Law Council
OF AUSTRALIA

A new decision-making framework for property matters in family law

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges that this submission has been primarily prepared by its Family Law Section.

The Family Law Section is the largest of the Law Council's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2,400 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The current members of the Family Law Section Executive are:

- Di Simpson (Chair)
- Jason Walker (Deputy Chair)
- Nicola Watts (Treasurer)
- Paul Doolan (Immediate Past Chair)
- Jamie Burreket
- Alison Burt
- Jasmine Evans
- Greg Howe
- Michael Kearney SC
- Trevor McKenna
- Aditi Srinivas
- Sydney William QC

Law Council Constituent Bodies

The Law Council is grateful to the following Constituent bodies for their assistance with the preparation of this submission:

- Law Society of NSW;
- Queensland Law Society;
- Law Society of South Australia;
- Law Society of Tasmania;
- ACT Law Society; and
- Family Law Bar Association of the Victorian Bar

Introduction

1. The Law Council of Australia and its Family Law Section welcome the opportunity to contribute to public submissions on approaches for simplifying the property provisions in the *Family Law Act 1975* (Cth) (**the Act**).

2. The Consultation Paper poses 26 discussion questions, that are grouped into seven different headings, and in accordance with the request from the Attorney-General's Department (**AGD**) this response has addressed, where applicable, the questions posed.

3. In this response reference will be made to section 79 and section 75 of the Act without repeating the analogous provisions in section 90SM and section 90SF.

Prior submissions and responses

4. The Law Council of Australia and its Family Law Section note that it has previously provided a series of detailed written submissions to a number of bodies which were intrinsically linked to the questions the subject of current discussion. These include:

   (a) submissions made 7 May 2018 by the Law Council in response to the Issues Paper published by the Australian Law Reform Commission enquiry into the Family Law System;

   (b) submissions made on 16 November 2018 by the Law Council in response to the Discussion Paper published by the Australian Law Reform Commission as part of its enquiry into the Family Law System;

   (c) a letter sent in July 2019 by the Law Council to the AGD responding, on a preliminary basis, to each of the 60 recommendations made in the final report by the Australian Law Reform Commission into the Family Law System; and

   (d) submissions to the ongoing Joint Select Committee into the Australian Family Law System.

5. For ease of reference, and to avoid duplication, attached to these submissions at Attachment A is a document in tabular form that collates those prior major submissions by the Law Council, and which address five major topics being:

   (a) any potential codification of *Stanford v Stanford* [2012] HCA 52 (***Stanford***);

   (b) spouse maintenance and child support reform;

   (c) debt;

   (d) gifts, windfalls, inheritance, and dowry; and

   (e) any potential codification of the principles emerging from the decision of the Full Court of the Family Court of Australia in *Kennon v Kennon*[1] (***Kennon***).

[1] (1997) FLC 92-757.

Revised framework - Questions 1 to 7

6. The Law Council supports reforms that would more clearly articulate the decision-making steps to be followed in determining family law property matters, subject to the following important caveats:

    (a) that any reform does not move away from the discretionary system of decision making in property matters;

    (b) that there is no introduction of either presumptive starting points for assessment of contributions, nor the introduction of any semblance of a community of property regime; and

    (c) that any reworking of the statutory provisions does not give rise to any change in the developed and established jurisprudence in the area.

7. The Law Council agrees with the Consultation Paper that since *Stanford* there has been greater uncertainty as to the decision-making process to alter property between separating parties. This uncertainty arises in a number of ways including:

    (a) whether, and in what circumstances, the court should decline to make any order changing the parties' property interests given the breadth of the discretion in subsection 79(2) because of the absence of any guidance in the legislation as to what constitutes a 'just and equitable' circumstance;

    (b) what power exists to grant interim relief while the subsection 79(2) issues remain undetermined; and

    (c) how subsection 79(2) relates to the enquiry in subsection 79(4) including the overarching obligation in section 79 to grant relief that is 'appropriate'.

8. The Law Council Constituent Bodies have reported that in matters where a *Stanford*-based argument is run by one party, it can be difficult to assess the merits at a preliminary stage in proceedings, a great deal of extraneous evidence is often brought (which is otherwise outside the scope of matters to be considered under section 79), and the argument may often be made to avoid otherwise proper and necessary interim financial relief. This can detract from the main issues, create an unnecessary hurdle to an early resolution and add unnecessary cost and delay to the proceedings. However, the Law Council notes that the challenges that arise from *Stanford* must be put in perspective. It is an issue that arises in a small number of cases and anecdotally by the likely greater harm in unsettling 45 years of well-considered jurisprudence about how the remainder of section 79 operates.

9. This potential for miscomprehension or misunderstanding of the existing statutory financial provisions of the Act and of the effect of the High Court decision in *Stanford*, is with respect apparent even within the Consultation Paper issued by the AGD.

10. On pages 8 and 9 of the Consultation Paper, a proposed six step approach is set out, however it appears to confuse the order in which steps one and two are approached by the Courts. Rather than what appears in the Consultation Paper, the first step, as noted by the High Court in *Stanford*, involves the Court ascertaining the existing legal and equitable rights and interests and liabilities of the parties. The second step requires that the Court shall not, unless it is found to be just and equitable to do so, alter those respective interests in property.

11. There are references in the Consultation Paper to there being a *just and equitable* requirement. The statutory requirement of subsection 79(2) of the Act is that an order not be made altering interests in property unless it is just and equitable to do so. However, the language of the property alteration provisions (subsection 79(1)) requires that any order made be *appropriate* not that the order be *just and equitable*.

Questions 1 to 4

Procedural steps

12. Questions 1-3 and the first part of question 4 raise statutory framework considerations as to how applications for property alteration should be addressed and the process to be followed. The property settlement process under the Act was the subject of extensive analysis in a 2013 paper published in seminars presented by the Family Law Section and entitled 'Property Settlement after *Stanford*'. Questions 1-3 cover the same areas, and the paper sets forward (at paragraphs 30-31 of Attachment B) an approach to be adopted in property cases under the Act.

13. Currently there are essentially two inquiries. The first is the jurisdictional requirement of subsection 79(2) of the Act and the second is consideration of what order that should be made if it is found that it is just and equitable to make an order. For various reasons there is confusion and hence support for clearly articulating the steps to be followed in determining family law property matters.

14. If the jurisdictional requirement of subsection 79(2) of the Act is necessary and retained, then it should be made obvious and what is relevant to that inquiry should be specified. For example, if the matters in subsection 79(4) can and should be taken into account, then this should be specified. Subsection 79(2) would then have to be amended to say that it ought not be presumed that an alteration will be made, but in determining whether it is just and equitable to do so, regard must be had to the matters in subsection 79(4).

15. If once the jurisdictional requirement of subsection 79(2) of the Act is satisfied and there is another/second inquiry then again it should be made obvious and also what is relevant to the second inquiry should be specified. As the plurality in *Stanford* observed at [42] if it is just and equitable that the court make a property settlement order then what order, if any, should then be made is determined by applying subsection 79(4).

16. In summary, if there are two inquiries then the relevant statutory considerations for each inquiry should be specified. As well, if there are two inquiries then it should be made clear that the finding in relation to first inquiry can be made at any time including after the finding(s) as to the second inquiry.

17. Next, if the requirement of two inquiries is retained, then it has to be reconciled with subsection 79(1) unless (1) is deleted. For present purposes subsection 79(1) provides that the court may make such order as it considers appropriate altering the interests of the parties in the property of the parties or either of them. Currently the term 'just and equitable' is the outcome of the first inquiry. If the outcome of the second inquiry is that the order to be made that reflects the finding as to entitlement is also to be just and equitable then that should be made clear.

18. Subsection 79(1) then becomes otiose.

19. It may be that the outcome of the second inquiry or what is identified as step 6 in the discussion paper is other than just and equitable and it could be fair and just which is a term used by the plurality in *Stanford* at [43]. Removing what the Consultation Paper refers to as step 6 would avoid confusion.

20. After identifying and valuing the property of the parties or either of them and their resources, there should in summary essentially just be 2 inquiries:

    (a) subsection 79(2) with specifics as to considerations; and then

    (b) subsection 79(4).

21. This approach would permit the development of jurisprudence around the 'just and equitable' enquiry in subsection 79(2) without threat to well established jurisprudence around subsection 79(4).

Use of examples

22. It is noted that the examples provided in the six-stage process would not necessarily be included in the legislation. The Law Society of New South Wales (**LSNSW**) suggests that they should not be included, as they could be construed as limiting or misleading, but rather, each stage of the process should be described in general terms. For example, the inclusion of examples in steps 3(a) to 3(e) may imply that the examples given should be given equal weight, whereas the correct approach is to apply a discretion as to the weight given to each factor, according to the circumstances. In 3(b), instead of 'direct and indirect financial contributions', LSNSW states that it may be more helpful to set out the relevant types of financial contributions such as initial contributions (brought into the relationship), contributions generated during the relationship, and contributions received from external sources. If examples are considered necessary, LSNSW is of the view that they would more appropriately be placed in supporting material or in a legislative Note.

23. The Law Council's Family Law Section offers further caution to the use of examples in subsection 79(4) because of the risk that poses in interrupting the line of well settled jurisprudence around the operation of subsection 79(4). Any change to language poses a risk and any supplementing with additional language also poses a risk.

Dissenting view of the Family Law Bar Association of the Victorian Bar

24. The Family Law Bar Association of the Victorian Bar has taken a dissenting view to that of all of the other constituent bodies, the Family Law Section and the Consultation Paper's own proposed scope. The Victorian Bar proposes a rebuttable presumption being introduced into the legislation which allocates to each party equal contribution unless a party is able to satisfy a court that a different outcome is justified on the evidence in that particular case. The Law Council understands that this was considered and rejected by the Government.

