Labour Government’s policy objectives, enabled it to do so with “considered haste”.¹¹¹

Section 15’s reform process reflected this prioritisation of speed over substance. The Drafting Office was given two months to draft the provisions of the SOP.¹¹² During this drafting period, the House was asked to vote on whether they agreed to the introduction of the SOP without having seen its substance. The Government’s original intention was

¹⁰⁶ Audrey Young and Catherine Masters “Wife’s Property – Split Plea Could Aid Many” *The New Zealand Herald* (online ed, New Zealand, 25 May 2000).

¹⁰⁷ (29 February 2000) 582 NZPD 833.

¹⁰⁸ Palmer, above n 64, at 4.

¹⁰⁹ Matrimonial Property Amendment Bill, above n 98, at 14.

¹¹⁰ Wilson, above n 62, at 10.

¹¹¹ (29 February 2000) 582 NZPD 832.

¹¹² Wilson, above n 62, at 11.

to bypass the select committee stage, only bringing the SOP back into the House for a final vote.¹¹³

The Government's justifications for this swift legislative action were lacklustre. It considered that the Bills had already endured a lengthy legislative process,¹¹⁴ and submissions on economic disparity had been canvassed in the Government Administration Committee.¹¹⁵ It also stated that the former Minister of Justice foreshadowed a similar advancement of a SOP on the issue if he was still in charge.¹¹⁶ Yet the intention of the previous Minister had actually been to amend provisions on spousal maintenance in order to address economic disparity in light of the submissions made to the Select Committee on the Bills, rather than introduce a whole new substantive provision containing a different policy direction to the Act. Further, the previous Select Committee had not had the opportunity to receive advice on the economic disparity issue, nor had the House debated it.¹¹⁷ While the Bills had already spent a substantial time in Parliament, the particular issue of economic disparity had not. Presumably, the Government wanted to pass the reform swiftly so not to clog the legislative agenda. The Government was also acutely aware of the controversy surrounding the reform and appears to have hoped to bypass as much scrutiny as possible.

The proposed swift legislative process was met with a strong pushback in Parliament. Many were opposed to debating "blindly" on the issue, without seeing the substance of the SOP.¹¹⁸ Rt Hon Jenny Shipley (Leader of the Opposition) stated:¹¹⁹

I find it a constitutional outrage that a constitutional lawyer, as a Minister, would seek a motion that will allow a Supplementary Order Paper to be introduced that effectively places a new Bill in this Parliament that will not go to a select committee, that has not had evidence called upon it, and that has excluded the public from an opportunity to be able to express an opinion on it.

The Government was forced to back down from its decision not to refer the SOP to a select committee. The amendments were referred to the Justice and Electoral Committee,

¹¹³ (4 May 2000) 583 NZPD 1926.

¹¹⁴ (31 May 2000) 584 NZPD 2741.

¹¹⁵ (29 February 2000) 582 NZPD 834.

¹¹⁶ At 832.

¹¹⁷ Matrimonial Property Amendment Bill, above n 98, at 20.

¹¹⁸ (4 May 2000) 583 NZPD 1931.

¹¹⁹ At 1927.

where the public was given one month to make submissions.¹²⁰ Even then, many were concerned with passing a complex amendment through a speedy select committee stage.¹²¹ Anne Tolley MP stated, “this is a scandalous rush at social engineering, one could say”.¹²²

Section 15 was undoubtedly a rushed addition to an otherwise drawn-out reform. This hastiness reflects a broader feature of New Zealand’s legislating culture: often important Bills are rushed through the House because of the three-year term the Government has to implement its legislative agenda. It is in the interest of governments to get the technical aspects of reform right, but this interest is often surpassed by the need to pass legislation as quickly as possible due to scarce parliamentary time and drafting resources.¹²³ The legislative backlog has become more acute since New Zealand changed to the Mixed Member Proportional voting system.¹²⁴ Ironically, matrimonial property reform, along with the potential to address economic disparity, stagnated under the National Government due to other priorities. On the contrary, the following Labour Government rushed the reforms through the House. This reflects Sir Geoffrey Palmer’s observation that:¹²⁵

The yin and yang between which the demand for new law in New Zealand oscillates consists on the one hand of legislating too quickly and getting it wrong or on the other hand going too slowly so that important issues lacking political priority remain.

C Ramifications for the Legislative Development Process

Hasty legislating is the enemy of a good policy and, accordingly, good reform.¹²⁶ Section 15’s late introduction as a SOP and subsequent rush through the latter stages of the legislative process impacted on the efficacy of the provision. The Government was acting on inherited Bills, so any changes made were necessarily going to be bolted-on adaptations to the existing statutory regime. But the extemporaneous commitment to s 15 caused essential inputs into the legislative development process, such as research, consultation, and scrutiny to be rushed or overlooked. This compromised the

¹²⁰ (31 May 2000) 584 NZPD 2732.

¹²¹ At 2740.

¹²² At 2740.

¹²³ Palmer, above n 64, at 4.

¹²⁴ At 6.

¹²⁵ At 6.

¹²⁶ At 14.

development of a clear problem definition and policy objective, as well as the level of scrutiny accorded to the legislative mechanism.

1 Uncertain problem definition and policy objective

The ‘backbone’ to any reform is a clear problem definition, supported by its policy objective.¹²⁷ The problem that the policy aims to resolve must be clearly defined so that the legislation can be applied with some direction. This demands pragmatism through research and consultation, as the policy cannot be justified based on the abstract pursuit of justice.¹²⁸ In outlining the broader aim of providing a compensatory-based remedy to economic disparity, s 15 was void of an underlying justification and clear objective. Parliament did not establish the parameters of the underlying problem, and therefore could not ascertain whether s 15 would resolve economic disparity in any meaningful way. These difficulties were exposed in the resulting reform. Parliament failed to specify what the provision compensated *for* and to what *extent* it aimed to compensate.

(a) What is being compensated?

Clarity about what is to be achieved is determined by a “rigorous definition of the problem”.¹²⁹ Parliament did not establish the type of disparity that was considered to be the ‘problem’. Compensatory claims are typically based on the loss suffered. But Parliament did not specify the type of loss the provision intended to compensate for, apart from the reference made to “economic advantages or disadvantages” in s 1N(c). Was it loss of future potential income, or loss of the future benefit of the spouse’s higher income? Or does the lump sum signify compensation for domestic work carried out throughout the relationship?

Prima facie, Parliament intended to compensate for either the loss of income of the financially weaker spouse or the enhanced income of the higher earner. In this sense it is compensatory and redistributive in nature. But the latter is inconsistent with the usual concept of “loss” that underpins compensatory awards. To consider economic advantages within the scope of the provision requires a conceptual shift from the focus on “loss” to

¹²⁷ Legislation Design Advisory Committee, above n 95, at 7.

¹²⁸ Mavis Maclean and John Eekelaar “The Perils of Reforming Family Law and the Increasing Need for Empirical Research, 1980-2008” in Joanna Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing, Portland, 2009) 25 at 37.

¹²⁹ Palmer, above n 64, at 3.

“gain”.¹³⁰ Compensating for “likely”, or prospective, loss is also inconsistent with notions of causation and usual requirements of tangible proof of loss.

The policy basis for compensating for some forms of loss, but not others, is unclear. A claimant may forgo a higher earning career, but unless the disparity is significant, he or she will not be compensated.¹³¹ Claimants who did not have an established career prior to the relationship are also unlikely to receive compensation due to difficulties in proving that their “likely” income would have been higher. If the justification of s 15 is to compensate for the undertaking of domestic work and loss of *potential* career or income, theoretically it should not matter whether the likely disparity in income and living standards is “significant”, or whether the claimant had a pre-existing career or high income stream, because the claimant has still suffered a loss due to the division of functions. In other words, they have still forgone the income or career they otherwise would have achieved.

(b) What should the compensation achieve?

The objective of the compensation was also not clearly devised. Parliament did not elucidate on the extent to which claimants ought to be compensated. The provision does not clarify whether s 15 aims to bring the parties to economic parity, or whether it aims for a lesser form of personal compensation, with equalisation being the upper limit.

