

16 July 2021

Property Consultation  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

By email: [propertyconsultation@ag.gov.au](mailto:propertyconsultation@ag.gov.au)

Dear Property Consultation Project Team,

**Response to Consultation Paper – A New Decision-Making Framework for Property Matters in Family Law**

1. Women's Legal Service NSW (**WLS NSW**) thanks the Attorney-General's Department for the opportunity to comment on the Consultation Paper – A New Decision-Making Framework for Property Matters in Family Law.
2. WLS NSW is a specialist accredited women-led community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

**Our work in family law**

3. We provide legal advice, assistance and representation in family law and related issues through our telephone advice lines; apprehended violence order list days at Local Court; outreaches at women's health centres, family relationship centres and women's correctional centres. We regularly appear in the Family Court and the Federal Circuit Court of Australia.
4. This work is also a key part of the work of the First Nations Women's Legal Program (FNWLP) – with lawyers and community access workers working together to support Aboriginal women to engage in the family law system. This includes supporting and representing clients through the Indigenous list operating in the Federal Circuit Court in the Sydney Registry.



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5. Another important part of the work of the FNWLP is in community development and community education across NSW. A key component of this is focused on raising awareness within the Aboriginal community about the importance of early access to legal advice and accessing the family law system.

### Use of language

6. While acknowledging that anyone can experience family violence, the research and our experience over more than thirty-five years clearly highlights that family violence is predominantly perpetrated by men against women and children. Our language in this submission is at times gendered to reflect this.

### Discussion questions

7. We have read the revised framework proposed in the Consultation Paper: A new decision-making framework for property matters in family law (**Consultation Paper**), and provide comments in response to discussion questions 1, 12, 15, 20, 21, 22, and 23:
  - 7.1 Question 1: Do you agree that there would be benefit in more clearly articulating the decision-making steps to be followed in determining family law property matters? What is your view on the approach outlined in this paper? What risks and issues should be considered as part of this reform process?
  - 7.2 Question 12: Should the FLA retain child support as an express contribution and/or needs factors in the proposed codified decision-making steps?
  - 7.3 Question 15: What are your views on the option of referencing debt as a separate contributions factor?
  - 7.4 Question 20: Would requiring courts to consider the impact of family violence as one of the contribution factors be an appropriate way to take account of the impact of family violence on a party? What would be the risks, benefits or issues associated with such an approach?
  - 7.5 Question 21: Should the impact of family violence instead be considered as a future needs factor? What would be the risks, benefits or issues associated with such an approach?
  - 7.6 Question 22: Would it be appropriate for the impact of family violence to be considered as both a contribution factor and a future needs factor? What would be the risks, benefits or issues associated with such an approach?
  - 7.7 Question 23: Should family violence be accounted for in spousal maintenance applications? If so, how?

## Recommendations

### 8. In summary, we recommend:

#### 8.1 In relation to Question 1:

8.1.1 We support the proposal by Fehlberg and Sarmas<sup>1</sup> that the decision-making steps for property settlement should have a greater focus on needs rather than parties' contributions, by the court prioritising the "provision of suitable housing for dependent children, followed by consideration of the parties' material and economic security."

8.1.2 The decision-making steps to be followed in determining family law property matters should be clearly articulated in the FLA, in plain language, particularly given the large percentage of matters that settle without recourse to the courts. The wording of the proposed steps in a proposed Bill should receive input from stakeholders by way of a further consultation process.

#### 8.2 In relation to Question 15:

8.2.1 Debt should be referenced as a separate contributions factor. Section 79 and s90SM of the *Family Law Act 1975* (Cth) (**FLA**) should be amended to insert a new subsection (4)(aa) which directs the court to take into account the debt/financial liabilities incurred directly or indirectly by or on behalf of a party resulting in the reduction or minimisation of the of any of the property of the parties. The subsection should require the court to consider debt that may have been incurred by one party on behalf of another.

8.2.2 The family law courts should work with relevant industry bodies to implement procedures to ensure that court powers to make orders to split, alter or transfer unsecured joint debts can be given practical effect.

8.2.3 Where appropriate, courts should give priority to making orders that split, alter or transfer *secured* debts, as this is often an urgent issue that cannot wait until a final hearing.

8.2.4 Support must be provided to the survivor of family violence to address their credit history in situations where economic abuse has impacted their credit rating and/or financial wellbeing

#### 8.3 In relation to Question 20:

8.3.1 Section 79 and s 90SM of the FLA should be amended to insert a new subsection which directs the court to take into account the impact of family violence on the

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<sup>1</sup> Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 *Australian Journal of Family Law* 81.

contributions of both parties, including the negative contributions by the perpetrator.

- 8.3.2 Section 79(4)(c) and s 90SM(4)(c) regarding the welfare of the family should be amended to include the addition (in italics): “the contribution made by a party to the marriage/relationship to the welfare of the family constituted by the parties to the marriage/relationship and any children of the marriage/relationship, including any contribution made in the capacity of homemaker or parent, *and the negative contribution caused by family violence perpetrated by a party to the marriage/relationship.*”
- 8.3.3 That a further subsection could be included (in s 79/90SM or elsewhere in the FLA) to provide examples of what amounts to “impact” in relation to contributions.
- 8.3.4 The Government should also consider introducing a specific Objects section in the FLA to identify the goal(s) of the amendment. For example:
- 8.3.4.1 To recognise the impact of family violence on the parties’ contributions; and
- 8.3.4.2 To assist in identifying an outcome that ensures the provision of suitable housing for dependent children and the economic security of the parties.
- 8.4 In relation to Questions 21 and 22: The impact of family violence should be considered as both a contribution factor and a future needs factor. Section 75(2) and s 90SF(3) of the FLA should be amended to insert a new subsection which directs the court to take into account the extent to which the immediate or future circumstances of either party have been affected by family violence perpetrated by a party to the relationship.
- 8.5 In relation to Question 23: Family violence should be accounted for in spousal maintenance applications. An amendment of s 75(2) and s 90SF(3) as recommended above allows the court to consider family violence in spousal maintenance applications.