25. The Family Law Bar Association of the Victorian Bar has noted that in practice, where the marriage is of significant duration and where there are children or where all of the property is acquired during the relationship, the question of contributions rarely poses a problem for parties or the courts. In its view, such contributions are found to be equal, but in litigation, in order to achieve such an obvious finding, it is necessary to marshal evidence in support. This leads to lengthy affidavits in which the deponent's daily activities are dissected in minute detail and the opposing party's efforts are criticised and diminished. In contested hearings the court is left to trawl through this evidence and make a finding.

Alternative drafting approach

26. The Family Law Bar Association of the Victorian Bar has also adopted a dissenting view on the need for reform, suggesting that a redraft of relevant sections of the Act ought to

be made to allow for a clearer legislative pathway, which in its view would ultimately make subsection 79(2) redundant.

27. The proposed amendments to section 79 of the Act put forward by the Family Law Bar Association of the Victorian Bar is as follows (with amendments in red):

79(1) In property settlement proceedings commenced after the breakdown of the marriage, the court may make such order as it considers ~~appropriate~~ just and equitable:

(a) in the case of proceedings with respect to the property of the parties to the marriage or either of them — altering the interests of the parties to the marriage in the property; or

(b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage — altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including

(c) an order for a settlement of property in substitution for any interest in the property; and

(d) an order requiring:

(i) either or both of the parties to the marriage; or

(ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

79 (2) A party shall not be entitled to bring proceedings for an order under sub-section (1) before the breakdown of the marriage unless that party is able to show special circumstances to justify the commencement of the proceedings.

79(3) In considering the property in respect of which any order should be made the court shall consider:

(a) The identity of the property in which either party has a legal or equitable interest;

(b) The quantum of any liability which a party asserts ought to be taken into account or which should be taken into account in the interest of justice;

(c) The value to be attributed to the property identified in subsection (a) or any liability identified in subsection (b);

(d) Whether it is just and equitable to disregard any property identified in subsection (a) or any liability identified in subsection (b) for the purpose of making a property settlement order;

(e) Which of the following approaches to division of the parties' assets should be adopted:

(i) Creating a consolidated net pool of assets of both parties and dividing that pool on a percentage basis; or

(ii) Approaching the matter by an assessment and division on an asset-by-asset basis; or

(iii) Making an order for the payment of a fixed sum of in lieu of any in specie transfer of property; or;

(iv) An adjustment on any other, and what, basis.

79 (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall proceed on the presumption that contributions made during the marriage are taken to be equal unless a party rebuts such presumption, in which case the court shall take into account and give appropriate weight to the following matters:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned

property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage, any children of the marriage and any direct lineal relatives of each party, including any contribution made in the capacity of homemaker or parent; and

Which together shall be described as "Retrospective Factors". The Court shall allocate a provisional division or allocation of property after considering the Retrospective Factors.

(d) Thereafter, the court shall consider the following Prospective Factors:

- *(i) the age and state of health of each of the parties; and*
- *(ii) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and*
- *(iii) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years or having attained that age is in need of care; and*
- *(iv) commitments of each of the parties that are necessary to enable the party to support:*
  - *(A) himself or herself; and*
  - *(B) a child or another person that the party has a duty to maintain; and*
- *(v) the responsibilities of either party to support any other person; and*
- *(vi) the eligibility of either party for a pension, allowance or benefit under:*
  - *(A) any law of the Commonwealth, of a State or Territory or of another country; or*
  - *(B) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;*

  and the rate of any such pension, allowance or benefit being paid to either party; and
- *(vii) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and*
- *(viii) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and*
- *(ix) the effect on either party to the marriage of domestic violence; and*
- *(x) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and*
- *(xi) the need to protect a party who wishes to continue that party's role as a parent; and*
- *(xii) if either party is cohabiting with another person — the financial circumstances relating to the cohabitation or any change to those circumstances which may occur in the future; and*
- *(xiii) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:*
  - *(A) a party to the marriage; or*
  - *(B) a person who is a party to a de facto relationship with a party to the marriage; or*

(C) the property of a person covered by subparagraph (A) and of a person covered by subparagraph (B), or of either of them; or

(D) vested bankruptcy property in relation to a person covered by subparagraph (A) or (B); and

(xiv) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and

(xv) compliance or otherwise with any child support assessment by a party who is assessed as a payer of child support;

(xvi) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(xvii) the terms of any financial agreement that is binding on the parties to the marriage; and

(xviii) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage; and

(xix) the effect of any proposed order upon the earning capacity of either party to the marriage; and

(xx) any other order made under this Act affecting a party to the marriage or a child of the marriage.

And after considering the Prospective Factors, the court shall make or decline to make such further adjustment in the division of property as is just, to attain the objective contained in subsection (1) of this section.

28. Family Law Bar Association of the Victorian Bar suggests that it is more appropriate that the step of identifying and valuing be expanded and given appropriate prominence, under the following process:

    (a) Firstly, the court should identify the property of each party.

    (b) It should resolve any dispute about ownership, such as determining whether an interest in property exists or not.

    (c) it should then resolve any valuation issues.

    (d) It should determine whether any property or any liability is to be disregarded for the purpose of making an order under subsection 79(1).

    (e) It should consider and explain whether it will be determining the matter by;

        (i) creating a consolidated pool of assets of both parties and dividing that pool on a percentage basis; or

        (ii) approaching the matter by an assessment and division on an asset-by-asset basis; or

        (iii) making an order for the payment of a fixed sum of in lieu of any in specie transfer of property; or

        (iv) an adjustment on any other, and what, basis.

Question 4

29. As to second part of question 4 the Law Council considers that contributions should be considered before consideration of what the discussion paper has described as the future needs of the parties, which is a continuation of the existing approach.

30. The Law Council notes that the matters of contribution specified in paragraphs 79(4)(a), (b), (c) and (g) of Act are concerned with the accumulation of the assets and contributions to the welfare of the family. It is a retrospective inquiry into how the parties acquired the assets they have and the role undertaken by each party during the relationship. The statutory considerations in paragraphs 79(4)(d),(e), and (f) and (g) including the statutory considerations in subsection 75(2), so far as they are relevant, are concerned with the economic consequences of the breakdown of the relationship, which includes what is described in the Consultation Paper at page 8 as current and future needs. The statutory considerations in paragraphs 79(4)(d), (e), (f) and (g), including the statutory considerations in subsection 75(2), so far as they are relevant, were referred to in *Hickey v Hickey* [2003] FLC 93-143 as the other factors. It is obviously necessary to know what the contribution-based entitlements are before consideration of the other factors.

Question 5

31. As to question 5 the Law Council recommends against any change to the existing list of contribution matters.

32. Subject to some redrafting of the matters currently in paragraphs 75(2)(j) and (k) of the Act the Law Council also recommends against any change to the existing future needs factors, other than in relation to family violence (addressed below).

33. There should also be some redrafting of paragraph 79(4)(g) and paragraph 75(2)(na). For example, the words is to provide, or might be liable to provide in the future be deleted from section 79(4)(g) and the words has provided be deleted from paragraph 75(2)(na).

34. It is noted that the LSNSW has formed the view that in relation to current and future needs (step 4 in the Consultation Paper), the criteria should include the provision for a standard of living that in all circumstances is reasonable (see paragraph 75(2)(g) of the Act) which would cover needs such as access to appropriate housing. The LSNSW considers this to be a critical factor which is not captured elsewhere.

35. Further, the ACT Law Society has suggested that the concept of contributions be broadened (perhaps in the notes to the relevant section of the Act) to include a proper recognition of the administration responsibilities of the family undertaken by a party. This may include activities such as booking and attending medical appointments, making school lunches, liaising with teachers, arranging extra-curricular activities. The Act Law Society is of the view that this addition is important as equality of time for children in a separated family does not automatically equate to equality of care, including non-physical form of care given to children.

Question 6

36. In a discretionary system, the Law Council considers that no particular contributions or future needs factors should be given primary consideration or additional statutory weight. The Law Council recommends against any proposition as stated in question 6 which would see a hierarchy of needs and/or contributions. In a discretionary system, it is an anathema to require specific quantification or allocation of additional weight or priority to particular factors over another.

Question 7

37. The Law Council is of the view that the Act cannot and should not attempt to provide any further clarity about, let alone quantification of, homemaker (and it is assumed necessarily also parental) contributions.

38. It is noted that the ACT Law Society has referred to the term 'homemaker' as being archaic and could be modified as 'domestic and administrative' responsibilities. The ACT Law Society holds concerns that the homemaking contribution is not given significant weight.

39. The Family Law Section again raises the need to balance drafting changes centred around language and the risk to established jurisprudence.

Spousal maintenance - Questions 8 to 11

Question 8

40. As to question 8 (and as was previously submitted by the Law Council to the Australian Law Reform Commission: see Attachment A), the spousal maintenance provisions should be de-linked from the property division framework and be stand-alone.

41. The Law Council does not agree with the suggested criteria on pages 8 and 9 of the Consultation Paper and recommends that the factors for consideration in spousal maintenance cases should remain unaltered, save for there being some redrafting (see above), and also reference added to family violence (see further below).

Question 9

42. The Law Council believes that the future needs factors for consideration in property division cases and spousal maintenance cases should remain unaltered, save for there being some redrafting (see above), and also reference added to family violence (see further below).

43. The Queensland Law Society (**QLS**) notes that there are some subsection 75(2) factors that may be considered more relevant to spousal maintenance than to property settlement. However, this does not necessarily mean that the factors will never be relevant to both, and the QLS therefore agrees that the same factors apply to both property division and spousal maintenance.

Question 10

44. The currently low number of applications for spousal maintenance is likely to have a number of causes that include:

    (a) the Australian family law system operates markedly differently to those in number of other common-law jurisdictions in that the emphasis in Australia has largely been on a 'clean break' whereby larger capital funds are often received by a spouse with the effect of removing the need for ongoing support and provision by means of spousal maintenance;

    (b) the delays in obtaining interim hearing dates in the Family Court and Federal Circuit Court, largely caused by chronic underfunding and a failure to replace judicial officers in a timely fashion upon retirement from the Bench; and

(c) the cost and level of work involved in bringing a spousal maintenance application can often be self-defeating of the application itself.

