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Australian family property law: 'Just and equitable' outcomes?

Belinda Fehlberg and Lisa Sarmas

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Abstract

In this paper we focus on the broad discretion under Australia's Family Law Act 1975 (Cth) (FLA) to reallocate interests in property of spouses and separating de facto partners. We look at previous empirical research on the discretion's operation and consider options for change. We identify that there is an absence of up-to-date empirical research data on the discretion's operation, and that there is potential risk and possibly limited effect associated with legislative reform in this area. Yet the consistent empirical research finding that women, particularly mothers with dependent children, experience significant economic disadvantage post-separation leads us to see some merit in legislative reform that identifies the need to provide for the material and economic security of the parties and their dependent children as key factors to be considered when making property orders.

1. Introduction

Our paper examines the broad discretion under Australia's Family Law Act 1975 (Cth) (FLA) to reallocate interests in property of spouses and separating de facto partners¹ in the light of previous empirical research on the discretion's operation. Although acknowledging the absence of up-to-date empirical research data on the discretion's operation, and the potential risks and possibly limited effect of legislative reform, the consistent empirical

¹ 'De facto relationship' for the FLA is defined as a couple (different sex or same sex), who are not legally married to each other, are not related by family, and have had 'a relationship as a couple living together on a genuine domestic basis' (s 4AA(1)). For financial orders, the FLA also requires a de facto relationship of at least two years' duration, a child of the relationship, or that a party has made substantial contributions such that a failure to make an order would lead to serious injustice (s 90SB). See further: Belinda Fehlberg, Rae Kaspiew, Fiona Kelly, and Juliet Behrens, *Australian Family Law: the contemporary context* (Oxford: OUP, 2015), pp 20-22, 91-98, 495-6.

research finding that women, particularly mothers with dependent² children, experience significant economic disadvantage post-separation prompts us to formulate a proposal for legislative change that identifies the need to provide for the material and economic security of the parties and their dependent children as key factors to be considered when making property orders. We suggest that the structure of the current legislation places too great a focus on the parties' contributions and that a reformulation to prioritise the provision of suitable housing for dependent children, followed by consideration of the parties' material³ and economic security would increase the likelihood of outcomes that are more fundamentally consistent with the key legislative requirement that 'The court shall not make an order ... unless it is satisfied that, in all the circumstances, it is just and equitable to make the order' (FLA s 79(2)/90SM(3)).

There are several reasons why it seems important to focus on Australian family property law now. In May 2017, the Australian Federal Attorney General announced a major review of the family law system, to be undertaken by the Australian Law Reform Commission. The inquiry is now underway, and the final report is due by 31 March 2019. The Inquiry's widely-cast terms of reference include 'the underlying substantive rules and general law principles in relation to ... property'.⁴ Inclusion of property is significant given that Australian family property law has not been the subject of major law reform proposals since 1999.⁵ Lack of law reform attention has been striking – and concerning given that the adverse economic consequences of separation and divorce for women in the short and longer term continue to be identified by Australian empirical research (section 3.1),⁶ (due mainly to their still greater role as the primary carers of children during and after heterosexual relationships end).⁷ These consequences are known to be particularly serious for some groups of women,

² Which we define as children of the parties aged under 18, and children of the parties aged over 18 who are completing their education or have a mental or physical disability (consistent with FLA s 66L which provides for court-ordered maintenance for children over 18 in these circumstances). While the current financial provisions of the FLA refer only to children of the parties aged under 18 (e.g. ss. 72(1) and 75(2)), we consider that an extension paralleling s.66L is warranted.

³ We have included the concept of 'material' as well as 'economic' security on the basis that '[m]aterial wellbeing is a broader concept' and that 'income measures alone are insufficient to properly understand poverty—or ... a life with dignity': See, eg Tanya Corrie, 'Economic Security for Survivors of Domestic and Family Violence: Understanding and Measuring the Impact' (New Zealand: Good Shepherd Australia, 2016) p 37. Further elaboration of the precise elements that constitute material, as distinct from economic, security are beyond the scope of this paper, but might include, for example, a safe home for a party escaping family violence.