### Family violence in family law matters

9. Before responding to the questions contained in the Consultation Paper, we draw attention to the prevalence of family violence in family law matters.
10. The Australian Law Reform Commission (**ALRC**) highlighted this prevalence in its 2019 report.<sup>2</sup> The report found that based on a series of studies conducted by the Australian Institute of Family Studies,<sup>3</sup> in the 10 years preceding 2019:

<sup>2</sup> *Family Law for the Future - An Inquiry into the Family Law System: Final Report* (Report 135, March 2019), 103.

<sup>3</sup> Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

- 10.1 Family violence, including physical hurt and emotional abuse, was reported by approximately 60% of separated parents prior to and during separation.<sup>4</sup>
- 10.2 Up to 70% of parents also reported that children had been exposed to family violence,<sup>5</sup> and nearly one in five parents reported that they had safety concerns for themselves and/or their children as a result of ongoing contact with the other parent.<sup>6</sup>
- 10.3 These experiences can be sustained after separation, with 5–17% of parents surveyed five years after separation reporting safety concerns.<sup>7</sup>
11. Further, only approximately 7% of separated parties resolve their property matter by a judicial decision and those families are more likely than not to have experienced family violence.<sup>8</sup>
12. This means that the vast number of matters are resolved without judicial oversight and many of these matters will involve parties where there has been a history of family violence.
13. These statistics reinforce the need for legislative provisions to:
  - 13.1 Recognise the prevalence of violence in relationships and those separating; and
  - 13.2 Given the small percentage of cases that have judicial oversight, ensure that the principles and steps for property settlement are clear, concise and in plain language.

**Question 1: Do you agree that there would be benefit in more clearly articulating the decision-making steps to be followed in determining family law property matters? What is your view on the approach outlined in this paper? What risks and issues should be considered as part of this reform process?**

14. While we do not propose to comment in detail on the specific approach to decision-making steps proposed on pages 8 and 9 of the Consultation Paper, we make the following suggestions.

***Prioritising: the provision of suitable housing for dependent children and the economic security of the parties***

15. We submit that in the decision-making steps the court should prioritise needs rather than the parties' contributions. As proposed in the 2018 article by Fehlberg and Sarmas,<sup>9</sup> the court

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<sup>4</sup> Rae Kaspiew et al, Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments) (Australian Institute of Family Studies, 2015), 14.

<sup>5</sup> Ibid, 41-42.

<sup>6</sup> Ibid, 43-45.

<sup>7</sup> Lixia Qu, et al, 'Post-Separation Parenting, Property and Relationship Dynamics After Five Years' (Report, Australian Institute of Family Studies, Attorney-General's Department, 2014) xvi.

<sup>8</sup> Lixia Qu, et al, 'Post-Separation Parenting, Property and Relationship Dynamics After Five Years' (Report, Australian Institute of Family Studies, Attorney-General's Department, 2014).

<sup>9</sup> Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 *Australian Journal of Family Law* 81.

should prioritise the "provision of suitable housing for dependent children, followed by consideration of the parties' material and economic security."<sup>10</sup>

16. As noted by Fehlberg and Sarmas,<sup>11</sup> the consistent empirical research finds that women, particularly mothers with dependent children, experience significant economic disadvantage post-separation. This point was acknowledged by the ALRC in 2019.<sup>12</sup>
17. The 2018 *Small Claims, Large Battles* report by Women's Legal Service Victoria (**WLSV**)<sup>13</sup> highlights that for women experiencing disadvantage, the risk of poverty, homelessness and ongoing financial insecurity is heightened by the lack of fast, affordable pathways to resolve family law property disputes.<sup>14</sup> The report refers to research that highlights the following:<sup>15</sup>
  - 17.1 Women are at greater risk of poverty than men, and women are more at risk of post-separation financial hardship.
  - 17.2 Research by the Australian Institute of Family Studies published in 2014 indicates that 'men who divorce experience a substantially faster rate of increase in income post-divorce than had they remained married'.
  - 17.3 Meanwhile, single women, many of whom may be divorced or separated, are at greater risk of housing insecurity, have difficulty entering or re-entering the workforce, and for all women a significant gender gap in superannuation balances creates a disadvantage when they retire.
  - 17.4 Acute effects of separation for women can include a drop in income, which men do not experience. Indeed, studies have demonstrated that women experience a decrease in income, while men's incomes increase in the first year post-divorce.
18. Further, we note that while Australia has a well-established (and much reviewed) child support program, child support 'was never intended to meet the housing needs of children, only day to day expenses.'<sup>16</sup>
19. We share the concern raised by Fehlberg and Sarmas that the interests of women and children are attracting decreasing attention in the context of the disproportionate poverty rates for women and children in Australia and the particularly adverse economic consequences of separation and divorce for them.<sup>17</sup>

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<sup>10</sup> Ibid, 2.