45. The approach taken in Australia differs markedly from the approach often seen in English case law where there are lower capital awards by way of property settlement or sometimes life estates in terms of a home, but longer term and larger spousal maintenance provisions. As well, unlike in some other jurisdictions, spouse maintenance awards in Australia are not tax deductible as to payments nor taxable as to receipt.

46. Finally, the QLS further suggests that spousal maintenance orders do not provide the absolute finality and separation from a former partner sought by many litigants following legal separation. Any issues around compliance with a spousal maintenance order would need to be pursued via legal avenues including contravention application, which would involve considerable financial and emotional cost. The QLS considers that this may also act as a deterrent for some parties in seeking spousal maintenance orders.

Question 11

47. Additional guidance material on spousal maintenance orders would be helpful to self-represented litigants. As it stands, there is very little publicly available material to guide parties in their application for spousal maintenance. The Law Council would welcome the development of these materials. In particular, guidance should be provided in relation to the particular evidence that should be presented, the required form of this evidence, and the court documents and forms which must be completed.

48. This type of guidance would be helpful as long as the material is clearly distinguished from the law itself.

Child Support - Questions 12 to 14

Question 12

49. The Law Council recommends that the Act retain child support as an expressed contribution factor (paragraph 79(4)(g)) and future needs factor (paragraph 75(2)(na)) as set out above.

50. There are, however, alternative views on this issue including from the Law Society of South Australia, who has formed the view that the Act should not retain child support as an express contribution and/or needs factors in the proposed codified decision-making steps, noting the entirely different jurisprudential considerations, namely the financial division of matrimonial property versus the obligations of parents to financially support their children in accordance with their circumstances.

Question 13

51. The Law Council recommends against the proposition that the Act be amended to require a Court to specify the amount of child support taken into account (if any) when making a property adjustment order. Such a process is frankly unachievable, and in a discretionary system Judges must necessarily operate based on assumptions arising from existing childcare arrangements as to levels of child support that might be provided having regard to the financial circumstances of the parties and their children.

52. Requiring Judges to somehow quantify that amount may prove factually and legally impossible and add enormously to the costs of parties in litigation by requiring them to

produce schedules and/or actuarial evidence of costs for multiple children literally over decades and based on a series of hypothetical assumptions about schooling, costs of care and the like. The Law Council has concerns as to how that evidence could be amassed and what use would be made of it, whether it could potentially thereafter lead to applications under section 79A to set aside property orders on the basis of a miscarriage of justice if those figures proved to be incorrect (whether due to error or because of changes of circumstances), and as to what influence they would thereafter have on assessments or decisions about child support.

Debt - Questions 15 to 17

Question 15

53. The Law Council's Family Law Section recommends against referencing debt as a separate contribution factor and is unclear as to how this can be categorised as a contribution factor in any event.

54. It is noted that the LSNSW has formed the view that the inclusion at step 3(d) of 'debts incurred before, during and after the relationship' may be appropriate, however could more clearly be classified under 'direct and indirect financial contributions' step at 3(b). The LSNSW states that this would reflect the current judicial approach of treating debt as a type of 'negative contribution'.[2]

55. The LSNSW further notes that consideration could be given to including in step 3(b) any financial losses that were incurred during or after the relationship, such as investment losses or property that was 'dissipated' by one party. LSNSW considers that the decision in *Bevan v Bevan* [2014] FamCAFC 19 would tend to support regarding such items as 'negative contributions' if they directly reduced the parties' property interests.

Question 16

56. The Law Council's Family Law Section does not regard the proposed step 5(c) (set out on page 9 of the Consultation Paper) as a useful process and refers instead to the steps as suggested above. In any event, it is already dealt with in paragraph 75(2)(ha).

57. It is noted that the LSNSW has suggested removing this item altogether, stating that while in practice, the recoverability of a debt may have a bearing on the debtor's financial position, this is beyond the scope of the family law courts to consider. The LSNSW is of the view that recovery of a debt is a matter for the creditor to pursue through other means, including through the bankruptcy courts.

Question 17

58. The Law Council has no further comments about how debt should be provided for in an amended decision-making framework.

[2] See for example, *Watson v Ling* (2013) FamCA 57; *Bevan v Bevan* [2014] FamCAFC 19.

Gifts/windfalls/inheritances/dowry - Questions 18 to 19

Question 18

59. The Law Council queries what is meant by the reference to common law principles governing the treatment of gifts, windfalls and inheritances. The Law Council is not aware of any such common law principles.

60. It is not clear from the Consultation Paper whether the AGD is suggesting that there is an existing common law principle that should be enshrined in the Act, that says that gifts, windfalls and inheritances are absolutely the property of the party receiving them and therefore cannot be the subject of alteration of property interests. That is, that gifts, windfalls and inheritances should somehow be excluded from the definition of property under the Act.

61. It is noted that the term windfalls is not defined in the Consultation Paper, so the Law Council is unable to comment further upon it.

Question 19

62. The Law Council cautions that any specific legal principles relating to dowry would be difficult to implement, as dowry is a cultural practice that differs from culture to culture.

63. The Senate Legal and Constitutional Affairs References Committee's 2018 inquiry *The Practice of Dowry and the Incidence of Dowry Abuse in Australia* referred to 'inconsistent approaches' adopted in dowry matters, however, it is noted that inconsistency was largely observed in the decisions of state courts relating to dowry abuse, not in family law property matters.

64. If family violence is incorporated as a factor relevant in assessing contributions and as a future needs factors, this would be sufficient to address concerns about dowry abuse in property disputes, providing the definition of 'family violence' which applies to these provisions includes economic abuse in a manner that captures dowry abuse.

Family violence - Questions 20 to 24

Questions 20-22

65. The Law Council repeats the recommendation made in its letter of July 2019 to the AGD when responding to recommendation 19 of the Australian Law Reform Commission enquiry (see Attachment A).

66. The Law Council submits that the question of family violence is best addressed by legislative amendment to what is presently subsection 75(2) by the insertion of an additional factor, namely, the effect of family violence on a party to [the marriage/the relationship] or a child [of the marriage/the relationship/the household]. By including the amendment in subsection 75(2), the issue of family violence would then apply in respect of both property and spouse maintenance cases (but note it is agreed that these provisions be split out to property specifically and spouse maintenance specifically). In this way, it is not listed as a 'contributions' factor, and there would not be therefore an additional requirement in the statute or interpretation of the statute, that requires a causal link between the contribution being made more arduous and the conduct in question.

67. The Law Council has difficulties with the concept that family violence could be considered as both a contributions factor and a future needs factor, as that may lead to inappropriate doubling up of the factor.

68. However, it is noted that several of the Law Council's Constituent Bodies have indicated support for including the impact of family violence as a consideration both in the assessment of contributions, as well as future needs factors. In providing this view, QLS suggests that including family violence as a relevant consideration within the Act at both the contributions and future needs stage of a property division would ameliorate some of the difficulties associated with applying *Kennon*, and will also appropriately recognise the harmful and often long-term impacts of family violence on survivors.

69. Noting the challenges associated with including family violence as a contribution and future needs factor within the Act, the QLS have advised that implementation of any proposed reforms should be supported by increased resourcing to the courts as well as to legal assistance sector providers, including Legal Aid Commissions and Community Legal Centres.

70. QLS also strongly supports increased and ongoing education for registrars and judicial officers on domestic and family violence, stating that this would support the appropriate application of any new provisions which require the court to consider the impact of family violence in property matters. This would include education on recognising family violence, the dynamics of family violence and how control may manifest, and the impact of additional vulnerabilities, disadvantage and trauma.

Question 23

71. The Law Council recommends that family violence should be a factor included in the spousal maintenance factors and should be part of the separate list of spousal maintenance factors.

72. The Law Council raises for consideration the potential effect on judicial resources, legal aid funding, and the cross-examination of vulnerable victims' scheme, that may be occasioned by the inclusion of family violence as a statutorily prescribed factor in financial cases. It is essential that the Courts, legal aid services and support services are properly funded, to ensure an ability to deal with the likely increase in the level of cases that therefore come before the Courts in financial matters and where family violence is a factor that the statute mandates must be taken into account.

73. The Law Council also believes it important that the government identify the philosophical intention behind the inclusion of family violence as a statutory factor. Are these provisions intended to be penal in nature or to be compensatory in nature or to be a deterrent in nature?

74. Further, will it be mandatory in financial cases to give evidence of any issue of family violence that occurred during the course of the relationship or after separation, or will the parties have a discretion as to whether or not they give that evidence?

75. Another matter that requires consideration is as to what will constitute family violence for the purposes of financial provisions of the Act. Section 4AB of the Act currently provides a definition, and examples, of family violence for the purposes of the Act. The Consultation Paper is silent on this point. The Law Council seeks clarification on whether the existing broad definition of family violence as utilised for the purposes of parenting provisions in the Act would be adopted.

Attachment A: Summary of Family Law Section and Law Council of Australia positions on key issues*

*The summary is comprised of excerpts from the documents referenced below and are provided for reference only. These excerpts should be read in the fuller context of where they appear in the relevant document, noting that some have been summarised or truncated for concision.