Complete parity between parties must not have been the goal for two reasons. First, the causation hurdle precludes a remedy where the claimant’s inferior economic position is owed to extraneous factors.¹³² Secondly, separate property holdings are not remedied. In *Scott v Williams* the Court of Appeal stressed that complete parity was not the objective of s 15, stating:¹³³

Section 15 is not there to simply split the parties’ future earning capacities – which is not relationship property in any event. It is not there to equalise the income stream of two persons who almost certainly were bound to have had different income earning capacities had they not married in the first place.

¹³⁰ Green, above n 19, at 288.

¹³¹ Joanna Miles “Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation” (2004) 21 NZFLR 268 at 295.

¹³² At 296.

¹³³ *Scott v Williams*, above n 91, at [97].

On face value this reasoning seems obvious. But the presumption of equal sharing aims for some sort of parity, based on the notion of a ‘partnership of equals’. It is not concerned with the fact that the parties would have had different levels of assets had they not entered into the relationship.

Ideology and anecdotal evidence framed the broader economic disparity issue. But the specific problem (what was being compensated for) and the objective (what the compensation ought to achieve) required further research and consideration throughout the early policy development stages. The Royal Commission and Working Group had undertaken research on the Act, but this was done over a decade before s 15 was passed. The cross-section of relationships and the underlying social issues s 15 addresses are complex and variable. Notably, the Working Group had also operated under significant time pressure. The Working Group was established in March 1988, and reported back to Cabinet in September of the same year.¹³⁴ Considering their research covered the law regarding matrimonial property, family protection and de facto relationships, it is unlikely economic disparity received the research it needed. In any case, the Working Group was sympathetic to arguments about inequality of result. But it considered it a “mistake to imagine that the matrimonial property laws could solve the problems of poverty and gender inequalities inherent in our social fabric”.¹³⁵ Section 15 was clearly not formulated based on the research undertaken over a decade prior.

Whether reform is driven by assumptions as to how people conduct their relationships, or by reference to what society considers the law ought to achieve, evidence and data have central roles to play in the development of policy objectives, including the underlying justification.¹³⁶ The issue of economic disparity is complex. Section 15 necessitated long-term and in depth research of other related areas. For example, its vague causal nexus and the “but for” test that has since been developed by the courts considers the income potential of the financially weaker party had they stayed in the workforce. Such inquiries cannot be undertaken in the abstract. Individual and familial choices about participation in paid employment and the division of roles are constrained by external factors, such as labour market conditions, participation in paid employment, the gender pay gap, paid

¹³⁴ Bill Atkin “More Law Reform: The Report of the Working Group on Matrimonial Property and Family Protection (October 1988)” (1989) 2 Fam L Bull 18 at 18.

¹³⁵ At 20.

¹³⁶ Joanna Miles and Rebecca Probert “Sharing Lives, Dividing Assets: Legal Principles and Real Life” in Joanna Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing, Portland, 2009) 3 at 13.

parental leave, other legal regulations and policy levers, and even broader social norms.¹³⁷

English courts have recognised the importance of social science data in calculating awards based on projected income.¹³⁸ Data has proved that financial recovery is mostly achieved by re-partnering rather than improvement in employment opportunities.¹³⁹ Yet re-partnering substitutes a new dependency for an old one, without addressing the underlying problem.¹⁴⁰ The financial loss on divorce or separation, and the potential to financially recover, differs depending on the characteristics of the parties, such as age, income, health and tenure of relationship.¹⁴¹ It does not appear that this type of data influenced the formulation of s 15.

The importance of a policy justification based on research and data has become apparent in the courts' ad hoc approach to calculating quantum under s 15. The courts are unsure of the objective they are meant to be satisfying. Methodology is speculative and based on little evidence of how long it will take for the financially weaker party to increase their income stream. The Family Court in Australia recognised that the courts must have regard to bodies of literature and data in assessing economic circumstances and future prospects.¹⁴² Data on how parties deal with the financial implications of settlement may also reveal potential impediments to settlement in the substantive law.¹⁴³ Without a sense of social realism, the "law of unintended consequences is likely to rule the day".¹⁴⁴

In saying this, evidence-based policy was not as widely used in the early 2000s as it is today. There are also limitations to relying on data to inform social policy objectives. The distillation of data and research can never be fully free of normative judgments about what the law ought to achieve. Research data is open to interpretation and differing conclusions.¹⁴⁵ Further, accurately modelling behaviour within relationships to establish

¹³⁷ Miles and Probert, above n 136, at 21.

¹³⁸ See *Stack v Dowden* [2007] UKHL 17, 2 AC 432. See generally Miles and Probert, above n 136, at 14.

¹³⁹ Miles and Probert, above n 136, at 17.

¹⁴⁰ At 13.

¹⁴¹ Hayley Fisher and Hamish Low "Who Wins, Who Loses and Who Recovers from Divorce?" in Joanna Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing, Portland, 2009) 227 at 234.

¹⁴² *In the Marriage of Mitchell* (1995) FLC 92-601; 19 Fam LR 44 (FC).

¹⁴³ Miles and Probert, above n 136, at 13.

¹⁴⁴ At 13.

¹⁴⁵ At 15.

the policy justification is difficult.¹⁴⁶ In any case, the policy of s 15 was “made in the teeth of, rather than on the basis of, the research and other empirical evidence available”.¹⁴⁷

2 *Lack of pre-legislative scrutiny*

The late tabling of the SOP detrimentally affected the level of pre-legislative scrutiny accorded to s 15. The provision was only one of a number of substantial reforms being hastily pushed through Parliament. Its time in the spotlight was limited. The decision to address the concept of ‘career capital’ through lump sum awards was an innovation that required extensive consideration through parliamentary debate and the select committee process.

The first opportunity for parliamentary debate of the economic disparity issue was hindered because the substance of the SOP had not yet been drafted. MPs debated the overarching policy rather than the specifics of the legislative mechanism contained in s 15.

Pre-legislative scrutiny that did occur highlighted the problems with the drafting of the provision. The Opposition believed a better way of addressing economic disparity was to order regular payments from one party to the other for significant differences depending on the ability to pay and reasonable need, rather than future predications.¹⁴⁸ This was consistent with the recommendations of Royal Commission and Working Group, both of which had warned against reform of s 15’s kind.¹⁴⁹ Ms Tolley commented that spousal maintenance provisions were not invoked often, and perhaps that was the greatest fault of the Act.¹⁵⁰ Ultimately, the Government did not believe maintenance to be the best avenue.¹⁵¹ The short amount of time spent scrutinising s 15 had little influence on the resulting legislation.

The lack of time afforded for scrutiny in Parliament was arguably mitigated by the work of the Select Committee, which received submissions from legal professionals and

¹⁴⁶ Fisher and Low, above n 141, at 255.

¹⁴⁷ John Dewar “Introduction” (2000) 14 AJFL 79 at 79.

¹⁴⁸ Justice and Electoral Committee “Matrimonial Property Amendment Bill and Supplementary Order Paper No 25” [1999-2002] VII AJHR I at 696.

¹⁴⁹ Royal Commission on Social Policy, above n 49, at 224. See also Henaghan and Atkin, above n 4, at 185.

¹⁵⁰ (21 March 2001) 591 NZPD 8439.