<sup>11</sup> Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 *Australian Journal of Family Law* 81.

<sup>12</sup> *Family Law for the Future - An Inquiry into the Family Law System: Final Report* (Report 135, March 2019), 6.21.

<sup>13</sup> Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018)

<sup>14</sup> Ibid, 4.

<sup>15</sup> Ibid, 15.

<sup>16</sup> Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 *Australian Journal of Family Law* 81, 18.

<sup>17</sup> Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 *Australian Journal of Family Law* 81, 17.

20. We propose that legislative reform to the decision-making steps must address this disadvantage and focus instead on ensuring provision of suitable housing for dependent children, and economic security of **both of** the parties.
21. Consideration of the provision of housing and economic security **at each step** of the decision-making process offers the best way of encouraging 'just and equitable' outcomes in the decision-making steps.

### *Over-emphasis on contributions*

22. We share Fehlberg's and Sarmas' concern that there is an over-emphasis on contributions. This is evident in the current structure of the decision-making steps which requires contributions to property to be considered first.<sup>18</sup> In practice we find that this is given more emphasis than future needs. This encouragement is reinforced by the inclusion of two property-related contributions, followed by only one in relation to contributions to the welfare to the family.<sup>19</sup>
23. Only after this consideration, are factors addressing economic disparity between the parties considered, mainly through reference to the additional factors. As argued by Fehlberg and Sarmas, this encourages a perception that contributions to property are the first concern, a point backed up by jurisprudence: judgments most commonly involve consideration of contributions before needs.<sup>20</sup>
24. This reinforces the need to legislate that housing of dependent children and economic security of the parties should be prioritised in the decision-making framework.

### *Clear articulation*

25. It is imperative that the decision-making steps to be followed in determining family law property matters are clearly articulated. Clear articulation and use of plain language would assist self-represented people in particular, especially given the small percentage of matters that have judicial oversight.
26. We agree with Fehlberg and Sarmas that in the drafting of the decision-making steps, caution should be exercised in the examples that are included in the legislation. For instance, proposed step 3c (contributions to the welfare of the family) in the Consultation Paper<sup>21</sup> includes the example: "childcare provided by one party which enabled the other to work or otherwise improve the value of the property." This implies that there needs to be a nexus between homemaking/parenting contributions and the value of assets in each case, which is not the case.<sup>22</sup>

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<sup>18</sup> Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?'' (2018) 32 *Australian Journal of Family Law* 81, 5.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Consultation Paper: A new decision-making framework for property matters in family law, p8.

<sup>22</sup> Belinda Fehlberg, Rae Kaspiew, Fiona Kelly, Jenni Millbank and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2<sup>nd</sup> ed, OUP, 2015), 527.

27. We submit that once the proposed decision-making steps are drafted, the Bill should receive further input from stakeholders through another consultation process.

**Recommendations:**

1. The decision-making steps for property settlement should have a greater focus on needs rather than parties' contributions, by the court prioritising the "provision of suitable housing for dependent children, followed by consideration of the parties' material and economic security."
2. The decision-making steps to be followed in determining family law property matters should be clearly articulated in the FLA, in plain language. The wording of the proposed steps in a proposed Bill should receive input from stakeholders by way of a further consultation process.

**Question 12: Should the FLA retain child support as an express contribution and/or needs factors in the proposed codified decision-making steps?**

28. As submitted in our response to Question 1 above, the decision-making steps for property settlement should prioritise the provision of suitable housing for dependent children, followed by consideration of the economic security of the parties.
29. It is our experience that the child support formula (which is based, in part, on the number of nights each parent spends with the child(ren) and future needs factors relating to the time each parent spends with a child, gives rise to the opportunity for a parent (e.g. the father) to seek orders for children to spend time with them which are not in the best interests of the child, but which provide a financial benefit or imperative for the father and in turn, limit the property adjustment in favour of the mother.
30. In our practice, we often find that those arrangements do not ultimately reflect the actual or long-term situation beyond proceedings and accordingly this leads to longer-term financial disadvantage for women because not only are they the primary carer of children, they also receive less of the property division because the property settlement was predicated on caring responsibilities which do not eventuate.
31. In turn, the child support being paid by the father at the time of the property settlement may not be the amount that is paid in the long-term.
32. We raise this to draw attention to the fact that the child support regime is often misused to avoid responsibility, and consideration of the same in the property settlement decision-making framework can be misleading and does not always assist in furthering the provision of housing for dependent children, nor the economic securities of both parties.



**Question 15: What are your views on the option of referencing debt as a separate contributions factor?**

*Referencing debt*

33. We support the proposal that debt be referenced as an express separate factor in the consideration of contributions to the property pool.
34. We agree with the contention contained in the Consultation Paper that a separate consideration of debt may provide clearer guidance for people referring to the FLA to negotiate their own property settlements.<sup>23</sup> It will also assist self-represented litigants navigating the court process.
35. Such an amendment is particularly necessary for victim-survivors of family violence and financial abuse. Financial/economic abuse includes perpetrators incurring debts in the victim-survivor's name and using joint debt to continue to perpetrate violence against victim-survivors.<sup>24</sup>
36. In our practice, we often advise women who are required to pay off debts in their name that were incurred by their former partner and/or debt that is attached to assets that are in the possession of her former partner.
37. The 2015 *Stepping Stones* report by WLSV<sup>25</sup> illuminated the hardship suffered by victim-survivors of family violence and financial abuse when they were pursued for the whole of a joint debt by banks, telecommunications and utility companies. Of the 170 women assisted through the Stepping Stones project, the majority left violent relationships with some form of debt, with 43% affected by joint debt.<sup>26</sup>
38. Eighty four percent of the clients in the WLSV's 2018 Small Claims, Large Battles project had experienced economic abuse. Many of the clients in the project showed that they encountered situations in which their former partner ceased making payments for joint debts, such as mortgages, car loans or credit cards. Of those cases where financial abuse was identified, in around one-quarter the abuse resulted in a significant increase in the size of the debt.<sup>27</sup>
39. Section 4AB of the FLA classifies the denial of financial autonomy and withholding of financial support as family violence,<sup>28</sup> however the FLA does not account for this in the provisions relating to property settlement.

