The politics of difference: a feminist perspective on the history of the Property (Relationships) Act 1976

By Joy Liddicoat

There is a long and fascinating history to the changes brought about by the Property (Relationships) Act 1976. This article examines the history of these reforms by focusing the policy context from the 1980s until today and by looking at the fundamental forces driving policy change. This article is based on a recent interview with the Hon. Margaret Wilson, Attorney-General and Associate Minister of Justice, who was responsible for overseeing the final chapter of the matrimonial and de facto property reforms from 1999-2001.

We should begin by going back to the 1980s and the Labour Government that established the working group on matrimonial property and family protection. What were the reasons for establishing that working group?

Well, there were three things driving the formation of the working party. First, I think it came from the work that originally began in the 1970s, from women such as Pauline Tapp. Those of us who worked on matrimonial property law in the 1970s did so from an equality basis — the 50:50 basis —which was premised on sameness of treatment. But as time went on we saw that this sameness could lead to an inequality of result. So the first thing was an awareness that equality was a useful model but had limitations in terms of outcomes.

Secondly, we argued that equality was relevant to social policy. That was where we got, for example, employment equity as a top priority and at the same time that was why matrimonial property was important. And thirdly, at that time the Law Commission was involved because the legislation was administered by the Justice Department and progress had foundered until then.

That concept was picked up by the working group: the concept that equality is not equity and the need to look at that broader social context for the government policy.

Yes, and in the 1980s, in the Labour Party, we developed that concept across policy, which was quite a comprehensive approach to what government had to do and part of that was matrimonial property. We argued for a much more open approach and to use the concept of equality in the way that it should be used: in substance and not just in form.

In some ways the issues throughout the 1990s actually remained the same but the context was really changing. It wasn’t until the late 1990s that the National-led Government finally introduced draft law reforms. The Official Information Act papers show that during that time the Government was clearly struggling to develop any kind of comprehensive policy stance, both in relation to the detail of matrimonial property laws and the extension of such law to other relationships. What do you think was changing in the 1990s that affected the kind of legislation that National actually introduced?

Several things. One was a desire to keep the Government out of people’s lives and to try and transfer the functions of government into the private sector. That included the property issues such as matrimonial property and relationships. What they were doing was allowing the Government to step out and using the contract model for relationships and were really affirming the control of the individual.

At the same time, of course, reality was telling us something different. That was why we were saying it is about the power that the Government has to create a legal framework which could be used in relationships.

How do you think that feminist thinking on these issues developed in the 1990s?
Well, what many were trying to do was to marry the ideas of equality and difference. So the politics of difference, as we know, came through with all that post-modernist feminist movement. I think that was really useful because it provided another framework to look at difference and, I think, reconcile it with the notion that equality is not equity.

*It allowed a discussion of equality of outcome without denigrating from the place or context of the individual?*

Yes and the National Government was really coming at it from the place of individual responsibility, not social responsibility — therefore they only tended to look at difference, not outcome.

*When the Labour Government inherited the National Bills, what was your initial thinking about what needed to happen with those — were you clear or did it take some time to emerge?*

Well, first I looked at the very strong thread of social tradition that runs through Labour. Then, when I’d read the Select Committee reports on what had happened with the two Bills, it seemed to me that the debate about equality of outcome was there but it couldn’t get any traction because there was still this resistance to acknowledging there was a genuine problem. And I thought also, informed by the politics of difference, that what we should do almost put it in a context where the focus was not women but property, because that was exactly what the Bills were about.

*So that the Bills could try and facilitate the politics of difference rather than seek to perpetuate that notion of boxes into which people had to fit?*

Yes. I think the issue became characterised as women always wanting more, but it seemed to me that it wasn’t about women — actually, it was about property. Consequently it was about positioning people in relation to that. So from a legal standpoint they should start with property and then look at the position of people vis-à-vis that. So we got it out of the trap of having to fight the politics of gender.

*Was there any sense at all from where you were sitting that women’s groups relaxed when the Labour-led Government was elected or that they weren’t sufficiently supportive of the bills?*

I think those groups had been working for years on this particular issue. When we got in they were relieved because they actually thought then that they had managed to get the issue up in terms of economic disparity. They knew it was sort of on the agenda.

I was also driven by the continuum of the policy stream: there was unfinished business. We couldn’t do it in 1988 because there was some resistance within Justice and we ran out of time. And for me the problem still remained and it got worse. So how did you address that when the need was even greater?