¹⁵¹ (29 February 2000) 582 NZPD 833.

women's organisations.¹⁵² But there was only limited time for public consultation.¹⁵³ Peter Dunne MP argued for "durable social reform". He argued that the public needed to understand the reform and its implications, yet he was not convinced a rushed select committee process allowed for this public awareness.¹⁵⁴

One month to hear submissions was insufficient given the important philosophical and practical changes s 15 was to make to the Act. Select committees perform a fundamental role in recommending changes to Bills on the basis of public submissions and scrutiny undertaken. The length of time set for submissions and consideration should be commensurate to the importance of the potential reform. Currently, select committees usually have six months to report back, which is often extended if more time is needed.¹⁵⁵ The examination of Bills by select committees "substitutes for the scrutiny functions ordinarily performed by a second parliamentary chamber".¹⁵⁶ Public engagement and consultation was important in informing the wider social dimensions to s 15. In the context of family law reform, there is often an over-reliance on traditional legal materials such as judgments and academic literature to inform the law.¹⁵⁷

The deficiencies in s 15's legislative development process echo the common syndrome in New Zealand of "we have a problem, let's pass a law".¹⁵⁸ The Government did not produce a discernible problem definition, which in turn meant that the provision was void of a clear policy objective. The lack of time to scrutinise the legislative mechanism intensified the complications inherent in the resulting reform. It was accepted by Ms Wilson that this legislative approach was "not perfect" given the complexity of the issues.¹⁵⁹ This reveals the trade-off that the Government was willing to make in order to provide economically disadvantaged parties with some sort of remedy, albeit a poorly drafted and ill thought out one. It also potentially illustrates that "seat-of-the-pants reactions and popular sentiments" enlighten the law rather than careful research and

¹⁵² (14 November 2000) 588 NZPD 6518.

¹⁵³ Matrimonial Property Amendment and Supplementary Order Paper No 25, above n 62, at 36.

¹⁵⁴ (1 June 2000) 584 NZPD 2760.

¹⁵⁵ Office of the Clerk of the House of Representatives "Parliament Brief: The Legislative Process" (March 2014) New Zealand Parliament <www.parliament.nz> at 2.

¹⁵⁶ PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [11.6.2(7)].

¹⁵⁷ Reg Graycar and Jenny Morgan "Law Reform: What's in it for Women?" (2005) 23(2) Windsor YB Access Just 393 at 410.

¹⁵⁸ Palmer, above n 64, at 25.

¹⁵⁹ Wilson, above n 62, at 11.

analysis.¹⁶⁰ Section 15's reform process contributed to a disjunction between the overall intent behind s 15 and its successful execution.

V Conceptual Challenges to Legislative Coherency

Law reform cannot operate in a vacuum. Legislation must be developed consistently with the wider legal framework. Wider legislative coherency is particularly crucial for reform such as s 15, which “represents a major philosophical change” from the concepts underpinning the pre-existing relationship property regime.¹⁶¹ Tension is not itself problematic. The law often contains conflicting principles and rules that apply to different circumstances. But reform must be devised in a way that makes it clear which rule or principle prevails and when. It is dubious whether s 15 operates harmoniously with its wider scheme. The following analysis distils the conceptual inconsistencies that have complicated s 15's practical application.

A Equal Sharing Versus Discretionary Compensation

At the heart of the Act lies the presumption of equal division, based on the principle of entitlement. Entitlement derives from the fact of the parties' relationship and that both parties are considered to have contributed equally, albeit differently, to the relationship.¹⁶² Section 15's discretionary, compensatory nature is conceptually inconsistent with entitlement-based equal sharing. This is particularly so, given that most of the other changes made by the 2001 Amendment Act actually strengthened the Act's presumption of equal sharing.¹⁶³ The provision has been criticised on the basis that entitlement and compensatory principles cannot easily coexist. This inconsistency creates a perception of s 15 as a bolted on adaptation to a solid “bedrock of equal sharing”, which has been an important feature of the law for over four decades.¹⁶⁴ Section 15 awards are seen as the “exception to the norm”, or even a “punishment” for the higher income earner, rather than the fairer way of dividing property.¹⁶⁵ Prior to s 15, practitioners and the judiciary were not required to make judgment calls or exercise a broad discretion in making awards.¹⁶⁶ In this respect, s 15 distorts the architecture of the scheme.

¹⁶⁰ Palmer, above n 64, at 29.

¹⁶¹ (29 March 2001) 591 NZPD 8629.

¹⁶² Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change” (2008) 39 VUWLR 814 at 814.

¹⁶³ At 828.

¹⁶⁴ Green, above n 19, at 270.

¹⁶⁵ At 270.

¹⁶⁶ At 272.

On the other hand, the different philosophies are not completely incompatible. Section 15 expounds “a more sophisticated concept of equality than the bare equal sharing rule can do”.¹⁶⁷ Miles states:¹⁶⁸

The combination of an equal sharing entitlement rule with a compensatory claim gives the ideological advantage of positively recognising the value of the claimant’s contribution to the relationship whilst also seeking to secure some measure of fuller economic equality.

This sophisticated concept of equality aligns with the purpose and principles in the Act. In *Z v Z (No 2)* the Court of Appeal recognised the importance of “the legislative setting” as well as the “social and economic context” of the Act.¹⁶⁹ The move towards a different concept of equality was reflected by the insertion of two new purpose and principle sections during the 2001 reforms. Sections 1M and 1N contain the references to “equality” and “equal status” seen within the original long title of the 1976 Act.¹⁷⁰ Nowhere in these sections does the Act refer to the need for “equal division”; the objective is the “just division of relationship property”.¹⁷¹

The Act must inevitably recognise different methods and principles of asset distribution in order to achieve the scheme’s intended purposes. Robert Fisher QC (previously a High Court Judge) identifies three rationales for redistributing assets on separation: ‘causation-based property division’, ‘relationship-caused property division’ and ‘spousal support obligations’.¹⁷² Causation-based division awards each party a share in the property that each party, in his or her own way, helped to create throughout the relationship.¹⁷³ The relationship is viewed as a partnership for this purpose.¹⁷⁴ Whereas relationship-caused division will award one party more property than the other, as compensation for a disparity earning capacities caused by the party’s roles throughout the relationship (i.e. the division of functions).¹⁷⁵ Spousal support obligations are underpinned by the

¹⁶⁷ Miles, above n 131, at 304.

¹⁶⁸ At 305.

¹⁶⁹ *Z v Z (No 2)*, above n 54, at 264 and 267. See generally Atkin, above n 31, at 350.

¹⁷⁰ Sections 1M(b) and 1N(a) and (b).

¹⁷¹ Miles, above n 131, at 305.

¹⁷² Fisher, above n 5, at 2-3.

¹⁷³ At 2.

¹⁷⁴ At 3.

¹⁷⁵ Fisher, above n 5, at 3.

maintenance needs of one party.¹⁷⁶ A combination of rationales is necessary to satisfy the redistributive aims of the Act. Therefore, the incorporation of equal sharing entitlement and compensatory principles is indispensable in meeting the expectations of the parties.

New Zealand's relationship property scheme has, for a long time, contained a mishmash of messages to achieve justice in individual cases.¹⁷⁷ Section 15 is not the only provision that deviates from the principle of equal sharing. For example, under s 13(1), shares in property can be determined based on the contributions made to the relationship where extraordinary circumstances would render equal sharing repugnant to justice. The Act is social legislation of a wide application;¹⁷⁸ there is always a need to challenge traditional notions of how to achieve justice and equality. Section 15, based on a different conceptual foundation, attempts a different pathway to these goals of equality and justice.¹⁷⁹

In any case, the inconsistency is potentially overstated. Section 15 covers enhanced income claims, which appears to align with the principle of entitlement rather than compensation. The term 'compensation' is associated with the notion of 'loss'. Yet, orders for enhanced income are based on the fact that one party is left substantially better off than the other.¹⁸⁰ In this sense the financially weaker party is 'entitled' to a greater share.

Further, the compensatory principle arguably accords with the broader deferred community property system which the Act operates as. Parties retain individual property rights during the relationship but, once the relationship has ended, the relationship property is "community" property to which both parties are entitled to a (presumptive) equal share. If the deferred community property regime is about "credit that has been produced by the existence of the community", then the loss and enhancement of career and income opportunities should be perceived as relevant products.¹⁸¹ If the scheme accounts for relationship debts, the loss of career and earning potential should also be shared.¹⁸² From the broader perspective of a deferred community property system, compensation is theoretically consistent.

¹⁷⁶ Fisher, above n 5, at 3.

¹⁷⁷ Atkin and Parker, above n 9, at 22.

¹⁷⁸ At 22.

¹⁷⁹ At 23.