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<sup>23</sup> Consultation Paper: A new decision-making framework for property matters in family law, p11.

<sup>24</sup> Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Report, Women's Legal Service Victoria, September 2015) 1-79.

<sup>25</sup> Ibid.

<sup>26</sup> Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018) 29.

<sup>27</sup> Ibid.

<sup>28</sup> FLA s 4AB(g) and (h).

40. People navigating a property settlement with little or no legal representation may be unaware of the case of *Kowaliw & Kowaliw*<sup>29</sup> which allow some cases of financial/economic abuse to qualify as “wastage.” The case sets out two circumstances where the general approach to debt being shared, can be departed from:
- 40.1 where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, or
- 40.2 where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.<sup>30</sup>
41. Whether financial/economic abuse would qualify as wastage as set out in *Kowaliw* would depend on the particular facts and application of the *Kowaliw* principles. The onus would be on the victim-survivor to have the court make such a finding. We submit the *Kowaliw* principles are not sufficient to properly account for the impact of financial abuse on how contributions are considered by the court, and in turn, its impact on a victim-survivor’s entitlements.
42. We submit that debt should be explicitly included in s 79 as a consideration to be taken into account by the court when determining a property settlement. It should make clear that unreasonable debts incurred (directly or indirectly) by one party should be considered a “negative” contribution by that party (or should offset any contribution made by that party) and/or that party should take responsibility for the debt. The legislation should make clear that the court must give consideration to debts that may have been incurred in one party’s name by the other party.

### Financial disclosure

43. Reference to debt as an express separate factor may assist with obtaining financial disclosure relating to debts. Two-thirds of women in WSLV’s Small Claims, Large Battles project<sup>31</sup> experienced problems with non-disclosure of the other party’s financial circumstances. The current processes available to parties for finding information if a person fails to comply with disclosure obligations are costly and are not guaranteed to be successful.<sup>32</sup>

### Transfer of debt

44. We submit that the person who incurred the debt should ultimately be responsible for the debt, including a transfer of the debt into that party’s name. This is not happening in practice.
45. The family law system is routinely employed to divide the remaining property of the parties; it is not routinely used to divide the remaining debt between the parties (e.g., where there is a net negative asset pool). A property settlement apportioning debt between the parties is, in

<sup>29</sup> (1981) FLC 91-092.

<sup>30</sup> *Kowaliw & Kowaliw* (1981) FLC 91-092 at 10.

<sup>31</sup> Women’s Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018).

<sup>32</sup> Women’s Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018) 22.

many cases, unavailable because of the position taken by banks of refusing to split joint unsecured debts.<sup>33</sup>

46. As stated above, in our practice, we regularly advise women who are left with debt in their name that was incurred by their former partner and/or debt that is secured, i.e. attached to assets that are in the possession of her former partner. For example, a woman's former partner may be in possession of a motor vehicle registered in the woman's name, and the partner refuses to make repayments. Alternatively, the partner may have disposed of the car but fails to pay the loan with the sale proceeds. Circumstances like these leave our clients in extremely financially insecure and precarious situations. Further, these smaller assets are commonly the only means of escape or shelter for our clients but if the partner is not willing to sign over the registration to the woman, this asset cannot be realised by the woman.
47. Women may be pursued by creditors for mortgage repayments, car loans, personal loans and credit card debts, even where they do not have the benefit of the home, the car, the loan monies, or the credit card purchases. To avoid liability for a debt incurred, the contract with the lender would need to be altered, but this cannot usually be done without the consent of the other party and the creditor. The fear of bankruptcy or a negative credit rating means many women continue to service joint debts even when they have little means to do so.<sup>34</sup>
48. Section 90AE(a) of the Family Law Act expressly allows the court to make an order directing a creditor of the parties to substitute one party for both parties in relation to the debt owed to the creditor. The court may only make the order if it is not foreseeable that the order would result in the debt not being paid in full and in all the circumstances it is just and equitable to make the order.<sup>35</sup>
49. There are a number of practical impediments to the effective use of s 90AE, and examination of case law indicates that its use is not commonly exercised. The 2015 *Stepping Stones* report highlighted that the family law courts do not routinely exercise their powers under s 90AE to alter responsibility for joint liabilities because banks and other creditors generally oppose such orders.<sup>36</sup>
50. When a woman is unable to deal with a joint debt because the perpetrator and/or lender withholds consent to her removing her name, entering a hardship agreement or dividing the debt, she is placed in a very difficult position.<sup>37</sup> Unresolved joint debt issues can cause women financial hardship, including being unable to afford essential items such as food and heating.<sup>38</sup> It affects a woman's credit rating and financial future, in turn impacting on her economic

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<sup>33</sup> Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Report, Women's Legal Service Victoria, 2015), 46.