Codification of Stanford – the 4 step process for determining alteration of property interests (discussion questions 1-7)

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205. The LCA submits that there is no empirical data, research or systemic case examples that would lend support to the view that the discretionary system for the alteration of property interests should be changed. To the contrary, that discretionary system of property adjustment has, through the accumulation of over 40 years of case law, developed a system of precedent cases that guide the exercise of the discretion in ways which are widely understood and followed. 206. The broad policy objective of a property adjustment system ought be to afford the community a fair and known system, which promotes the resolution of issues without the need for an adjudicated determination. The present system provides a sufficiently broad discretion to properly address the individual needs of separating couples,	The proposal to clarify the pathway for the making of decisions in the alteration of property interests is supported, however it is clearly subject to the drafting of the legislative provisions. For example, if the proposal is intended to signify an intent to codify the provisions in Stanford, what precisely are the 'steps' that will be statutorily prescribed by the legislature? The decision of the High Court in Stanford has been the subject of much academic debate and differing interpretations as to the pathway it illuminates. It is with respect not clear from the proposal or the accompanying text in the Discussion Paper, as to how such a	6.12 Thus, the starting point under Australian law is that legal and equitable interests prevail on separation unless the court is satisfied that, in all the circumstances, justice and equity require an adjustment. 6.13 In summary, in considering an application to alter property interests, the court must: • identify the existing legal and equitable interests of the parties in the property; • consider whether it would be just and equitable to make an order altering those interests; and • if it is just and equitable to do so, consider what orders should be made, taking into account the factors listed in s 79(4), which incorporate the 'future needs' factors set out in s 75(2).	In the LCA Response to the Discussion Paper [#3-10] FLS supported clarification of the ss79 / 90SM legislative pathway subject however to the wording adopted and noting the impact it may have on the jurisprudence developed to date in Stanford. Those concerns remain. In addition, thereto, consideration now needs to be given to what impact for example Recommendations 12, 13 and 16 (if they were to be adopted and implemented) would have on how such a pathway should be described. Query whether the 'pathway' is intended to alter section 79 or simply articulate that which is said to be required in determining that which is 'just and equitable'. If the former, the ALRC Report gives no real consideration to the manner in which the law is intended to be altered and the consequences of the same; if the latter, there is no attempt to formulate the 'steps' in order to properly assess whether

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whilst affording sufficient certainty to those who negotiate in its shadow so as to avoid the need for a Court determination in the vast majority of cases.	proposal would be implemented or what exactly it would do.[3]	6.14 Section 79(4) of the Family Law Act includes seven key factors to be considered including: • the financial contributions to the acquisition, conservation or improvement of property; • the non financial contributions to the acquisition, conservation or improvement of property; • the contributions to the welfare of the family including any contribution made in the capacity of homemaker or parent; • the effect of the proposed order on any earning capacity of the parties; • the relevant matters contained in section 75(2) with respect to the future needs of the parties; • any other order under the Act affecting a party to the marriage or a child of the marriage; and • any child support assessment. 6.15 Section 75(2) sets out a list of factors to be considered in respect of the future needs of the parties including: • the age and state of health of the parties;	there may be any impact upon the former, including by fettering discretion in any way. **Re recommendation 12: the Family Law Act 1975 (Cth) should be amended to include a presumption of equality of contributions during the relationship.** As the ALRC Report noted [at para 7.25] the LCA Response to the Issues Paper [at Question 17] adamantly opposed a departure away from a discretionary based property alteration. That position remains. The LCA response to the Discussion Paper in fact assumed the continuation of a discretionary based approach to property alteration as consideration of the abandonment of that was not foreshadowed in the ALRC Discussion Paper. The FLS acknowledges the dissenting report of Commissioner Sinclair and the problems it highlights [at para 7.97 to 7.100 of the ALRC Report]. In addition the following questions arise in respect of a presumption of equality of contributions 'during the relationship' when read in conjunction with Recommendation 13 as to the Balance Sheet being at date of separation and Recommendation 16 about an equal split of superannuation accumulated during a relationship: 1. does that mean that in each case there would need to be drawn up 5

[3] 18.

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		• income and financial resources; • care of a child; • duration of the marriage; • provision for a standard of living that in all the circumstances is reasonable; • parental responsibilities; and • any other fact or circumstance that the interests of justice require to be taken into account. 6.16 The complexity of these provisions, particularly the lengthy list of factors with no clear hierarchy, does not assist readers to understand the process that a court would use to arrive at a just and equitable division of property. In 2014, the Productivity Commission noted that the provisions, and associated court processes, were a particular barrier to access to justice and considered that it was timely for the Australian Government to consider whether the property provisions in the Family Law Act should be clarified to make it easier and cheaper for people to work out their entitlements and come to fair agreements about their division property.[23] The ALRC concurs… **Recommendation 11** The Family Law Act 1975 (Cth) should be amended to: y specify the steps that a court will take when considering whether to make	pools of property with different contributions assessments to each ie: (i) net property excluding super at date of cohabitation; (ii) net property excluding super accumulated during the relationship and valued at date of separation; (iii) super accumulated during the relationship; (iv) net property excluding super accumulated post the relationship ending and valued at the date of trial / settlement;

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		an order to alter the interests of the parties to the relationship in any property; and y simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property. **Recommendation 12** The Family Law Act 1975 (Cth) should be amended to include a presumption of equality of contributions during the relationship. 7.6 In line with recommendations for legislative simplification in Chapter 14, the ALRC recommends that core provisions of Pt VIII be redrafted to clearly set out the analytical steps involved in property settlement proceedings.2 7.7 The recommendation retains judicial discretion, recognising the importance of providing judicial officers with the scope to order a division of property that is just and equitable in each individual case. 7.8 As discussed in relation to Recommendation 18 below, the ALRC recommends separating the provisions relating to property settlement from those relating to spousal maintenance. The revised list of need factors with respect to property settlement should include: • the caring responsibilities for any children of the relationship;	(v) super accumulated post the relationship ending? 2. What does "accumulated" mean in respect of superannuation? 3. Does the assessment by a court of an adjustment for future needs factors have to be carried out: (i) in respect of each of the 5 separate pools identified above; or (ii) only against the pool as a whole but if so at what date and does it exclude increases / decreases in value of assets post separation, and does it exclude superannuation accumulated prior to the start of a relationship?

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		• the income earning capacity of each of the parties; • the age and state of health of the parties; and • the effect of any adjustment for need on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant. 7.9 The presumption of equality of contributions could be displaced when there is evidence that a party has: • wasted assets; • deliberately or unreasonably damaged property; • accumulated liabilities for his or her own benefit; • received compensation awards for pain and suffering or economic loss which have not been dissipated during the relationship and are otherwise traceable; or • received inheritances and gifts. 7.10 The recommended approach to property division is to: 1. ascertain the existing legal and equitable rights and interests, and liabilities, of the parties in their property;	4. The exception expressed in reference to Recommendation 13 (the date of separation being the relevant date to value the parties' interests in their property/liabilities – unless the interests of justice require otherwise) is not expressed in reference to the other recommendations (Recommendation 12, presumption of equality of contributions; Recommendation 16, presumption that the value of superannuation accumulated during a relationship should be split equally). In circumstances where injustice may readily occur if the other recommendations were applied, absent such an exception, this is a curious anomaly. 5. If, as foreshadowed by Commissioner Sinclair in his dissenting view, at paragraph 7.98, the outcome will be "a system of presumptions with exceptions" the FLS agrees with Commissioner Sinclair's reservations that such will create greater complexity and

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		2. presume equality of contributions unless a statutory exception applies; and 3. determine what adjustment should be made in favour of either party having regard to any matter that is relevant to the particular circumstances of the parties, including: a. the caring responsibilities for any children of the relationship; b. the income earning capacity of each of the parties; c. the age and state of health of the parties; and d. the effect of any adjustment on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.	may increase matters about which litigation is likely. It may also, in the end, bear little difference to the current broad based discretionary system. Consideration of a few possible scenarios readily illustrates the challenges of the reforms being contemplated in the ALRC Report: 1. What of contributions in short relationships? 2. What of contributions where one party is a high income earner and the other party is not working outside the home and there are no children? 3. In the above scenario, what impact does the person's higher income have on their superannuation interests in the period of the relationship in circumstances where the income earning capacity was created prior to the relationship commencing?

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			4. Given the present delays in matters being concluded in the courts, valuing property at the time of separation is likely to result in injustice between the parties, without consideration of movements to the value of the property in the post-separation period. The exception "unless the interests of justice requires otherwise" is likely to be urged and relied upon in most matters (and may hardly be considered "exceptional" in that event). 5. In paragraph 7.9 of the ALRC Report, it is suggested that the presumption of equality of contribution could be displaced where there is evidence of certain matters (including waste, deliberate damage to property, receipt of inheritances and gifts, receipt of compensation payments) but it does not address more fundamental considerations including significant income disparity where the parties do not have children or how property

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			owned prior to the relationship is to be treated (especially if it is merged with other property during the relationship). What, in any event, is intended to be the consequence of an outcome of equality of contributions? Is it thereby intended that there will be a corresponding equality of entitlement to the identified interests and, as the above points touch upon, what interests? FLS notes that the ESPR presumption has been misunderstood and misapplied, and has a real concern that a "presumption" of equality of contributions will be misunderstood as equal split of assets (ie 50/50) and also lead to consideration of future needs adjustments being ignored or overlooked which will most likely harm women with young children.

Spouse maintenance / child support reform (discussion questions 8-14)

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213. Those who promote either the imposition of a community property regime or the implementation of presumptions of equal contribution (or something similar), also tend to overlook the part played by spouse maintenance/alimony in foreign systems of that nature. Because of the potential for injustice in capital distribution in assumptive and prescriptive systems, spouse maintenance necessarily plays a far more significant role in those jurisdictions. Whilst this is not a factor that can be the subject of comprehensive documentation in what is merely a response to an Issues Paper (because of the complexity of the area and its consequences), consideration must be given to an enormous range of consequences that arise were there to be an increased role for spouse maintenance in an Australian family law system. These include but are not limited to: • the fact that spouse maintenance in many such foreign jurisdictions is tax deductible to the payer, and	Refers to para [234] of Issues Paper submission.	Separating property division from spousal maintenance **Recommendation 18** The *Family Law Act 1975* (Cth) should be amended so that: • the spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and • access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications.	**Re recommendation 18:** This accords with the LCA Response to the Discussion Paper and the LCA Response to the Issues Paper.