¹⁸⁰ Miles, above n 131, 268.

¹⁸¹ Atkin, above n 69, at 4.

¹⁸² At 4.

B Clean Break Principle

A foundational principle of the Act is that parties should have a “clean break”. This principle is not spelt out in the legislation, but gained early judicial recognition in *Haldane v Haldane*, where it was held that property division should be complete and final in the absence of compelling reasons to suggest otherwise.¹⁸³ Relationship property should be divided so that parties can start afresh without continuing demands on each other’s property.¹⁸⁴ Prima facie, s 15 is consistent with the clean break principle because it grants a one-off lump sum award.¹⁸⁵ Section 15 provides finality to property division that is not achieved with ongoing maintenance payments.

However, s 15’s consistency with the clean break principle has been called into question. The provision requires that the courts retrospectively analyse the parties’ roles throughout the relationship to establish a causal link.¹⁸⁶ Courts must also conduct a future inquiry into likely living standards and income. The complex and drawn out disputes that arise from s 15’s uncertainty also preclude parties from easily moving forward.¹⁸⁷ The courts have recognised this potential inconsistency. In *M v B*, William Young P opined that a large award under s 15 would have to be paid over time, and that the husband’s freedom to switch career or retire would be circumscribed as a result.¹⁸⁸ Such an award would not allow for the “contingencies of life”.¹⁸⁹ This illustrates the way in which the courts have felt constrained by the clean-break principle, or at least have justified a lower award on the basis of it.

Parliament did not clarify how to reconcile the clean break principle with awards under s 15. As a result, the courts have taken inconsistent approaches to applying the clean break principle. While William Young P’s assessment expressed above illustrates a strict adherence to the principle, other judges have viewed adherence to the clean break principle as less important than providing a fair remedy. Hammond J thought that the

¹⁸³ *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 557 per Cooke J, 563 per Richardson J and 572 per Somers J.

¹⁸⁴ *Z v Z (No 2)*, above n 54, at 4.

¹⁸⁵ Atkin, above n 69, at 4.

¹⁸⁶ Green, above n 19, at 16.

¹⁸⁷ For example, the Family Court’s decision in *Williams v Scott*, above n 91 was appealed all the way to the Supreme Court. The parties are still waiting to hear the final outcome in the Supreme Court three years on from the Family Court judgment.

¹⁸⁸ *M v B*, above n 25, at [202].

¹⁸⁹ At [202].

clean break principle should not be taken too far.¹⁹⁰ Formal equality approaches had given rise to arguments that the financially weaker party ought to remain financially independent of the other, so the principle was too readily invoked to “castigate dependent [parties] in the very name of those equality principles”.¹⁹¹ As Lord Nicholls stated, the rigid application of the clean break principle has the advantage of certainty, but it also “runs the risk of being out-dated as social conditions change” so that the reasoning behind it no longer fits with modern notions of fairness.¹⁹²

As illustrated, it is unclear whether s 15 is consistent with the clean break principle, and the extent to which the principle ought to limit (if at all) orders under s 15. This indicates a problem with s 15’s legislative development. Parliament itself was divided on these issues. The Government thought that lump sum awards under s 15 preserved the clean break principle.¹⁹³ But those opposed to the reform viewed that it undermined the clean break principle as it created more uncertainty in the law.¹⁹⁴ Opinion was divided on whether adherence to the principle was even desirable or intended. Ms Kedgley stated “the clean break concept, as it is known, is literally condemning many women and children to poverty”.¹⁹⁵ Parliament needed to give clearer guidance as to how s 15 was to operate alongside the principle.

C Tension With Maintenance Claims

Section 15 “trespasses” onto the maintenance territory of the Family Proceedings Act 1980.¹⁹⁶ This demonstrates the lack of a wider cohesive approach to the law governing the financial affairs of separating couples. Maintenance is needs-based. It ensures parties’ ongoing financial needs are met for a transitional period following separation.¹⁹⁷ Economic disparity claims have confused the way in which property and needs-based remedies are dealt with. The two awards are theoretically different (s 15 is not based on needs), but have been described as functionally equivalent.¹⁹⁸ Both are concerned with

¹⁹⁰ *M v B*, above n 25, at [262].

¹⁹¹ At [262].

¹⁹² *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, (2006) 2 AC 618 at [115]. This was a conjoined appeal case.

¹⁹³ (29 Feb 2000) 582 NZPD 834.

¹⁹⁴ (29 March 2001) 591 NZPD 8629.

¹⁹⁵ (29 Feb 2000) 582 NZPD 840.

¹⁹⁶ Atkin, above n 69, at 1.

¹⁹⁷ Atkin and Parker, above n 9, at 137.

¹⁹⁸ *M v B*, above n 25, at [272].

the income differential between parties, and have therefore come to be justified on the same basis.¹⁹⁹ Section 15 awards may obviate the need for maintenance in some cases.

Parliament and the courts have tried to ensure cogency between the different determinations,²⁰⁰ but this has been of limited success. The order in which claims are decided is undetermined.²⁰¹ Their close linkage may mean that one remedy is offset against the other.²⁰² The discretionary aspect to s 15 has allowed the courts to pick and choose between the two remedies. This has often undermined the purpose of s 15, as maintenance awards have been preferred over s 15 awards as a means to addressing financial disadvantage.²⁰³ For example, the Court of Appeal in *Scott v Williams* stated that it could not be right that “there is a double payment based on a single need”.²⁰⁴ While it is true that s 15 may obviate the need for maintenance, the purposes of the two awards are fundamentally different.

During s 15’s reform, maintenance arose in the context of determining whether a one-off award or the maintenance scheme better dealt with economic disadvantage.²⁰⁵ But little attention was paid to how the needs-based theory of maintenance would be reconciled with s 15’s compensatory philosophy. As a result, their relationship is still confused by the courts, and there are differing opinions as to whether the partitioning of the individual financial elements of a relationship breakdown is ideal.

D Is Section 15 Conceptually Reconcilable?

The above analysis demonstrates that, on the whole, Parliament did not develop a remedy for economic disadvantage that was consistent with, or at least addressed by, the existing

¹⁹⁹ Bill Atkin “Harmonising Family Law” (2006) 37 VUWLR 465 at 473.

²⁰⁰ For example s 32 of the Property (Relationships) Act 1976 allows the court in a relationship property proceeding to make a maintenance order, and it must have regard to any previous maintenance orders made. Under s 65(2)(a)(ii) of the Family Proceedings Act 1980, the court must have regard to means derived from any property division when fixing the quantum for a maintenance order.

²⁰¹ See *M v B*, above n 25, at [127] per Robertson J and [207] per William Young P. Robertson J opined s 15 is to be considered before any determination regarding spousal maintenance is made. Yet William Young P stated that the order in which spousal maintenance and s 15 determinations are made is not particularly important.

²⁰² *V v V* [2002] NZFLR 1105 (FC) at [62]-[64].

²⁰³ *G v G* [2003] NZFLR 289 (FC) at [132]; and *de Malmanche*, above n 10, at [191].

²⁰⁴ *Scott v Williams*, above n 91, at [126].

²⁰⁵ See (29 March 2001) 591 NZPD 8630. Ms Tolley stated that “women would be better served by certainty in the law and by a beefing up of spousal maintenance, based on actual needs and the real abilities to pay”.

body of law. From a law reform perspective, s 15's conceptual challenges demonstrate the difficulty in navigating through a minefield of existing principles and rules. Section 15 was a response to the inequities of the existing principles and rules. Parliament was required to resolve these inequities, without departing too much from the existing body of law so as to maintain an appropriate level of legislative coherency. Whether Parliament appropriately balanced the interface between s 15 and the rest of the scheme is uncertain.

Section 15's swift passage resulted in an ambiguous and poorly drafted provision.²⁰⁶ These difficulties were intensified by the incongruous effect of s 15. Part VI will now provide an examination of the courts, and whether judicial approaches have further compounded these challenges.