<sup>34</sup> Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018) 29.

<sup>35</sup> FLA ss 90AE(3)(b) and (d).

<sup>36</sup> Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018) 30.

<sup>37</sup> Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Report, Women's Legal Service Victoria, 2015), 27.

<sup>38</sup> *Ibid*, 29.

security and in some cases the ability for her to access housing for dependent children. We have observed this first-hand in dealing with our clients.

51. We acknowledge that the ALRC did not recommend implementing a proposal to remove the requirement in s 90AE for the court to only reassign liability for debts where it is foreseeable the debt will be repaid,<sup>39</sup> as is noted in the Consultation Paper.<sup>40</sup>
52. However, we submit that reform is required to ensure debts are transferred in appropriate cases. We support the proposal WSLV's *Small Claims, Large Battles* report. We propose that the family law courts work with relevant industry bodies to implement procedures to ensure that court powers to make orders to split, alter or transfer unsecured joint debts can be given practical effect, including in matters involving smaller claims and/or economic abuse.<sup>41</sup>
53. For the reasons set out above, we propose that where appropriate, courts give priority to making orders that split, alter or transfer *secured* debts, as this is often an urgent issue that cannot wait until a final hearing.
54. It is not enough just to recognise and reassign debt to the person responsible for incurring debt/ benefitting from the purchase. Support must also be provided to the survivor of family violence to address their credit history in situations where economic abuse has impacted their credit rating and/or financial wellbeing.

**Recommendation:**

3. Amend s 79 and s 90SM of the FLA to insert a new subsection (4)(aa) which directs the court to take into account the debt/financial liabilities incurred directly or indirectly by or on behalf of a party resulting in the reduction or minimisation of the of any of the property of the parties. The subsection should require the court to consider debt that may have been incurred by one party on behalf of another.
4. The family law courts work with relevant industry bodies to implement procedures to ensure that court powers to make orders to split, alter or transfer unsecured joint debts can be given practical effect.
5. Where appropriate, courts should give priority to making orders that split, alter or transfer *secured* debts, as this is often an urgent issue that cannot wait until a final hearing.
6. Support must be provided to the survivor of family violence to address their credit history in situations where economic abuse has impacted their credit rating and/or financial wellbeing.

<sup>39</sup> Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper, October 2018) 64.

<sup>40</sup> Consultation Paper: A new decision-making framework for property matters in family law, p11-12.

<sup>41</sup> Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018), 31.

**Question 20: Would requiring courts to consider the impact of family violence as one of the contribution factors be an appropriate way to take account of the impact of family violence on a party? What would be the risks, benefits or issues associated with such an approach?**

55. WLS NSW supports amendment to the FLA directing the court to have regard to the impact of family violence on parties' contributions.

*Women who have experienced family violence are already at a disadvantage*

56. A key aspect of financial recovery following family violence is the division of the family property following separation.

57. Research has consistently shown that family violence 'significantly contributes to poverty, financial risk and financial insecurity for women, sometimes long after they have left the relationship'.<sup>42</sup> This research was acknowledged by the ALRC in 2019.<sup>43</sup>

58. Research by ANROWS in 2016 suggested that a woman who was subjected to family violence over an extended period (i.e., at multiple points over the three-year study) was more likely to experience adverse economic outcomes, including a decreased likelihood of being in paid employment.

59. As well as long-term psychological and physical impacts of experiencing family violence, the power imbalance resulting from family violence affects women's ability to negotiate and achieve fair property settlements. Research confirms that women who have experienced violence are more likely to agree to unfair property settlements. Sheehan and Smyth found that those who had experienced severe family violence were three times more likely to receive a minority share of property (being less than 40% of the pool).<sup>44</sup> They state that violence may create 'a substantial power imbalance between the parties that disadvantages the victim-survivor of violence' when negotiating a settlement. Similarly, in Qu and Others' study, they hypothesised that those who have experienced abuse may be more likely to accept lower settlements due to fear of the other party or wanting to finish property negotiations as soon as possible.<sup>45</sup> WLSV found that those who have experienced family violence may be more likely to accept lower settlements due to fear of the other party or wanting to finish property negotiations as soon as possible.<sup>46</sup>

<sup>42</sup> Parliamentary inquiry into a better family law system to support and protect those affected by family violence - Submission 6 (27 April 2017), 33.

<sup>43</sup> *Family Law for the Future - An Inquiry into the Family Law System: Final Report* (Report 135, March 2019), 6.24.

<sup>44</sup> Grania R Sheehan and Bruce Smyth, 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14(2) *Australian Family Law Journal* 102, 11; women who experienced family violence were more likely to have left the family home, and this was associated with receiving a lower share of property: Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Report, Attorney-General's Department, 2014), 106; Sheehan and Hughes, however, found no association between violence and share of property received, but they note that this may be because the single item measure of violence in the survey did not capture varying degrees of violence: Grania Sheehan and Jody Hughes, *Division of Matrimonial Property in Australia* (Australian Institute of Family Studies, 2001) Findings: Relationship context and other factors.

<sup>45</sup> *Ibid*, 9.

<sup>46</sup> Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018).