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also taxable income in the hands of the recipient; • the cost of housing in Australia compared to many other jurisdictions, which makes the need for a greater share of capital more important than endeavouring to obtain and enforce ongoing spouse maintenance; • the complexity of the spouse maintenance formulas required in some North American jurisdictions; • the intention manifested by s 81 of the Act, whereby the Parliament has directed the courts to as far as possible sever the economic relationship between the parties, a proposition to which spouse maintenance on a long-term basis runs counter; • the costs to the community of additional spouse maintenance hearings, applications to vary spouse maintenance, and applications for lump sum spouse maintenance; • the difficulties of enforcing spouse maintenance orders,			

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particularly in the case of self-employed individuals and the likely need for a government agency to be introduced with a mandate to oversee any such regime; • the absence of any empirical data or research studies that would suggest that the Australian community seeks to have spouse maintenance play a larger role, in the majority of cases, for separating parents or parties. 232. The LCA is of the view that no significant change should be made to the existing spousal maintenance legislative provisions in the Act. If there is substantive change to the property adjustment regime, the maintenance provisions may however require significant revision. 233. The LCA's position in respect of spouse maintenance needs to be understood in the context of the submissions above in Question 17 as to the importance of maintaining the discretionary system of property adjustment. There are very strong philosophical and financial arguments against the introduction			

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of changes to the Australian spouse maintenance provisions. 234. The only matters where the LCA suggests that changes in respect of spouse maintenance should be countenanced, and these are essentially as a consequence of or reflective of the submissions made above dealing with property settlement matters, are as follows: • the provisions of s 75(2)/90SF(3) would become stand-alone provisions dealing solely with spouse maintenance; • there should be a merging of the de facto and married financial relief provisions, so there is not a duplication between those matters going to de facto spouse maintenance and those going to spouse maintenance of married parties; • the LCA repeats those submissions made above regarding the 'pros and cons' of inclusion of family violence as a specific factor for consideration, including in spousal maintenance cases;			

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• the Family Law Amendment (Financial Agreements & Other Measures) Bill 2015 has currently lapsed. There are a number of clauses within that Bill that should, in the LCA submission, go again before the Parliament. One of those specifically affects maintenance, being the provisions under s 90HA of the Bill as to the point in time at which an award of spouse maintenance would terminate in circumstances where a party had commenced residing in a de facto relationship. 235. As stated above, a single-entry system with Registrar's triaging matters at the point of entry would allow urgent spouse maintenance matters to be listed quickly. There is often urgency and significant impacts on financially weaker spouses, generally women and the children of the family, if financial support is cut off. As the system currently functions, even such urgent matters may wait months for a first return date in court or may be included in a duty list of so many			

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cases there is no possibility of a hearing.			

Debt (discussion questions 15-17)

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Provisions for the split/transfer of debts 227. Paragraph 152 of the Issues Paper identifies the possibility of amendments to allow greater use of court orders for the split or transfer of unsecured joint debt and liabilities. The LCA considers that the existing provisions of the Act, including s 80 and Part VIIIAA provide a complete and sufficient set of powers for courts to make any orders necessary to apportion responsibility for liabilities on the breakdown of relationships.	With respect to the ALRC proposal that: *The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence:* It is not clear to the LCA that this is a matter that goes to amendment of the Family Law Act, how determinations of that nature would be made, or what is the 'financial sector' (i.e. is it any third party who is a creditor regardless of whether they are a supplier of services the parties had the benefit of, or a bank/credit union etc.), or how the rights of third party creditors would be addressed.[4]	**Unsecured debts** 7.48 As set out in paragraph 7.9, Recommendation 11 effectively adopts an 'add back' approach to both wastage and debt. That is, the unreasonable accumulation of unsecured debt is an exception to the presumption of equality of contributions. Recommendation 13 in relation to the valuation date for assessing property division ensures that, in most circumstances, debts accumulated post separation remain the sole responsibility of the party that accrued the debt. **Recommendation 14** The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap with respect to debts of parties to family law proceedings. The protocol should provide that: • disputes about the enforceability of a debt against one or both parties under the National Consumer Credit Protection Act 2009 (Cth) are dealt with by the Australian Financial Complaints Authority; and • disputes about the reallocation of a debt between parties to a family law	Agree with recommendations 14 and 15.

[4] 20.

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		proceeding are dealt with by the family courts. **Recommendation 15** The Privacy Act 1988 (Cth) and the National Consumer Credit Protection Act 2009 (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of the subsequent actions of Party A.	

Gifts/ windfalls/ inheritance/ dowry (discussion questions 18-19)

Law Council submissions to the ALRC's Review of the Family Law System – Issues Paper (7 May 2018)	Law Council submission to the ALRC's Review of the Family Law System - Discussion Paper (16 November 2018)	ALRC Final Report (Family Law for the Future — An Inquiry into the Family Law System) (March 2019)	Law Council and Family Law Section letter to Attorney-General's Department regarding the recommendations made in the Final Report (July 2019)
209. If the desire for reform is driven by a need to remove unpredictability of results or to reduce case law conflicts, then it is hard to see how an assumptive system that involves exceptions dealing with issues such as initial contributions, how to treat external contributions such as gifts and inheritances, how to deal with levels of care of children, how to deal with farming cases, and how to deal with family violence, either fulfils the goal of a more simplified and or predictable system or would result in any cost saving to individual users of the system (in terms of legal fees) or to the taxpayer generally (in the cost of maintaining and operating the judiciary).	N/A	7.9 The presumption of equality of contributions could be displaced when there is evidence that a party has: • wasted assets; • deliberately or unreasonably damaged property; • accumulated liabilities for his or her own benefit; • received compensation awards for pain and suffering or economic loss which have not been dissipated during the relationship and are otherwise traceable; or • received inheritances and gifts.	In paragraph 7.9 of the ALRC Report, it is suggested that the presumption of equality of contribution could be displaced where there is evidence of certain matters (including waste, deliberate damage to property, receipt of inheritances and gifts, receipt of compensation payments) but it does not address more fundamental considerations including significant income disparity where the parties do not have children or how property owned prior to the relationship is to be treated (especially if it is merged with other property during the relationship).[5]

[5] 16.

Codification of Kennon (discussion questions 20-24)

Law Council submissions to the ALRC's Review of the Family Law System – Issues Paper (7 May 2018)	Law Council submission to the ALRC's Review of the Family Law System - Discussion Paper (16 November 2018)	ALRC Final Report (Family Law for the Future — An Inquiry into the Family Law System) (March 2019)	Law Council and Family Law Section letter to Attorney-General's Department regarding the recommendations made in the Final Report (July 2019)
217. Paragraph 152 of the Issues Paper raises the question of the potential codification of the decision in Kennon & Kennon, or amendment of the legislation to otherwise provide clearer guidance about how family violence will be taken into account in property matters. 218. The FLS and the LCA have recently made submissions to the Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence, outlining the possible arguments for and against such an approach, and also querying why (if it were to be pursued) inclusion of amendments in respect of family violence would be restricted only to property settlement matters, rather than also being considered in the context of spouse maintenance and child support issues as well. For ease of reference, those submissions are excerpted below: **The case for amendment of the Act to account for family violence in property division orders** 83 The case for amendment is not new. It has been canvassed, more than once by the ALRC. It was also	[Refers to Issues Paper submission.] The LCA response to the Issues Paper addressed the arguments for and against this proposal and potential issues with a codification of Kennon (see paragraphs [217] to [218] on pages 56 to 61), and noted that it also drew extensively on the FLS / LCA submissions to the Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence. The LCA recognises the potential importance of change in this area and the preventative purpose which statutory inclusion of family violence may achieve. For example, there may over time be behavioural changes if parties are aware that they may have substantial and adverse financial consequences for them under the Family Law Act, leaving aside the existing criminal law ramifications of such actions. The LCA remains concerned however by the absence in the Discussion Paper of an attempt to grapple with the evidentiary challenges in family violence cases; to recognise that there are many other forms of behaviour (e.g. drug and alcohol abuse) that can have devastating consequences as well; and the floodgates risk for litigation. Whilst some of these are already highlighted in the Issues Paper submission by the LCA, a number of problematic issues need to be	**Recommendation 19** The *Family Law Act 1975* (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies. **Recommendation 20** The *Family Law Act 1975* (Cth) should be amended to extend s 69ZX to property settlement proceedings. 7.101 The economic impact of family violence is not adequately addressed under the Family Law Act. Empirical evidence indicates less favourable property outcomes for parties who have experienced family violence and infrequent adjustments for family violence under the Kennon principle.90 7.102 In light of this, the ALRC recommends that the Family Law Act be amended to acknowledge the relevance of family violence to the economic circumstances of the party who has suffered violence. This would be achieved by the express inclusion within the Family Law Act of a tort of family violence giving rise to the ability to claim compensation for both physical and psychiatric injury and any consequent economic loss. 7.103 This recommendation would have the effect of a statutory reversal of Kennon and provide a	**In response to recommendation 19:** FLS is concerned that adopting a statutory tort pathway will not achieve the stated goal of the reform, in that it will be more costly for litigants, increase the time that hearings take and thus further impact judicial resources, and not adequately address the financial consequences of family violence. One of the perceived problems with the Kennon approach, is that judges have historically been constrained from making any adjustment unless an evidentiary basis has been established to support a finding that the contributions of a party have been made more arduous as a direct consequence of the conduct in question (albeit some recent case law has adopted a more liberal approach to this issue). FLS proposes that the matter is best addressed by a legislative amendment to what is presently section 75(2) and section 90SF(3) by the insertion of an additional factor namely "the effect of family violence on a party to [the marriage/the relationship] or a child [of the marriage/the relationship/the household]". By including the amendment in section 75(2) and section 90SF(3) it applies in respect of both property and maintenance cases, it is not a contributions factor, and there will not be an additional requirement in the statute that