VI Judicial Impact on Reform

Judges perform a fundamental role in law reform. Section 15 empowers the courts to a significant extent by conferring a broad discretion. But judicial approach to s 15 has not been conducive to producing its intended outcomes. The architecture of s 15 and its wider scheme has produced structural impediments to justice. Judges have been inadequately guided in their exercise of discretion. Decisions have also been compromised by cultural factors, such as the reluctance to depart from the embedded philosophy of equal sharing. This is exacerbated by the lack of appellate decisions on s 15 to guide lower courts. The following discussion will analyse these structural and cultural factors that have impacted on court decisions in respect of s 15 and, as a result, the overall efficacy of this reform.

A Level of Discretion Conferred on the Courts

A fundamental law reform task is determining the legislative method. New Zealand has a tendency to welcome the doctrine of judicial discretion with open arms, without analysing whether it is the most suitable legislative tool to invoke. Of course, judicial discretion is an unavoidable feature of the legal system.²⁰⁷ But Parliament should only confer discretion to the courts in certain circumstances. It must carefully consider whether the legislation requires certain rules, individualised justice, or something in between.²⁰⁸ Section 15's broad discretion has caused difficulties in court. This necessitates an analysis of the extent to which s 15 conforms to traditional notions of

²⁰⁶ Green, above n 19, at 350.

²⁰⁷ See HLA Hart "Discretion" [2013] 127 Harv L Rev 652; and Wilfrid Waluchow "Strong Discretion" (1983) 33(133) *The Philosophical Quarterly* 321 at 321.

²⁰⁸ HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961) at 127.

judicial discretion, the type of discretion it confers and whether Parliament conferred the correct level of discretion for the mischief aimed to be solved.

Determining what constitutes a satisfactory conferral of discretion first requires an understanding, in clear terms, of what it means to exercise judicial discretion.²⁰⁹ Discretion cannot be equated with choice.²¹⁰ Hart saw discretion as a special form of reasoned and constrained decision-making, based on an appeal to rational principles.²¹¹ Hart stated:²¹²

...[D]iscretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious.

True discretion, according to Hart, only exists when decisions are made based on reason.²¹³ Judges are expected to use universal standards of fairness and rationality when reaching their decision, rather than exercise an unfettered power of choice.²¹⁴ There is a difference between arbitrary decision-making and the exercise of judgment (known as true discretion).²¹⁵ An arbitrary decision is one that does not appeal to some higher principles or standards. But there is also a difference between judgment based on the exercise of judicial discretion, and judgment that adheres to strict rules. In the former, there is no 'right' answer - there may be several - as long as the Judge operates within the limitations expressed in the defining formula.²¹⁶ In the latter, notionally there is only one correct answer.²¹⁷

²⁰⁹ Hart, above n 207, at 653.

²¹⁰ At 656.

²¹¹ Geoffrey Shaw "HLA Hart's Lost Essay: "Discretion" and the Legal Process School" (2013) 127(2) Harv L Rev 666 at 668.

²¹² Hart, above n 207, at 658.

²¹³ At 657.

²¹⁴ David Jennex "Dworkin and the Doctrine of Judicial Discretion" (1992) 14(3) Dalhousie LJ 473 at 474; and Francis Bennion "Distinguishing Between Judgment and Discretion" (2000) 42 PL 368 at 368.

²¹⁵ Bennion, above n 214, at 370.

²¹⁶ At 372.

²¹⁷ At 370.

Section 15 does not permit a court to exercise an unfettered discretion.²¹⁸ It has stipulated jurisdictional parameters, or defining limits, that must be satisfied before an order can be made. In *de Malmanche*, Priestly J stated that “Parliament has...marked out clear and unequivocal boundaries within which economic disparity may be redressed and outside which the courts may not step”.²¹⁹ Even so, the courts have a very wide discretion when determining whether an award is “just”.²²⁰ They also have complete discretion over the quantum. This reflects a broader type of discretion.

The discretionary power in s 15, although not arbitrary or unfettered, is problematic. Parliament did not confer the correct level of discretion to adequately guide the courts in the application of s 15. This has contributed to the various problems in s 15’s application outlined in Part II. The aspiration of substantive equality has become futile under s 15’s discretionary approach. These problems were anticipated during s 15’s reform. Many were worried that the “large measure of judicial uncertainty” would lead to a variety of assessments, results and an overall uncertainty.²²¹

The decision of whether to bestow the power of judgment or discretion, and to what degree, was no easy feat for s 15’s reform. In legislating for unequal lump sum awards, Parliament was walking the “tightrope of tightly defined law that gives security but lacks flexibility – a law that, like a Gruyère cheese, contains large holes down which people may fall”.²²² Section 15 was a new innovation for New Zealand’s relationship property regime. One would expect discretion to have been approached with more restraint considering s 15 was a novel provision and there was no guiding precedent.

The question then becomes: how do we establish whether the conferral of discretion was appropriate, or what the correct level of discretion would have been? The terminology of ‘rules’ and ‘discretion’ are not binary; they operate on a continuum. Legislators are not faced with a stark choice between all-or-nothing rules and discretion, but instead must devise the right amalgam of discretion and rules.²²³ They must also choose from the

²¹⁸ *M v B*, above n 25, at [123].

²¹⁹ *de Malmanche*, above n 10, at [155].

²²⁰ Section 15(3).

²²¹ (14 November 2000) 588 NZPD 6519.

²²² At 6525.

²²³ Carl Schneider “Discretion and Rules: A Lawyer’s View” in Keith Hawkins (ed) *The Uses of Discretion* (Oxford University Press, Oxford, 1991) 47 at 79.

differing types of discretion.²²⁴ Law reformers are equipped with a “toolbox containing many devices”.²²⁵ On the continuum lies strong discretion at one end, strict rules at the other, and an array of legal instruments such as presumptions, principles, factors and guided discretion in the middle.²²⁶ But there is no magic formula for choosing the “optimum point on the scale”.²²⁷

Rules provide certainty and predictability, which is why the rules-based relationship property regime has otherwise operated consistently. But case-by-case decisions that afford a degree of individualised justice are also an important part of the legal system. When choosing between rules and discretion – or somewhere in between – the policy-maker must account for the range of circumstances that might be subject to the legislation. Hart recognised two clear situations where judicial discretion should be conferred. The first is ‘relative ignorance of fact’.²²⁸ This is where the legislator cannot predict or ascertain the range of factual situations that may come before the courts on the particular issue. The second, ‘relative indeterminacy of aim’, is when the policy or aim of the legislation cannot be clearly defined. Under both heads the conferral of discretion is necessary, as it is unclear what the law might require in order to do justice in any given case.²²⁹

Relative ignorance of fact and indeterminacy of aim are present in regards to s 15. The types of relationships and the demarcation of roles between partners are variable – particularly in contemporary times where there is a growing shift away from the traditional family unit. Section 15 also involves a prediction of future income and living standards, which adds further uncertainty of fact. As discussed in Part IV, the specific aims of the provision are unclear. The quantum necessary to address economic disparity changes depending on the circumstances of the case. A just regime of property division must therefore have some flexibility on the borders.²³⁰

²²⁴ Carol Harlow and Richard Rawlings *Law and Administration* (Cambridge University Press, Cambridge, 2006) at 104.

²²⁵ Cass R Sunstein “Problem With Rules” (1995) 83(4) CLR 953 at 959.

²²⁶ At 959.

²²⁷ Schneider, above n 223, at 49.

²²⁸ Hart, above n 207, at 661.

²²⁹ Jennex, above n 214, at 473.

²³⁰ John Priestly “Whence and Whither: Reflections on the Property Relationships Act 1976 by a retired Judge” (paper presented to Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 16.

There are conflicting views on whether discretion or rules are better for out of court settlement. Schneider proposes that the less certain the result in court, the greater the scope for bargaining and freedom over outcome.²³¹ This view overlooks the power relations at play in negotiating. Greater judicial discretion might encourage more creative settlements, but it does not bolster the position of weaker parties to the extent that clear rules do. The assumption that indeterminate rules allows parties to more freely negotiate ignores systemic power imbalances between parties that needs to be remedied by the law.²³² According to Mnookin and Kornhauser, bargaining outcomes are influenced by the legal rules indicating the decision a court would impose if parties fail to reach an agreement and the degree of uncertainty of legal outcomes.²³³ The law provides a framework within which separating couples can ascertain their rights and responsibilities.²³⁴ Rule-based legislation encourages the financially stronger party to compromise with the weaker to reach a more equitable outcome.