60. Family violence perpetrators often use the family law system to continue abuse – ‘systems abuse’ – particularly by dragging out proceedings to force the other party into a settlement they want.<sup>47</sup> ‘Systems abuse’ is described by Smallwood as the exploitation of ‘rules or processes’ within financial and legal systems to control, financially damage or abuse another person.<sup>48</sup> It includes vexatious behaviour by the other party, controlling women ‘through the emotional and economic toll of ongoing court proceedings’.<sup>49</sup>
61. As submitted in our response to Question 1 above, the decision-making steps for property settlement should prioritise the provision of suitable housing for dependent children, followed by consideration of the economic security of the parties. This will assist to address the disadvantage faced by women who have experienced family violence.

### *Difficulties with Kennon*

62. Currently, the only way in which violence or abuse might be accounted for in contribution factors is by way of what is known as a “Kennon adjustment”, named after the case of *Marriage of Kennon*.<sup>50</sup> However, this mechanism for acknowledging the financial impact of violence on contributions is limited, for several reasons.
63. As stated in the Consultation Paper, to meet the criteria for a Kennon adjustment, a party would need to prove they were subject to a course of violent conduct that:
- 63.1 had a significant adverse impact on their contributions; or
- 63.2 made those contributions significantly more arduous.<sup>51</sup>
64. The Kennon adjustment requires the victim-survivor of violence to prove a causal connection between violence and their contributions. As noted in the Consultation Paper, one of the main concerns with the Kennon adjustment is that even if the victim-survivor can prove the course of violent conduct, it can be difficult to demonstrate the impact that the violence has had on the party’s contributions.<sup>52</sup>
65. Further, in *Kennon*, the Full Court made it clear that an adjustment would only apply in ‘exceptional’ circumstances and to a ‘relatively narrow band of cases.’
66. The Consultation Paper outlines statistics which highlight the fact that despite the court’s capacity to make Kennon adjustments, in practice they are applied infrequently and their effect on the ultimate division of property is minor. This raises the question of why *Kennon* is raised so infrequently considering how often family violence is raised in family law parenting

<sup>47</sup> Owen Camilleri, Tanya Corrie and Shorna Moore, ‘Restoring Financial Safety :Legal Responses to Economic Abuse’ (Report, Good Shepherd Australia New Zealand and Wyndham Legal Service, 2015), 40-41.

<sup>48</sup> Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Report, Women’s Legal Service Victoria, 2015), 42.

<sup>49</sup> *Ibid* 42–43.

<sup>50</sup> (1997) 22 Fam LR 1.

<sup>51</sup> Consultation Paper: A new decision-making framework for property matters in family law, p6.

<sup>52</sup> Women’s Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (Report, March 2018) 34.

proceedings and commonly reported to police. It is possible that a lack of understanding of Kennon on the part of some lawyers and self-represented parties plays a role here.<sup>53</sup>

67. The cases reviewed by Easteal AM, Warden and Young in 2014 suggest that Kennon is not always raised by legal practitioners, even when the circumstances might lend themselves to such a claim. Further, self-represented parties would be unlikely to know about the *Kennon* principle.<sup>54</sup> As a judicial officer noted in *Hutton & Hutton* [2007] FamCA 1701 of a litigant in person:

*“It appeared to me that the wife’s allegations, although not clearly, if at all, articulated as such, might fall within the decision of the Full Court in Kennon . . .”*<sup>55</sup>

68. Further, the principles arising from *Kennon* have evolved over time and have expanded to encompass a greater number of factual circumstances.<sup>56</sup> Legal practitioners and self-represented parties who are not aware of this evolution cannot put forward the necessary arguments to strengthen their case. This will be discussed further in the section below.
69. A lack of awareness of *Kennon* (and cases which have reviewed the principles in *Kennon*) and what is required to establish a successful claim may have contributed to the cases that failed to specifically address impact on contribution, or to provide any evidence of impact.<sup>57</sup>
70. We submit that an explicit requirement in the legislation for the court to have regard to the impact of family violence on both parties’ contributions will reduce the issues with *Kennon* that are experienced by self-represented litigants, representatives, and in turn, the judiciary.
71. The Australian Law Reform Commission supports legislative reform:

*“Commentators, law reform bodies and others have raised strong arguments that the Family Law Act should be amended to recognise family violence expressly as a relevant factor in property disputes. . . . Legislative recognition may have a number of advantages over continued reliance on the Kennon precedent . . . [It] will provide greater confidence for victims of violence and their legal representatives who seek to raise family violence allegations in property disputes, in particular, out-of-court settlements.”*<sup>58</sup>

<sup>53</sup> Patricia Easteal, Catherine Warden and Lisa Young, ‘The Kennon “Factor”: Issues of Indeterminacy and floodgates. (Australia)’ (2014) 28(1) *Australian Journal of Family Law* 1, 9.

<sup>54</sup> *Ibid*, 23.

<sup>55</sup> *Hutton & Hutton* [2007] FamCA 1701 at [202]. The self-represented wife in this case made claims of serious assaults which were denied completely by the husband. While she did not argue *Kennon*, Carter J noted its relevance however the wife did not lead evidence which supported her claims of violence and so they were not accepted.

<sup>56</sup> Will Stidston and Elizabeth Mathews, ‘Adjusting for Violence’ (2018) *Law Institute Journal* 32-35, 34.

<sup>57</sup> Patricia Easteal, Catherine Warden and Lisa Young, ‘The Kennon “Factor”: Issues of Indeterminacy and floodgates. (Australia)’ (2014) 28(1) *Australian Journal of Family Law* 1, 23.

<sup>58</sup> Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, Consultation paper, 2010, pp 426–8.