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made almost a decade and a half ago by the Family Law Council (FLC), a body that now lies dormant,56 given the unexplained failure of the Government to appoint constituent members to it since early July 2016. 84 Going back to 1994, the ALRC made recommended legislative reforms to respond to the prevalence of violence against women in Australia.57 They included recommendations to direct the Family Court to take into account family violence in property and spousal maintenance proceedings. It should be noted that those 1994 recommendations predated the decision of the Full Court of the Family Court, In the Marriage of Kennon (Kennon).58 85 In the ALRC's 1994 report, it was stated that the courts generally had regarded family violence as 'irrelevant' except where it had a direct financial consequence.59 It was considered however by the ALRC that violence against a woman by her partner was relevant both to her ability to contribute to the marriage and to her future needs. The ALRC suggested that violence was often 'overlooked' as a relevant factor in proceedings	addressed as part of any drafting exercise to achieve a statutory amendment. • Will the existing definition of 'family violence' in the Family Law Act apply to financial matters? • Will one incident of 'family violence' suffice or will a course of conduct be required? • What is the intent of the amendment in respect of the contributions factor? Is it intended to be punitive/compensatory in nature and will a link to making contributions more arduous be required? In respect of the future needs factors, is it intended to be relevant only if there is a causal link to a diminution of income earning capacity or having an effect for example on health? • Is there a risk of a 'double dip' if it is included both as a factor affecting contributions weighting and a factor going to future needs, if it arises from the same factual incident or incidents? The LCA considers that the effect of family violence, if it is to be included and is not already covered by (in the married persons context) section 75(2)(o), is more readily identifiable as a factor relevant to the future needs of a	principled approach to the assessment of compensation for family violence.	requires a causal link between a contribution being made more arduous and the conduct in question. **Re recommendation 20:** Does not agree. The *Family Law Amendment (Family Violence and Cross Examination of Parties) Act 2018* (Cth) provides a Commonwealth funded scheme to ensure victims of family violence are not directly cross examined by the alleged perpetrator of that violence. The scheme applies in property proceedings as well as parenting matters and will apply to final hearings occurring after 10 September 2019. S 69ZX is part of a particular scheme in Division 12A which recognises the nature of parenting proceedings. It ought not be adopted simpliciter to financial proceedings, including ones that are intended to include tortious claims – so conceived, it is conflating the property settlement concerns with proceedings for damages and failing to recognise the different nature and consequences of each.

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before the Court, despite the provisions of the Act making it possible for the Court to consider that violence. 6 The ALRC recommended that 'violence should be taken into account in determining the extent to which it diminishes the ability of a woman to make financial and non-financial contributions to the marriage'. 60 There is some discussion in that report as to whether the violent conduct might be better considered as a negative contribution to the welfare of the family (but that approach had been resisted by the courts as implying fault). The ALRC also recommended that violence be taken into account in the future needs assessment in s 75(2) of the Act (which is already available to the court when considering, for example, the health of a party, the earning capacity of each, and the 'any other fact or circumstance' which justice requires be considered). 87 The ALRC returned to this issue in a post-Kennon context in 2010. Following Kennon, it is well established that the court may take family violence into account in proceedings for the adjustment of	party rather than as a factor in the assessment of contributions. • If it is included simply as a factor for consideration, it must in the vast majority of cases then be reflected by the percentage awarded to a party of the 'property' available for division. It will not usually be a specific percentage as the case law eschews any approach that breaks down the overall percentage into component parts, rather it is (generally, but not always) a holistic exercise in arriving at the overall outcome (for example, a court may assess contributions to be equal and then award 12% for future needs, but will not generally say that the 12% is made up of 3% for income disparity; 5% for care of children and 4% for family violence, or break them up into specific dollar amounts although this can be done). This will normally therefore mean no correlation is available for example between what an award in a civil case for an assault may have been and the award given because of family violence in arriving at an alteration of property interests. As it is embodied in a percentage, it may also mean that family violence in a case involving wealthy parties with larger property pools, has a greater effect than more serious family violence in		

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property between parties to a marriage (or de facto relationship): • they are provided below for reference only where a party is able to establish that there has been a violent course of conduct during th They are provided below for reference only e marriage/relationship, which had a 'significant adverse impact' upon that party's contributions; or • which conduct made those contributions 'significantly more arduous'. 88 In its 2010 report, the ALRC again recommended that the provisions of the Act relating to property adjustment, be amended to refer expressly to the impact of violence on past contributions and on future needs.61 89 A detailed analysis of the case for law reform in this area, and the uncertainties arising from the application of Kennon in daily practice, were also expressed in a letter of advice from the Family Law Council to the Attorney General in 2001.62 They do not need to be repeated here, it being noted that the recommendations of the Family Law Council for change to section 79 of the Act were set out in	a case involving a smaller property pool (e.g. 3% adjustment for family violence in a pool of $10million for couple A is greater than 10% for more serious and sustained episodes of family violence for couple B who have a pool of only $500,000). This raises social justice and comparative justice issues and goes back to the question of the intent of the legislative reform i.e. is to be punitive or compensatory or preventative or giving recognition to the contributions made? f. Will it be mandatory to disclose family violence in financial cases, even if a party does not want to pursue a finding or seek a contributions weighting or future needs adjustment on that issue? • Will it be necessary to give particulars of the incidents or actions that amount to family violence, to enable a respondent to address them? • Evidence at trials is generally filed simultaneously by way of exchange. If there are not pleadings that identify the issues, will the rules need to be amended to require a party raising such matters to file evidence first, with the other party then responding, or otherwise permitting a case in reply?		

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paragraph 28 of the letter, and as to subsection 75(2) in paragraph 29 of the letter. 90 Amendments to the financial provisions of the Act, to incorporate family violence in the manner proposed by the Family Law Council, would convey a powerful social and community message. An amendment to the contributions provisions of subsection 79(4) of the Act (and its de facto relationship equivalent) might take the following form: …whether there has been a course, or significant episode, of family violence by one party to the other party to the marriage which has had a significant adverse impact upon the contributions made by the other party or which made those contributions significantly more arduous. 91 An amendment to subsection 75(2) of the Act (and its de facto relationship equivalent), to include a new matter to be considered could take the form proposed by the Family Law Council in 2001: …the extent to which the financial circumstances of either party have been affected by family violence	• Will the usual rules of evidence in the Evidence Act 1995 (Cth) (Evidence Act) apply to family violence cases? Will a party still be entitled to bring a common law claim for damages in respect of for example an assault (either separately in a civil court or in the FCA or FCCA under accrued jurisdiction) as well as seeking findings about the same incidents and contributions weightings/ future needs adjustments under the Family Law Act? How would the state laws and commonwealth laws interact? k. What effect, from the point of view of case load, length of trials, number of witnesses, and judicial workload and funding and resources of the courts, would an amendment of this nature have?[6]		

[6] 18-20.

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perpetrated by a party to the marriage. 92 It is to be anticipated that if the Act is amended in this manner, there will be a significant increase in the number of cases before the courts in which an adjustment in financial cases for family violence is sought. This will result in an increased demand upon the courts' resources given the expansion of evidence about these matters - which are likely to be highly disputed inter partes - and an increase to the number of cases that require judicial determination. 93 Further resourcing will be required for the courts and their Child Dispute Services sections, and to legal aid and CLCs, coupled with a program of legal education, to support the implementation of any such change and to deal with the added workload the changes will bring. The case against amendment of the Act to account for family violence in property division orders 94 The rationale for opposing legislative change in this area, derives from several main factors. 95 The Kennon decision is oft spoken of as being based on family violence issues, but in fact the Full			

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Court decision was not limited to that area alone. It also looked at circumstances where contributions by a party were made arduous where for example the abuse of alcohol was a factor. Endeavours to codify Kennon into statute may unintentionally restrict the law that has developed, if an amendment to the Act speaks only to circumstances of family violence. 96 The Family Court has already by Kennon (and leaving to one side arguments about whether what the Full Court said was ratio or obiter) provided for recognition of family violence and other matters within the existing statutory framework. The court should be permitted to continue, on a case by case basis, to develop the application of and availability of Kennon style claims. 97 If the motivation for codification is to address the limited reported use of Kennon claims, then it needs to be understood that codification will not circumvent the need for evidence that is particularised and relevant. Many Kennon style claims currently fail not because clients and lawyers are not cognisant of the relevance of family violence, but rather for reason of lack of admissible evidence and the inability to adduce evidence that			

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establishes that there is a causal link between the acts of family violence and the nature and extent of and circumstances in which a party has made their contributions. The mere amendment of subsections 79(4) and/or 75(2) (and their de facto relationship equivalents) in the Act will not address that problem, so the risk then becomes that any amendments to the Act do not resolve the Evidence Act issues. 98 The Act and Kennon claims do not 'cover the field' in this area, such that litigants can still bring personal injury damages claims in the courts of the states and the territories in addition to claims for property alteration, or can ask that any such tortious claim be dealt with in the family courts together with the Act property claim under the accrued or associated jurisdiction of the courts. 99 If the Act were to be amended to make family violence a factor required by statute to be considered in property claims, the existence of that additional consideration will likely have the effect of making settlement of cases more difficult and hence increase the number of cases being both filed in the family courts, and which go to final trial and determination in the			

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family courts. This may have a very significant financial impact on both the courts and the legal aid services and cause major revenue implications for the Federal Government. Other matters 100 The Law Council raises several other matters for general consideration in the context of any proposed amendment to the Act to address family violence in property division, without expressing any concluded view on those as set out below: • Whether there is any doubt regarding the constitutional power of the Commonwealth under the marriage or divorce heads of power, to make laws that insert 'family violence' as a factor for consideration in the alteration of property interests either under subsections 79(4) or 75(2) and or under the referral of powers in respect of de facto matters. • If the Act was amended to include family violence as a factor in proceedings for the alteration of property interests, and in circumstances where matrimonial torts have been			

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abolished, it would be necessary to consider whether the Act as a Commonwealth law then 'covers the field', so that litigants can no longer bring damages claims whether in a state court for damages, or using those state based laws under the accrued or associated jurisdiction of the family courts. Whether Kennon should be codified in subsection 75(2) rather than subsection 79(4) of the Act (and the de facto relationship equivalents) so as to also apply to spouse maintenance claims. If not, the basis for saying it is a factor important and relevant to property division, but not spouse maintenance, needs clarification. • Whether Kennon should be codified in section 117 of the Child Support (Assessment) Act 1989 (Cth) as a ground for a departure application for child support. If not, the basis for saying it is a factor important and relevant to property division, but not the support of			