Discretion is a “sensible escape valve”, provided that the provision is limited and controlled in some way.²³⁵ Section 15 should have comprised a discretionary power that sat closer to the middle of the continuum. The courts have tried to devise guiding principles and formulas to calculate quantum, which shows a desire for more guidance. The following discussion will show that the Act has not provided other mechanisms to control and guide judicial decisions, heightening the problems associated with broad discretion.

B Inadequate Guidance From the Act’s Purpose and Principles

The purpose and principles of the Act are contained in ss 1M and 1N.²³⁶ Parliament intended these sections to inform the courts of the policy and approach to be taken in interpreting and applying s 15.²³⁷ This would have mitigated some of the ambiguity associated with a broad discretion. Elias CJ stated extra-judicially that the Act should be made sense of as a whole, and in cases where contributions are not easily quantifiable “it may be necessary to look further into the scheme and overall purpose of the Act if the end

²³¹ Schneider, above n 223, at 77.

²³² Tess Wilkinson-Ryan and Deborah Small “Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining” (2008) 26 Law and Inequality 109 at 111.

²³³ Robert Mnookin and Lewis Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 YLJ 966.

²³⁴ At 950.

²³⁵ Priestly, above n 230, at 16.

²³⁶ See Appendix for the full text of ss 1M and 1N.

²³⁷ (14 November 2000) 588 NZPD 6518; and Green, above n 19, at 73.

of just division is to be met in a particular case”.²³⁸ Unfortunately the purpose and principles of the Act have failed to guide the courts in a number of fundamental ways, leading to a number of decisions that are inconsistent with the principles of the broader scheme. In particular, the courts have failed to recognise the equal status of contributions and appropriately account for economic advantages.²³⁹

1 All contributions to be treated equally

As mentioned previously, the Act is founded on the characterisation of relationships as ‘partnerships of equals’.²⁴⁰ Section 15, read alongside s 1M(b), should recognise unpaid work in the home through an adjusted award.²⁴¹ The courts have recognised that financial and non-financial contributions *ought* to be treated equally, but this purpose is often frustrated by the application of s 15. Lady Hale in the House of Lords spoke about this problem:²⁴²

It is easy to count the money or property which one has acquired. It is impossible to count the value which the other has added to their lives together. One is counted in money or money’s worth. The other is counted in domestic comfort and happiness.

Problematic judicial dicta has undermined domestic contributions and afforded a higher value to financial contributions. As Wendy Parker states “the valiant attempts to accommodate differences has been met with criticism that the focus on contributions has disadvantaged the providers of domestic contributions”.²⁴³

In *M v B* William Young P sympathised with the argument that if the wife had worked throughout the marriage, the husband would not have assumed any shortfall in domestic responsibilities but that, instead, “nannies and the like would have been employed”.²⁴⁴ He considered that such an argument could often be plausibly deployed. As correctly pointed out by the High Court in *Jack v Jack*, this view is too simplistic and ignores the real value of contributions made by the homemaker.²⁴⁵ Judges have also attempted to inquire into

²³⁸ Elias, above n 38, at 5-6.

²³⁹ Green, above n 19, at 74-75.

²⁴⁰ At 76.

²⁴¹ Susannah Shaw “Disparity in *Jack v Jack*: Judicial Overreach or a Just Result at Long Last?” (2014) 45 VUWLR 535 at 538.

²⁴² *Miller*, above n 192, at [150].

²⁴³ Wendy Parker “Sameness and Difference in the Property (Relationships) Act 1976” (2001) 3 BFLJ 276 at 277.

²⁴⁴ *M v B*, above n 25, at [201].

²⁴⁵ *Jack v Jack*, above n 78, at [51].

whether the financially weaker party chose not to work so that they could play tennis.²⁴⁶ While the courts have gradually moved away from demeaning dicta, it is still easy for them to lose sight that the proper focus is on what the parties together chose to do, rather than what they should have or could have done. If the nanny argument could be successfully used, a s 15 claim for enhanced income could never succeed where the household income was high enough to pay for external domestic assistance.²⁴⁷

Inadequate guidance gives rise to stereotypical assumptions about gender roles.²⁴⁸ For example in *A v A* the Family Court acknowledged that Mrs A had greater responsibility for the children, but found that the disparity was not due to the division of functions because she also worked throughout the relationship.²⁴⁹ This reflects underlying expectations about the stereotypical role of mothers and reduces the value placed on the private sphere. Inadequate guidance risks the courts withholding compensation where both parties have participated in the paid labour market, but one party has taken on a far greater portion of domestic functions, effectively carrying a double burden. Section 15 still allows for an approach that considers entrepreneurial skills intrinsically more valuable than domestic contributions. The conceptualisation of the private and public sphere as equally necessary for the perpetuation of society requires clear purposes and principles to guide the courts in the exercise of their discretion.²⁵⁰

2 *Regard to economic advantages and disadvantages*

Prima facie s 15 compensates for the claimant's loss of potential income, or the enhanced income of the financially stronger party. This accords with the principle in s 1N(c), that courts should have regard to both economic advantages and disadvantages. The courts have ostensibly accepted this principle. For example, in *X v X* Robertson J commented that the courts will need to consider compensation under s 15 "when a person has supported a spouse to obtain qualifications and experience which provide that spouse with an enhanced future earning capacity".²⁵¹

²⁴⁶ Elias, above n 38, at 15.

²⁴⁷ Shaw, above n 241, at 540.

²⁴⁸ Heidi Gray "Inequality in Equal Division: Embracing a Canadian Approach to Remedy Economic Inequality Upon Relationship Breakdown" (LLB (Hons) Dissertation, University of Otago, 2009) at 14.

²⁴⁹ *A v A* [2008] NZFLR 297 (HC).

²⁵⁰ Archana Parashar "Teaching Family Law as Feminist Critique of Law" (2000) 23 UNSWLJ 58 at 74.

²⁵¹ *X v X*, above n 21, at [49]–[50].

However, the courts have proved reluctant to have regard to enhanced income capacities, opting instead to focus on the loss to the claimant's income potential.²⁵² In *M v B*, William Young P viewed compensation for impairment of earning capacity as "likely to be easier to obtain than a redistribution of the other party's allegedly enhanced earning capacity".²⁵³ This problem was also recently observed in *Scott v Williams*. The High Court and Court of Appeal rejected the decision of the Family Court to include an assessment of enhanced income in the final award. The Family Court originally awarded Ms Scott \$850,000, but the High Court reduced the quantum to \$280,000. Faire J could see no evidence that the division of functions resulted in the husband having opportunities to develop his earning capacity he would not otherwise have had.²⁵⁴ The Court of Appeal agreed, holding that Mr Williams could command the salary he was on regardless of whether he had been in a relationship or single.²⁵⁵ The Court added that in any event, the enhancement was mutual as Mr Williams had supported his wife whilst she returned to studying for a period of time, therefore any assistance she gave should be offset by enhancement to her own career.²⁵⁶

The most significant circumvention of the Act's guiding principles was seen in an extra-judicial remark by Hon John Priestly:²⁵⁷

There is an uneasy illogicality in the assumption that the gifted partner or the workaholic or the fortunate who has built up a large pool of non-core assets (s 11(c)) owe that success solely or even largely to the function, activities and support of the other partner.

This view is problematic for two reasons: first, the jurisdictional hurdle that requires an established causal link between the disparity and the division of functions likely precludes claims where disparity was largely or solely attributable to 'gift' or talent (which itself opens the door to speculation). Secondly, it ignores that the "function, activities and support" of the financially weaker party likely enabled their partner to gain an enhanced income.

²⁵² Shaw, above n 241, at 537. See also *P v P* [2005] NZFLR 689 (HC) at [60]-[61].