I was also faced with the pragmatic issue of needing to clear the legislative agenda to get on with our policy. So my notion of doing a giant Supplementary Order Paper could be seen as a little unorthodox. But I wouldn’t have done it if I hadn’t read the Select Committee report and known that those groups that were really interested and informed on the issue had already had a say and this wasn’t going to come as anything new. Rather than make them grind themselves up all over again it was better in that sense to cut straight to the chase. But it was a quite radical change to make property the focus and extend it to same-sex relationships.

I also think individuals should take responsibility for themselves, but they should do it in a legal framework so that there is a safety net there if they don’t, for example, contract out of the Act.

*There is also the question, isn’t there, that if the safety net is not there, who benefits from that?*

Exactly. Also, it is all very well to say that people should contract out, but we know there are an awful lot of people who don’t and these are frequently the very people who need it. And that is what the law should always be — there to help those who can’t help themselves.

*The other factor that emerged was Joanne Morris’s report “Women’s Access to Legal Services”, * which was released during this time.*
Yes and I was very supportive of what Jo was doing and felt that that report did not have the backing, officially, of the Law Commission. While that didn’t make any difference to me, I thought it might have in some people’s minds, so I thought it was really important to link that report into what we were doing too.

Some people couldn’t see that the access to justice issues come out in this kind of way. This area of law and equality of outcome was a classic example of what the people she was interviewing were trying to get at.

*That the process of going through the justice system is as important as the outcome you are trying to achieve?*

Yes and in that sense I think we were delivering, if you like (which is what the Government is about), to that sector.

*The new law picks up many of the recommendations of the working group, but there were some new features, such as the principles to guide judicial discretion and those dealing with future earning capacity. How difficult was it to deal with this cutting-edge feminist thinking in the Parliamentary process?*

I was expecting economic disparity to be my main battleground and it wasn’t. By and large this was an idea that’s time had come. So I didn’t really have major issues. What we did also was to go to practitioners to get the ideas and the cutting-edge thinking because, at the end of the day, if the legislation doesn’t reflect what happens in practice there will be difficulties. It is the micro stuff that makes a difference.

*Were you surprised at the furore over the retention of the words “spouse”, “marriage”, “husband” and “wife”?*

Yes and no. I had said use the word “partner” and the drafters had mindlessly done it. But we were fortunate in some ways because the political opposition, both inside and outside Parliament, concentrated on matters of form and not substance. I quickly made it very clear there would be no objection to retaining these terms. However, there was very little correspondence on anything else.

And in the House it was only at the very end of the endless debate that I got the feeling that the Opposition really started to realise what was actually happening and that they had not thought through the detail. Only at the very end did they start to raise other issues. They concentrated very much on more almost moral issues and also those sort of notional issues of identity. There were lots of confessional-type speeches in the House about their own marriages and relationships. There seemed to be no clear strategy for the Opposition so they just talked about identity politics.

*Thinking about the Act itself, there are some exciting new aspects, such as the new explanatory part, the new drafting style, and so on. What aspects of the Act are you most proud of or most pleased with?*

I am pleased that we did have the notion of property and people have to focus on that side of their relationships. The recognition that equality is not sameness, that in fact it is about outcomes. That to get real justice and fairness people have to focus on the outcome and therefore the legislation should reflect this. While not everyone will like it, it should produce a fairer outcome in the longer term.

*The Select Committee report on the Bills talks about human rights, and you have also referred to the concept of equality that is firmly grounded in human rights. How do you think this fits with the Government’s overall human rights framework that seems to be developing?*

I want to mainstream human rights. I want them to be a normal consideration in people’s day-to-day activity. But I want to do that through balancing the individual and the social aspects. And I think when we see the new amendments to human rights legislation that is what we will see. The Government is trying to be clear about its role. So I guess that is what I was trying to do in the property relationships area as well. The law has to accommodate difference, but within the equality framework.

*If you can, think ahead to twenty years from now when you have long since retired. How do you think this area of law might be different?*
I think that will be dependent on three things. One is whether or not the law is going to reflect what the social conditions are. If we don't have legislatures that are responsive to that, then we will probably have a law which everyone is saying is not working well.

Secondly, how much cultural diversity will we have incorporated into our legal system? Thirdly, what will be the nature of people's relationships in twenty years' time? Will the nature of women’s and men’s unpaid work have changed, for example? Will roles in relation to children and childcare have changed?

In other words, if peoples’ relationships have changed, then how they conduct them vis-à-vis property may have changed too?

Exactly.

Minister, thank you for your time.

Footnotes

1 Joy Liddicoat of Strategic Legal Services is a human rights lawyer and public law specialist with 15 years’ experience in private practice and government, both in New Zealand and internationally. For more information, visit Joy’s website at www.strategic.org.nz.


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