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children living with a parent who has been the victim of family violence, needs clarification. • Whether Kennon should be codified in Part VII of the Act as a factor for consideration when making orders for child maintenance for children over the age of 18 years. • The appropriate definition of 'family violence' to be applied to any amendment, including whether the broad definition of family violence in the Act which was developed in the context of parenting cases would be adopted. • In terms of giving notice of family violence as a factor in financial cases: • Whether the Notice of Risk form should become mandatory in all cases – both financial and non-financial – so that particulars of that issue are given at the outset of each case. • Whether the Initiating Application in family law cases requires an amendment, so that			

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litigants in financial cases must inform the court of the presence of family violence factors even if not particularised at that stage. • There are no pleadings in family law cases under Part VIII of the Act. This gives rise to a question as to whether the Rules of the Family Court and the Federal Circuit Court respectively should be amended to require that any financial claim is pleaded at the outset as to the material facts relied upon (which would include family violence particulars). • In circumstances where there was family violence during a relationship, but a litigant who was the victim of family violence did not want to raise it as a factor in a financial case, an issue arises as to whether they should be compelled to raise that matter under the Rules / Act regardless of their wishes. • Whether family violence needs to be a factor set out in the			

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Application for Consent Orders form when applying for financial orders by consent, and the particulars which would need to be given to the court both of the presence of family violence and the respondent's position on that assertion. • Parties can enter into financial agreement pursuant to sections 90C, 90D and 90UD post separation which makes provision for alteration of property interests and or spouse maintenance. In doing so, they essentially 'contract out' of the Act. This raises the issue of whether an amendment to the Act is needed which requires that parties to a Financial Agreement take into account family violence before they make the agreement, so as to prevent parties contracting out of the relevance of family violence as a factor in the financial settlement.63 • The LCA response to the Issues Paper addressed both sides of this proposal, and			

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potential issues with a codification of Kennon. Further, see paragraphs [217] and [218] on pages 56 to 61 of the LCA submission to the Issues Paper, which drew extensively on the FLS / LCA submissions to the Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence. See also subparagraph [234(c)] of the LCA submission to the Issues Paper, in the maintenance context, as to the pros and cons of a specific inclusion of family violence as a factor			

Attachment B - Fundamental propositions from Stanford

2013 paper presented by the Family Law Section

1. In *Stanford* the plurality observed that: 'while the power given by s 79 is not "to be exercised in accordance with fixed rules", nevertheless, three fundamental propositions must not be obscured'[1] [Citation omitted]. The plurality went on to describe the 'three fundamental propositions' as follows[1]:

> *First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to "altering the interests of the parties to the marriage in the property" (emphasis added). The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order.*
>
> *Second, although s 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion. In Wirth v Wirth, Dixon CJ observed that a power to make such order with respect to property and costs "as [the judge] thinks fit", in any question between husband and wife as to the title to or possession of property, is a power which "rests upon the law and not upon judicial discretion". And as four members of this Court observed about proceedings for maintenance and property settlement orders in R v Watson; Ex parte Armstrong: (Footnotes omitted)*
>
> > *"The judge called upon to decide proceedings of that kind is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down".*
>
> *Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is "just and equitable" to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that "[c]ommunity of ownership arising from marriage has no place in the common law. Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be "decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses". The question presented by s 79 is whether those rights and interests should be altered.* [Footnotes omitted]
>
> *Third, whether making a property settlement order is "just and equitable" is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised "in accordance with legal principles, including the principles which the Act itself lays down". To conclude that making an order is "just and equitable" only because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be*

to conflate the statutory requirements and ignore the principles laid down by the Act. [Footnotes omitted]

2. The plurality in *Stanford* observed[1]:

> *… t]he fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage.*

First fundamental proposition

3. As to the first fundamental proposition, namely the necessity to identify, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property, as the plurality in *Stanford* observed[1] it follows from the text of paragraph 79(1)(a) of the Act, which refers to *altering the interests of the parties* in the property, and so obviously the property has to be identified. Next, it is necessary to know what the existing interests in property are because the question is *whether, having regard to [*the*] existing interests*[1], the court is satisfied that, in all the circumstances it is just and equitable to make the order. The necessity to identify, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property is also a fundamental proposition for the purposes of consideration of subsection 79(4) of the Act.

4. The definition of property in section 4 of the Act obviously includes both legal and equitable interests. For some time prior to *Stanford* there was discussion about whether it is normally necessary to determine equitable interests as between the parties to the marriage.[1] In many disputes involving third party interests it was ordinarily necessary. However, in disputes only involving the interests of the parties to a marriage the requirement to seek a declaration pursuant to section 78 in relation to equitable interests was not considered necessary because ordinarily both parties were seeking an alteration of interests[1].

5. It may be that post *Stanford* in the majority of cases that only involve the interests of the parties to a marriage the requirement to seek a declaration pursuant to section 78 of the Act in relation to equitable interests is not considered necessary because both parties may be seeking an alteration of interests[1]. In the circumstance that one party contends that an application by the other should be dismissed because it is not just and equitable to make an order then such an application may be necessary. It would not have assisted the estate of the wife in *Stanford* because there is no provision in section 78 for the continuation of proceedings after the death of a party. It is not necessary to consider whether the estate could have sought relief in another jurisdiction or relied upon the accrued jurisdiction of the Family Court.

6. On the other hand it may be that the High Court in *Stanford* is suggesting that in all cases it is necessary to determine both legal and equitable interests. One commentator has observed[1]: 'The pre Stanford practice was to list only assets legally owned by the parties and their "financial resources". However, equitable interest such as constructive trusts, resulting trusts and estoppel interests also need to be identified.'

Second and third fundamental propositions

7. The second and third fundamental propositions are well recognized. However, to put into context these propositions, and consideration by the plurality in *Stanford* of what Dixon CJ observed in *Wirth v Wirth*[1], it is instructive to consider some aspects of the

development of the law in relation to disputes between married persons with respect to their property interests.

8. At common law a wife, during marriage, had no legal existence independent of her husband[1]. The consequence was that the wife could not hold separate property of her own during the marriage. The husband became entitled to all freehold lands held by the wife at the time of marriage or acquired by her during the marriage. The husband also obtained title to all chattels belonging to the wife at the time of marriage or acquired by her during the marriage. These principles applied even after the marriage broke down.

9. The principle that the husband and wife were "one person in law" came under increasing criticism in the latter half of the nineteenth century and by a series of Acts, culminating in the *Married Women's Property Act* 1882 (Imp), married women in England became entitled to acquire, hold and dispose of property in their own right as if they were unmarried. Similar legislation was passed in the Australian states[1]. This legislation greatly improved the legal position of a married woman who had property in her own name or who earned income but it was of little assistance to women who had no assets or did not work outside the home.

10. The English Court of Appeal attempted to overcome the injustice inherent in the principle of separation of property and in a series of cases held that section 17 of the *Married Women's Property Act* 1882 conferred a discretion on the court to vary the established property rights of the parties, if this were necessary to achieve a fair result between them.[1] However in 1956 the High Court in *Wirth* returned to a traditional view of the legislation and held that it had no power to reallocate the property rights of married couples. Property disputes between a husband and a wife were to be determined by applying the same principles of property law as those, which applied to unmarried partners. As Dixon CJ observed[1]: in *Wirth*: 'But the title to property and proprietary rights in the case of married persons no less than that of unmarried persons rests upon the law and not upon judicial discretion.' [Citation omitted] Ultimately the view accepted in Australia was also adopted by the House of Lords[1].

11. The *Matrimonial Causes Act 1959* (Cth) introduced a national divorce law and conferred power on the court to make such orders for the settlement of property as it considered just and equitable[1]. The relevant provision appeared to abandon the strict principles of property law as a basis for determining matrimonial disputes. The *Family Law Act*, which replaced the 1959 Act, continued to permit the courts to reallocate the property rights of the parties to a marriage but specified more detailed criteria for the exercise of the judicial discretion. In summary the effects of the apparent inflexibility of orthodox common law and equitable principles in relation to matrimonial property disputes were ameliorated by the enactment of the *Matrimonial Causes Act,* which came into force in 1961.

12. In *Stanford* the plurality made clear that property disputes between a married couple have to be decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses. However the question presented by the relevant provision of the *Matrimonial Causes Act* and now section 79 of the Act is whether those rights and interests should be altered and this can only occur if it is just and equitable to make an order.

13. Walters FM (as he then was) recently made the following observations in *Erdem & Ozsoy*[1]:

> *I note that the third of the above propositions endorses pre-existing dicta to the effect that a party to a marriage does not effectively build up an interest in the*

patrimony of the parties over the duration of the marriage, such that the party may be regarded as having "a presently vested interest of an 'inchoate' kind which exists prior to the institution of proceedings under section 79 or the making of an order under that section". The law in Australia is to the effect that rights arising under section 79 "come into existence when an order is made under that section" and that neither section 79 nor the other provisions of the Family Law Act "establish rights, however described, in a party to a marriage over the property of the other spouse either arising from the existence of the marriage or the activities of the parties during that marriage or the institution of proceedings under section 79, where those rights do not otherwise exist under the laws in Australia. [Citation omitted]

Two inquiries

14. Consideration of the language of subsection 79(2) of the Act and subsection 79(4) reveals that there are two fundamental inquiries. One inquiry is pursuant to s 79(2) and the other is pursuant to subsection 79(4).