²⁵³ *M v B*, above n 25, at [199].

²⁵⁴ *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 at [167].

²⁵⁵ At [109].

²⁵⁶ At [110].

²⁵⁷ Priestly, above n 230, at 16.

The courts' approach to enhanced income claims is out of touch with the spirit of the Act and the reality that on separation the higher income-earner is left with a significant additional asset.²⁵⁸ The principle in s 1N(c) has not had a strong bearing on court decisions. The purpose and principles of the Act have not guided the courts to the extent demanded by the discretionary nature of s 15.

C Veneration For Precedent

The lack of guidance from the provision and wider statutory context would, under normal circumstances, heighten the reliance placed on precedent in order to achieve some level of consistency and predictability of decisions.²⁵⁹ But in applying s 15, courts face the auxiliary problem in respect of the constraints on the use of precedent. There are few appellate decisions to guide lower courts. The cases that have come before the courts predominantly involve the traditional blueprint of a relationship, even though the Act is intended to apply to a spectrum of relationships.²⁶⁰

In any case, the courts have been warned against a veneration of precedent in the case of "social legislation which has to keep pace with changing conditions and expectations".²⁶¹ Over-reliance on precedent risks creating a 'straightjacket' ill-suited to the variety of circumstances coming before the courts. This is reasoned on the same basis as the decision to confer a broad discretion. The type of order required to remedy economic disparity will change depending on the individual circumstances of the case. The courts should not approach s 15 with the same mind-set derived from earlier legislation.

Yet in 1998 when the reforms were introduced, Hon Douglas Graham stated "in drafting the Bill, as far as possible the terminology and concepts of the Matrimonial Property Act have been retained so that the existing body of case law under the 1976 Act can be tapped into".²⁶² This reflects the paradox of encouraging the courts to rely on precedent, but at the same time emphasising the importance of individualised justice.

Therein lies the quandary. Broad discretionary provisions require effective external aids to guide court decisions. This is particularly true for s 15 because it introduced a new policy direction. Not only did Parliament confer the wrong type of discretion, but the

²⁵⁸ Shaw, above n 241, at 538.

²⁵⁹ Green, above n 19, at 38.

²⁶⁰ At 12.

²⁶¹ Elias, above n 38, at 5.

²⁶² (26 March 1998) 567 NZPD 7919.

purpose and principles of the Act, as well as precedent, have not provided enough guidance to mitigate this. Judicial reluctance to depart from the equal sharing rule and give appropriate weight to the principles underlying the provision has caused significant disruption to the development and application of s 15.

VII Section 15: What Could Have Been?

Section 15 has proved to be an ineffective vehicle for achieving the ambition of substantive equality. As discussed, a combination of factors contributed to this. Even so, new law reform will never be perfect. Operational glitches and complications are inevitable in new machinery. Legislation cannot completely future-proof against unforeseen developments.²⁶³ But most of the problems in regard to s 15 arose due to deficiencies in the reform process rather than the inability to future proof. Many of the provision's difficulties were, or could have been, anticipated by Parliament. This section discusses the three options available to Parliament at the time of s 15's reform: address economic disadvantage through spousal maintenance orders; treat enhanced earning capacity as relationship property; or provide the court with discretion to adjust the division of relationship property (a s 15-type award).²⁶⁴ Obviously, the merit of these alternatives will be discussed with the benefit of hindsight. But Parliament anticipated problems in using a blunt tool such as s 15. Had many of the law reform challenges discussed in this paper been mitigated or reconciled, Parliament would likely have lead this reform down one of the following routes.

A Maintenance Avenue

An obvious alternative to s 15 was to amend the maintenance provisions in the Family Proceedings Act 1980 to address economic disparities based on need and compensatory principles. This approach was supported by the 1988 Working Group, which envisaged more emphasis placed on the role of maintenance and encouraging the courts to award lump sum maintenance out of the matrimonial property pool. The National Party also intended to take this route if they were re-elected in 1999, despite initially not addressing economic disparity in the De Facto and Matrimonial Property Bills.²⁶⁵

The symbiotic relationship between property division and maintenance has already been discussed in Part V. Under this approach, courts could award maintenance based on the relative means of the parties. Courts could order lump sum payments to reduce any

²⁶³ Palmer, above n 64, at 10.

²⁶⁴ Matrimonial Property Amendment Bill, above n 98, at 15.

²⁶⁵ At 15.

problems associated with ongoing periodical payments. This more prescribed approach would have mitigated the difficulties associated with undertaking future predictions and “but for” assessments seen under s 15. It would have strengthened the interrelationship between property division, maintenance and child support contained in s 32 of the Act.

1 Illustration: Canada’s spousal support provisions

Canada provides a tangible illustration of this approach. Canada is a useful comparator jurisdiction because the Canadian model follows a similar structure to New Zealand – issues of property division and maintenance are contained in different pieces of legislation.²⁶⁶ Spousal maintenance is governed at the Federal level by the Divorce Act.²⁶⁷ Provincial statutes determine the division of property.

Canada’s spousal support provisions are based on both compensatory and needs-based objectives.²⁶⁸ Under s 15.2(1) a court may make an order requiring a spouse to pay a lump or periodic sum deemed reasonable for the support of the other spouse. Courts must consider certain factors, such as the length of cohabitation, the functions performed by each spouse during cohabitation and any other orders or arrangements made.²⁶⁹ Section 15.2(6) states the objectives of an order. Objectives include recognising “any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown”,²⁷⁰ relieving economic hardship,²⁷¹ and “in so far as practicable” promoting economic self-sufficiency of each spouse within a reasonable amount of time.²⁷² The first of these objectives is similar to s 15. The latter objective reflects the clean break principle. The term “in so far as practicable” requires the courts to consider the principle when making awards, but they should not be unnecessarily constrained by it.²⁷³ Canada places less emphasis on the clean break principle than New Zealand.

An approach similar to Canada’s is desirable for a number of reasons. The fact that both need and compensation are encompassed in the same award resolves the philosophical

²⁶⁶ Gray, above n 248, at 28.

²⁶⁷ Divorce Act RSC 1985 c 3, s 15.

²⁶⁸ Section 15.2(6).

²⁶⁹ Section 15(4).

²⁷⁰ Section 15(6)(a).

²⁷¹ Section 15(6)(c).

²⁷² Section 15(6)(d).

²⁷³ See *Moge v Moge* [1992] 3 SCR 813, where the Supreme Court of Canada rejected a rigid adherence to the clean break principle. The Court held that the clean break model should not be unduly emphasised at the expense of other principles.

tensions between maintenance and economic disparity claims outlined in Part V. Further, the causation hurdle in Canada is much easier to satisfy. Economic advantage or disadvantage merely needs to arise from the marriage or its breakdown, rather than from the division of functions throughout the relationship. Finally, compensation in Canada is not limited by the relationship property pool. This means that financial inequality is far more likely to be remedied because compensation can be paid in periodic payments based on the higher income earner's earning capacity. One of the concerns of s 15 was that the financially stronger party's circumstances may change, rendering a lump sum award unfair. The ability of the courts to choose between capital or periodical payments gives flexibility and mitigates this concern.

B Treating Enhanced Earning Capacity as Relationship Property

Submitters to the Government Administration Committee in 1999 suggested treating enhanced earning capacity, or future earnings, as relationship property available for division.²⁷⁴ The Court in *Z v Z (No 2)* certainly saw merit in this approach, but thought it would be going beyond Parliament's intent to treat Mr Z's enhanced earning as property.²⁷⁵ The insertion of ss 1M and 1N as part of the 2001 reform package represents a fresher approach to property division.²⁷⁶ Widening the property pool would therefore have been consistent with the new spirit and principles of the Act. However, the courts would need to be satisfied that the enhanced earning capacity is the product of combined efforts throughout the relationship.²⁷⁷ This would yield problems associated with establishing causation seen with s 15.