### *Elimination of a high threshold*

72. As stated above, the case of *Kennon* made it clear that an adjustment would only apply in 'exceptional' circumstances and to a 'relatively narrow band of cases.'
73. However, in the subsequent case of *S & S*<sup>59</sup> both the trial judge and the Full Court on appeal were required to turn their minds to whether an adjustment contemplated by *Kennon* is limited to those cases encompassing "exceptional" examples of family violence.
74. The Full Court approved the trial judge's conclusion that an adjustment could be made despite the family violence not being of an exceptional nature. Their Honours said at [46]:

*"In addition to that stated by the trial Judge we would not want the reference in Kennon to "exceptional" on page 84,294 to be understood to mean rare. We do not agree with this qualitative description and would be more inclined to the view expressed by the trial Judge at paragraph 17:*

*". . . the references to 'exceptional cases' and 'narrow band of cases' occur in the context of the principle of misconduct in general rather than the more narrow formulation about domestic violence. Our reading of these passages, therefore, is that it is not necessarily correct that only cases of exceptional violence or a narrow band of domestic violence cases fall within the principles. It seems to me that reading these passages carefully, the key words in a case where there are allegations of domestic violence are 'significant adverse impact' and 'discernible impact' . . ."*

75. Notwithstanding the above case, in practice, the threshold for establishing that a party's contributions were more arduous because they were a victim-survivor of family violence is considered by family practitioners to still be quite high.<sup>60</sup>
76. Accordingly, to reflect the current case law principles, legislative change should make clear that an adjustment due to family violence can be applied broadly and not just to exceptional circumstances or a narrow band of cases.
77. Further, the evolution of the principles arising from *Kennon* over time and the consequential expansion to encompass a greater number of factual circumstances should be reflected in legislation. For example:
- 77.1 In the 2005 decision of *Stevens & Stevens*,<sup>61</sup> the Full Court was faced with a factual matrix in which the wife suffered verbal and physical abuse from the husband approximately once every six months during almost the entirety of their 16-year relationship. In considering the concept of a "course of conduct", the Full Court held at [65] that: "*The term 'course of conduct' is a broad one. We do not think that conduct must necessarily be*

<sup>59</sup> [2003] FamCA 905.

<sup>60</sup> Annette Wilson, 'Domestic violence in financial cases in the Family Court and Federal Circuit Court of Australia' *Swaab* (Web Page, 21 September 2018) < <https://www.swaab.com.au/publication/domestic-violence-in-financial-cases-in-the-family-court-and-federal-circuit-court-of-australia>>.

<sup>61</sup> (2005) FLC 93-246 at 80,043.



*frequent to constitute a course of conduct though a degree of repetition is obviously required . . .”*

77.2 In the 2012 decision of *Baranski & Baranski*<sup>62</sup> the Full Court extended the historic requirement that the family violence must have occurred during a marriage. Specifically, the Full Court concluded that post-separation family violence may also be relevant.<sup>63</sup>

### **‘Negative contributions’**

78. Further to legislating to account for the impact of family violence on contributions, we also submit that the court should take family violence into account as a negative contribution by the perpetrator.
79. In 2001 the Family Law Council provided written advice to the Commonwealth Attorney General (**2001 FLC Letter**),<sup>64</sup> arguing that the court should consider both the impact that the violence has on the victim, and the ‘negative contribution’ made by the perpetrator through being violent, for example through the wilful destruction of property, where the party responsible would bear the loss.<sup>65</sup> We are supportive of the advice and recommendations contained in the 2001 FLC Letter in this regard.
80. We also submit that the violent spouse makes a ‘negative contribution’ which should be taken into account in the overall assessment of contributions. Section 79(4)(c) already refers to contributions to the *welfare* of the family, including contributions made as homemaker or parent. It is consistent with this that actions that are clearly contrary to the welfare of the family should be taken into account to reduce the assessment of the contributions of the person who was responsible for such actions.<sup>66</sup>
81. Accordingly, we recommend that the FLA be amended both to refer to the impact of family violence on the contributions of the perpetrator, and also amend s 79(4)(c) and s 90SM(4)(c) to state that contribution to the welfare of the family includes the negative contribution caused by family violence perpetrated by a party to the relationship.

### **Other potential issues**

82. Including general provisions in relation to any amendment to the FLA to account for violence may still leave considerable room for judicial interpretation in relation to its application.
83. The difficulties identified with the application of *Kennon* and a general lack of awareness of the development of its principles, argue in favour of including more detail in legislative provisions to clarify their ambit and perhaps the introduction of a specific objects section to identify the goal of the amendment.<sup>67</sup> The objects should identify that the goal is to recognise

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<sup>62</sup> (2012) 259 FLR 122.

<sup>63</sup> Will Stidston and Elizabeth Mathews, ‘Adjusting for Violence’ (2018) *Law Institute Journal* 32-35, 34.

<sup>64</sup> Family Law Council, ‘Letter of Advice: Violence and Property Proceedings’, 14 August 2001.

<sup>65</sup> *Ibid*, 5.

<sup>66</sup> *Ibid*.

<sup>67</sup> Patricia Easteal, Catherine Warden and Lisa Young, ‘The Kennon “Factor”: Issues of Indeterminacy and Floodgates (Australia)’ (2014) 28(1) *Australian Journal of Family Law* 1, 26.

the impact of family violence on the parties' contributions, and to assist in identifying an outcome that ensures the provision of suitable housing for children and economic security of the parties.