15. In *Stanford* the plurality[1] stressed that the two inquiries should not be merged. The following observations are relevant:

> *It will be recalled that s 79(2) provides that "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". Section 79(4) prescribes matters that must be taken into account in considering what order (if any) should be made under the section. The requirements of the two sub-sections are not to be conflated. In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order.* [Emphasis added]
>
> *…*
>
> *Third, whether making a property settlement order is "just and equitable" is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised "in accordance with legal principles, including the principles which the Act itself lays down". To conclude that making an order is "just and equitable" only because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.* [Footnotes omitted] [Emphasis added]
>
> *…*
>
> *Section 79(4)(a)-(c) required that the contributions which the wife made to the marriage should be taken into account in "considering what order (if any) should be made" under s 79. It may readily be assumed that the length of the parties' marriage directly affected the extent of the contributions the wife had made. But, as already noted, the inquiries required by s 79(4) are separate from the "just and equitable" question presented by s 79(2). The two inquiries are not to be merged. And neither the inquiry whether it would have been just and equitable to make a property settlement order if the wife had not died, nor the separate inquiry whether it was still just and equitable to do so, was to be merged with or supplanted by an inquiry into what division of property should*

be made by applying the matters listed in s 79(4).[Emphasis added]

Subsection 79(2) inquiry

16. The question posed in the just and equitable inquiry pursuant to subsection 79(2) of the Act is whether, in all the circumstances, it is just and equitable to make an order. The expression "just and equitable" is not defined in the Act and it never will be. The expression only appears in subsection 79(2)[1]. As the plurality in *Stanford* observed[1]:

> *The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds. And while the power given by s 79 is not "to be exercised in accordance with fixed rules", nevertheless, three fundamental propositions must not be obscured.* [Footnotes omitted]

17. As observed above, the third fundamental proposition stresses the importance of the two inquiries not being conflated and that the answer to the just and equitable inquiry is not resolved only because of and by reference to the matters in subsection 79(4) of the Act.

18. However, in *Stanford* the plurality made the following important observations[1]:

> *In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4).*

19. It would not be unreasonable to observe that in the majority of cases the just and equitable requirement would be readily satisfied. There may be exceptional cases, such as existed in the circumstances of *Stanford*[1]. However, in the majority of cases it will be what the parties want and so very little time should be spent on the just and equitable inquiry.

Relevant factors inquiry

20. The question posed in the relevant factors inquiry pursuant to subsection 79(4) of the Act is what order, if any, should be made. If it is determined that an order be made then, as provided in subsection 79(1), *… the court may make such order as it considers appropriate.*

21. The nature and extent of the relevant factors inquiry, namely determination of what order, if any, should be made, applying the considerations in subsection 79(4) of the Act, was not considered in *Stanford* and this was because it was not necessary to do

so. However, again the text of the statute makes clear what is required. Subsection 79(4) provides that in considering what order, if any, should be made under the section the court *shall* take into account the considerations in paragraphs (a) to (g). It is mandatory to take the subsection 79(4) considerations into account.

22. As already observed, prior to *Stanford*, the preferred approach suggested that there were two parts to the inquiry pursuant to subsection 79(4) of the Act:

- Identify and assess the contributions of the parties within the meaning of paragraphs 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties.
- Identify and assess the relevant considerations referred to in paragraphs 79(4)(d), (e), (f) and (g) of the Act, including, because of paragraph 79(4)(e), the considerations referred to in subsection 75(2), so far as they are relevant, and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established after consideration of the considerations in paragraphs 79(4)(a), (b) and (c).

23. The two stages approach is a natural one in the light of the order of the seven paragraphs of subsection 79(4) of the Act. In *Mallett* Gibbs CJ observed[1]: '[t]he circumstances which the court is specifically required to take into account may be regarded as falling within two main classes.' His Honour went on to observe[1] that the first class deals with contributions and the second class deals with various matters including 'all those circumstances which relate to the present and future needs, and to the means, resources and earning capacity, actual and potential, of the parties.'

24. Paragraphs 79(4)(a), (b) and (c) of the Act are obviously concerned with contributions because each paragraph expressly provides that it deals with a "contribution". Consideration of these paragraphs reveals that there are the following contributions to be considered:

- Direct financial contributions to the acquisition, conservation or improvement of property.
- Indirect financial contributions to the acquisition, conservation or improvement of property.
- Direct non-financial contributions to the acquisition, conservation or improvement of property.
- Indirect non-financial contributions to the acquisition, conservation or improvement of property.
- Contribution to the welfare of the family including in the capacity of homemaker or parent.

25. The relevant considerations referred to in paragraphs 79(4)(d), (e), (f) and (g) of the Act, including, because of paragraph 79(4)(e), the considerations referred to in subsection 75(2), so far as they are relevant, are *prima facie* not concerned with contributions to the date of an order. They are more concerned with what may happen in the future[1].

26. Over the years there have been debates about such issues as the order in which applications for property settlement and maintenance should be dealt with[1] and the relationship between the considerations in subsection 75(2) of the Act, because of paragraph 79(4)(e), and maintenance. By and large, for a number of years, there has been a settled approach. For example, an application pursuant to section 79 should be dealt with before an application pursuant to sections 72 and 74. Next, the considerations in subsection 75(2) in a proceeding pursuant to section 79 are not to

be confused with an application pursuant to sections 72 and 74. Next, it is wrong to consider the subsection 75(2) considerations only where financial need is shown. The subsection 75(2) considerations are also concerned with ongoing contributions such as paragraph 75(2)(c) in relation to the care and control of children and paragraph 75(2)(o) in relation to homemaker and parent contributions to stepchildren.

27. For present purposes, the issue that arises is whether it can be assumed that ordinarily it will remain necessary to consider the matters of contribution in paragraphs 79(4)(a), (b) and (c) of the Act and make a finding as to the contribution based entitlement of each party and then consider the matters in paragraphs 79(4)(d), (e), (f) and (g) and make a finding as to the adjustment, if any, to be made to the contribution based entitlement of either party having regard to the "other factors".

28. The alternative view is that the legislation does not dictate an order in which the considerations in subsection 79(4) of the Act should be considered. The legislation does not require a finding as to entitlement having regard to the considerations in paragraphs 79(4)(a), (b) and (c) before dealing with the considerations in paragraphs 79(4)(d), (e), (f) and (g). Further, the legislation does not provide that the considerations in paragraphs 79(4)(d), (e), (f) and (g) are any less important than the considerations in paragraphs 79(4)(a), (b) and (c).

29. It may be that the answer lies in the discussion elsewhere in this paper about guideline reasons. As the Full Court observed in *Davut and Raif*[1]:

> *… if in a particular case, a trial judge adopts some other approach, he/she should indicate the reasons for adopting that other approach and be careful to ensure not only that all of the matters referred to in s 79(4) are properly taken into account but are also seen in the reasons for judgment, to have been taken into account.*

Conclusion - Stanford

30. The issue to be considered is whether the two inquiries approach should make any or any significant change to the current preferred approach to the determination of an application pursuant to section 79 of the Act.

31. In so far as an attempt could be made to outline, in a staged way, an approach to the determination of an application pursuant to section 79 of the Act then it may be as follows:

- Make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. In some circumstances it may be necessary to make a finding(s) as to equitable interests in property.
- Determine whether, in all the circumstances, it is just and equitable to make an order. This is the subsection 79(2) inquiry and in the majority of cases it should not be controversial.
- If it is determined that it is just and equitable to make an order then move to the relevant factors inquiry and identify and assess the considerations in subsection 79(4) of the Act.
- Consider the effect of the findings in relation to the subsection 79(4) factors and determine and resolve what order is appropriate.

32. Potential controversies in relation to steps one and three have already been considered. There may also be a lingering controversy about what is identified above as the fourth step namely consideration of the effect of the findings in relation to the factors enumerated in subsection 79(4) of the Act and determination of what order is appropriate. The issue is whether the concept of "just and equitable" is only of

concern to the inquiry pursuant to subsection 79(2) or is also relevant to consideration of the matters in subsection 79(4) and the order that is then made[1].

33. In *Ferguson and Ferguson*[1], referring to subsection 79(2) of the Act, Strauss J observed:

> *The subsection is directed to both the questions whether an order should be made at all, and what the order should be, if one is made. It seems to me, that the main purpose of sec. 79(2) is to ensure that the Court will not alter the property rights of the parties, unless it is satisfied that cogent considerations of justice require it to do so, and that if the Court decides that it is requisite to make any order under the section, the Court must be satisfied that the alterations so ordered, will go no further than the justice of the matter demands. Whether it is just and equitable in all the circumstances to make any and what order, involves a consideration of the matters which the Court is required to take into account under sec. 79(4)(a) to (e), because that subsection expressly enumerates the kind of matters which the legislature considered relevant in the determination of a claim for an alteration of interests in property. All these matters are concerned with considerations having financial or economic significance.*

34. In *W and W* Nygh J observed[1]:

> *It must be stressed however that sec.79(2) does not give this court an independent power to effect "palm tree justice". What is "just and equitable" depends on a proper consideration of the factors set out in sec.79(4). I am satisfied that the adjustment of the property rights of the parties as proposed by me is "just and equitable" within the meaning of sec 79(2) in the light of the considerations set out in sec.79(4).*

35. In relation to the observations of Nygh J in *W and W* it has been observed[1]:

> *On this view, s 79(2) is read together with s 79(4) and is not a condition precedent to a consideration of s 79(4). The court does not first look to s 79(2) in order to ascertain whether an order should be made and then turn to s 79(4) in order to formulate its precise order. The court considers both subs (2) and (4) of s 79 in determining whether and how to exercise jurisdiction under s 79.*

36. The view expressed above in *W & W* in relation to the interaction of subsection 79(2) of the Act and subsection 79(4) is probably wrong.

80. On one view, the j*ust and equitable* criterion does not apply to consideration of the matters in subsection 79(4) and nor does it apply to the determination of what order is appropriate. It only applies to the inquiry pursuant to subsection 79(2) as to whether or not an order should be made. Notwithstanding the terminology in subsection 79(2) of *just and equitable to make the order* the contention is that the words *the order* are referring to whether it is just and equitable to make *an order*[1]. It remains to be resolved if this view is correct and what, if any, practical consequences it may have[1]. If this view is correct then in so far as there may be a protraction of the debate as to whether the final step is only concerned with the form of the order, or also permits a further adjustment, it may be resolved in favour of the former view.