C Discretionary Lump Sum Award

The final route considered, and taken, by Parliament was the s 15-type lump sum award. Parliamentary and Select Committee scrutiny highlighted the difficulties in the drafting of s 15. The choice of a discretionary lump sum award would have been more effective had the provision been varied in regard to the level of discretion conferred, establishment of jurisdiction and calculation of quantum.

A move away from the causative requirement of proving loss due to the division of functions would have provided a more accessible remedy. Quantifying future economic

²⁷⁴ Matrimonial Property Amendment Bill, above n 98, at 15.

²⁷⁵ *Z v Z (No 2)*, above n 54, at 30.

²⁷⁶ Atkin, above n 31, at 356.

²⁷⁷ At 357.

loss by reference to retrospective roles in the relationship is arbitrarily restrictive.²⁷⁸ The requisite jurisdictional hurdle could have been based on a comparison of income and living standards. A comparative income approach would better encompass disparity caused by income diminution suffered and enhancement gained. This approach would ensure that a party whom did not have an established career prior to the relationship is not precluded from bringing a claim.

Parliament recognised the need for some judicial flexibility in the calculation of quantum, but this could have operated within a set of defined parameters. Parliament was aware that broad discretion in this area of the law had not worked well previously. One approach could have been to provide for the calculation of quantum according to specified percentage bands based on the level of economic disparity.²⁷⁹ The degree of disparity would have determined the award. This could have been altered according to specified guiding factors. Factors could include childcare burdens, the length of the relationship, current and future earning capacity, age and health and length of time out of the workforce. Some of these factors are already considered by the courts when determining whether a s 15 order is just.²⁸⁰ But this would have placed the level of discretion closer to the middle of the continuum between rules and discretion. Under such an approach, courts would have made more consistent inquiries. It would also have reduced the cost and complexity of engaging expert valuations.²⁸¹ Judges have undertaken this type of calculation of quantum for years and in many areas of the law, such as assessing other exceptions to the equal sharing rule and child support payments.²⁸²

One other adaption could have been to draft s 15 in a way that conferred an option between lump sum awards and periodic payments. Though this would give rise to tension with the clean break principle, it would have ensured that the absence of capital assets did not cancel the obligation to pay compensation. It would have alleviated the issue of economic disparity awards being “reserved for the rich”.²⁸³

²⁷⁸ Great Britain Law Commission *Matrimonial Property, Needs and Agreements* (Consultation Paper 208, 2012) at 49.

²⁷⁹ This approach has gained broad support. See Mark Henaghan “Exceptions to 50/50 Sharing of Relationship Property” (paper presented to Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 21; Gray, above n 248, at 53; and Green, above n 19, at 331.

²⁸⁰ See *Williams v Scott*, above n 91, at [312] and [313].

²⁸¹ Henaghan, above n 279, at 21.

²⁸² At 21.

²⁸³ Green, above n 19, at 317.

1 Illustration: Canada's 'Spousal Support Advisory Guidelines'

Canada's Spousal Support Advisory Guidelines provide guidance to the courts in determining quantum and the duration of awards.²⁸⁴ The Guidelines provide formulas for calculating awards that include factors such as duration of the marriage and the difference in the incomes of the parties. Courts still retain discretion in determining the final amount within the range determined by the formula, guided by some general considerations such as the needs of the parties and the amount of property received in division. Courts can also depart from the prescribed formula in exceptional circumstances, such as where the objectives of the Act are better served through a higher or lower quantum. The nature of the award can be altered without changing the overall quantum, for example by increasing the annual amount and shortening the duration of the award and vice versa.²⁸⁵

The Guidelines determine duration of awards based on the length of the relationship, whereas s 15 is calculated on the basis of the amount of time it is predicted the financially weaker spouse will reach his or her "but for" earning capacity.²⁸⁶ The policy behind the Canadian approach is that spouses' financial situations merge over time, so the longer the duration of the marriage, the more likely the financially weaker spouse has suffered disadvantages from it.²⁸⁷ It is easier to determine the parties' actual incomes and the duration of the marriage than the "but for" incomes of the parties.²⁸⁸ Similar factors could have been included in guidance provided to the courts under s 15.

Ultimately, the adapted version of s 15 would have been preferable. But there were obviously restrictions operating on Parliament at the time of s 15's reform which precluded it from achieving a better version of the provision. Progressing a law reform agenda is inextricably linked to the policy direction of the Government. Regardless of the legislative mechanism used, there needed to be a development of the underlying objectives of the provision and a straightforward method of application consistent with those objectives.²⁸⁹

²⁸⁴ Carol Rogerson and Rollie Thompson "Spousal Support Advisory Guidelines" Department of Justice Canada (July 2008).

²⁸⁵ At 104.

²⁸⁶ Gray, above n 248, at 38.

²⁸⁷ Rogerson and Thompson, above n 284, at 51.

²⁸⁸ Gray, above n 248, at 39.

²⁸⁹ Henaghan, above n 279, at 20.

VIII Conclusion

Section 15 has been heralded as a poor law reform attempt not because of its ambitions, but due to its failure to deliver on them. Major impediments to the reform process detrimentally affected the resulting provision. The provision's hasty reform process resulted in a vague policy justification and unclear objectives. Law that does not conform to discernable underlying principles will not be executed well. A central difficulty of this reform was establishing a clear conceptual approach to be taken. It is acceptable for reform to be based on different theories to the regime in which it sits, as long as the theories and principles are clearly articulated and form a cohesive piece of legislation. But the terms of reference to s 15's reform were isolated – not enough forethought was put into how s 15 was to fit within the wider statutory scheme. The broad discretion and insufficient statutory guidance has meant that the provision fails to empower the courts to reach satisfactory decisions. Cumulatively, these factors led to the lack of a clear policy “story” that s 15 was to follow.

Nonetheless, perfect should not be the enemy of the good.²⁹⁰ Parliament recognised that action was better than inaction. Even if the provision has only marginally remedied economic disparity, some form of remedy (albeit a poorly formulated one) is better than no remedy at all. The law has an important signalling effect; it provides legitimacy to the claims of financially weaker parties who have contributed to the relationship in non-financial ways. This reform was a step in the right direction towards substantive equality.²⁹¹

This paper has identified law reform hazards faced by s 15. This should inform the steps and precautions taken in relation to any future reform of s 15. The hastiness of s 15's reform reflects a broader feature of New Zealand's legislating culture - often there is more focus on getting reform through, rather than getting it right.²⁹² Future amendments to s 15 must recognise the intricate nature of the economic disparity issue, and involve a policy development process that identifies a clear problem and response. This should be influenced by evidence, research and consultation rather than anecdotal evidence and social assumptions.

²⁹⁰ Angela Partington (ed) *The Concise Oxford Dictionary of Quotations* (3rd ed, Oxford University Press, Oxford, 1994) at 340.

²⁹¹ Wilson, above n 102, at 54.

²⁹² Palmer, above n 64, at 6.

At the time of writing, the Law Commission is undertaking an examination on New Zealand's relationship property legislation. It will soon publish an Issues Paper and Study Paper on a number of matters, including s 15. The Commission will undertake nationwide consultation and publish documents on online digital platforms to increase public engagement.²⁹³ Following public feedback, the Commission will present the Government with recommendations devised on the basis of evidence and public input.

The Commission's forthcoming work could be the motivation that Parliament needs to engage in further reform to s 15, and will likely prevent the repeating of the mistakes previously made. But reforming a significant piece of social legislation is no easy feat. Political appetite is needed due to the extensive political debate that inevitably surrounds social reform. Whether the Government will consider s 15 to be ripe for scrutiny is uncertain. If s 15 does reappear on the legislative agenda, one can only hope the challenges outlined in this paper do not re-emerge.

²⁹³ Email from Lisa Yarwood (Senior Legal and Policy Advisor, Law Commission) to Ashley Varney regarding the Law Commission's Review of the Property (Relationships) Act 1976 (11 September 2017).

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XI Appendix 1

Property (Relationships) Act 1976

Purpose and principles

1M Purpose of this Act

The purpose of this Act is—

- (a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:
- (b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:
- (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

- (a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
- (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:
- (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:
- (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