84. As suggested by Easteal, Warden and Young, we suggest the legislation include examples of what amounts to the "impact" on contributions, similar to how s 4AB of the FLA provides examples of what may constitute exposure of a child to violence.<sup>68</sup> For example, injuries sustained as a result of the violence, impact on earning capacity, impact on ability to care for children, impacts as a result of denying financial autonomy, etc.

**Recommendation:**

7. Amend s 79 and s 90SM of the FLA to insert a new subsection which directs the court to take into account the impact of family violence on the contributions of both parties, including the negative contributions by the perpetrator.
8. Section 79(4)(c) and s 90SM(4)(c) regarding the welfare of the family should be amended to include the addition (in italics): "the contribution made by a party to the marriage/relationship to the welfare of the family constituted by the parties to the marriage/relationship and any children of the marriage/relationship, including any contribution made in the capacity of homemaker or parent, *and the negative contribution caused by family violence perpetrated by a party to the marriage/relationship.*"
9. A further subsection could be included (in s 79/90SM or elsewhere in the FLA) to provide examples of what amounts to "impact" in relation to contributions.
10. Introduce a specific Objects section to identify the goal of the amendment, for example:
  - To recognise the impact of family violence on the parties' contributions; and
  - To assist in identifying an outcome that ensures the provision of suitable housing for dependent children and the economic security of the parties.

**Question 21: Should the impact of family violence instead be considered as a future needs factor? What would be the risks, benefits or issues associated with such an approach?**

85. We submit that the impact of family violence should be considered as a future needs factor in addition to considering its impact on contributions. See our response to Question 22 below.

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<sup>68</sup> Ibid 27.

**Question 22: Would it be appropriate for the impact of family violence to be considered as both a contribution factor and a future needs factor? What would be the risks, benefits or issues associated with such an approach?**

86. We submit that it is appropriate for the impact of family violence to be considered as both a contribution factor and a future needs factor. This is essential to ensuring that the parties and children of the relationship have economic and housing security.
87. *Kennon* only applies to the assessment of contribution under s 79 or s 90SM; this is the retrospective aspect of the enquiry in a property settlement case. However, if that is the only basis for an adjustment, it will not account for any ongoing impacts of violence on the victim-survivor.<sup>69</sup>
88. For example, a woman may have experienced assaults that limited her ability to earn an income and care for her children during the relationship (contributions) but that also will limit her ability to work in the future due to injuries (future needs).
89. Further, as stated by Easteal, Warden and young, broader consideration of violence allowed by referring directly to violence under both heads is preferable given the difficulty family law decision makers have historically, and repeatedly, shown in giving proper weight to the impacts of violence in the family.<sup>70</sup>
90. The financial consequences of family violence (for example, being unable to work due to an injury caused by an abusive partner) may be relevant under s 75(2)(a) (age and state of health) and/or (b) (income, property and financial resources and physical and mental capacity for appropriate gainful employment). It could also be considered under s 75(2)(o) (any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account).
91. However, family violence is not specifically identified by the legislation as a relevant consideration when the court makes adjustments for future needs under s 75(2) or s 90SF(3).
92. Again, inconsistent practices of legal professionals are likely to influence the extent to which the financial consequences of family violence, are taken into account in any property settlement.<sup>71</sup>
93. Amending the FLA to explicitly include the effect of family violence on the current and future circumstances of the victim-survivor requires practitioners and the court to turn their minds to the impact of violence in a prospective way. Further, legislative amendment will cause people to specifically turn their minds to the impact of family violence on other factors, such

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<sup>69</sup> Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates (Australia)' (2014) 28(1) *Australian Journal of Family Law* 1, 25.

<sup>70</sup> Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates (Australia)' (2014) 28(1) *Australian Journal of Family Law* 1, 26.

<sup>71</sup> Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Report, Women's Legal Service Victoria, 2015) 43.

as the impact family violence has had on a victim-survivor's ability to parent their children in the future.

**Recommendation:**

11. Amend s 75(2) and s 90SF(3) of the FLA to insert a new subsection which directs the court to take into account the extent to which the immediate or future circumstances of either party have been affected by family violence perpetrated by a party to the relationship.

**Question 23: Should family violence be accounted for in spousal maintenance applications? If so, how?**

94. Section 72 of the FLA states that a party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, if that other party is unable to support herself or himself adequately, whether:
  - 94.1 by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
  - 94.2 by reason of age or physical or mental incapacity for appropriate gainful employment; or
  - 94.3 for any other adequate reason;having regard to any relevant matter referred to in subsection 75(2).
95. As submitted in the previous section, family violence usually has ongoing impacts, including on the victim-survivor's health and ability to maintain gainful employment.
96. We submit that family violence should be accounted for in spousal maintenance applications for the same reasons as set out in our response to Question 22 above.
97. Section 72 of the FLA, which sets out when a party to a marriage is liable to maintain the other party, requires the court to have regard to any relevant matter referred to in s 75(2). We have already submitted above that s 75(2) should be amended to include a new subsection which directs the court to take into account the extent to which the immediate and future circumstances of either party have been affected by family violence perpetrated by a party to the relationship.

**Recommendation:**

12. Amend s 75(2) and s 90SF(3) of the FLA to insert a new subsection which directs the court to take into account the extent to which the immediate or future circumstances of either party have been affected by family violence perpetrated by a party to the relationship in spousal maintenance applications.

If you would like to discuss any aspect of this submission, please contact Rishika Pai, Senior Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

**Women's Legal Service NSW**

**Philippa Davis**  
**Principal Solicitor**