⁴ George Brandis, Attorney-General for Australia, 'First Comprehensive Review of the Family Law Act', Media Release, 27 September 2017. An issues paper released by the ALRC in March 2018 noted that 'A number of suggestions have been made for changes to the Family Law Act's property regime': ALRC, 'Review of the Family Law System—Issues Paper' (IP 48) (Sydney: Australian Government, ALRC, 2018), pp 48-48.

⁵ Commonwealth of Australia, *Property and Family Law: Options for Change. A discussion paper* (Canberra: Commonwealth of Australia, 1999). On earlier proposals for reform, see Margaret Harrison, 'Matrimonial property reform', (1992) 31 *Family Matters* 18.

⁶ E.g. Davis De Vaus, Matthew Gray, Lixia Qu and David Stanton, 'The Economic Consequences of Divorce in Australia' (2014) 28 *International Journal of Law, Policy and the Family* 26.

⁷ Australian Institute of Family Studies, 'Mothers still do lion's share of the housework', Research summaries - May 2016: 'Becoming a mother heralds a dramatic change in the lives of Australian women. New mothers go

especially mothers with dependent children (but also older divorced mothers whose children are no longer dependent: a smaller group that has received less research focus)⁸, victims of family violence⁹ and women leaving low-asset relationships.¹⁰ While private transfers alone cannot be expected to fully resolve post-separation poverty¹¹ ('people who divorce have substantially lower incomes, assets, and employment rates pre-divorce than people who remain married',¹² two households will be more expensive to run than one, and commonly pre-separation family arrangements will result in one party having a much reduced income earning capacity), property division under the FLA remains an important strategy for reducing post-separation financial disadvantage.¹³ Clearly, in order to maximise the potential of this strategy, law and the family law system¹⁴ need to be accessible and responsive. After many years of significant research, policy, and law reform focus on post-separation parenting law and process¹⁵ (including the relevance of family violence and

from spending a weekly average of 2 hours caring for others to a whopping 51 hours'; Lixia Qu, Ruth Weston, Lawrie Moloney, Rae Kaspiew and Jessie Dunstan, *Post-separation parenting, property and relationship dynamics after five years*, Australian Institute of Family Studies, Melbourne, 2014: 'Most children were in the care of their mother for the majority of nights or all nights per year (i.e., 66–100% of nights) in each wave, with around three-quarters being in such an arrangement in Wave 3' (p xvi).

⁸ Susan Feldman and Harriet Radermacher, *Time of Our Lives: Building Opportunity and Capacity for the Economic and Social Participation of Older Australian Women* (Lord Mayor's Charitable Foundation, Melbourne, 2016) pp. 21-22; Bruce Smyth and Ruth Weston, *Financial living standards after divorce: A recent snapshot*, Research Report No. 23 (Melbourne, Australian Institute of Family Studies, 2000. In Britain, see Mike Brewer and Alita Nandi, *Partnership dissolution: how does it affect income, employment and well-being?* (ISER Working Paper Series, paper no 2014-30, Institute for Social and Economic Research, University of Essex, 2014).

⁹ Grania Sheehan and Bruce Smyth, 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law* 102; Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence* (Melbourne: Women's Legal Services Victoria, 2015); Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30 *Australian Journal of Family Law* 1. See also *A Better Family Law System to Support and Protect Those Affected by Family Violence*, Report of the Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence, Standing Committee on Social Policy and Legal Issues, House of Representatives (Canberra, Parliament of Australia 2017) Chapter 5.

¹⁰ It should be noted that most separating spouses and de facto partners have low or modest property to divide (section 3), and receipt of a just and equitable share of available property remains important in a context where every dollar counts. This issue is the focus of: Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving economic equality in the family law system*, 2018.

¹¹ Raising questions regarding the extent of individual ('local'), partner ('horizontal') and State ('vertical') responsibility: Joanna Miles, 'Responsibility in family finance and property law' in Jo Bridgman, Heather M Keating and Craig Lind, *Regulating Family Responsibilities* (Farnham, Ashgate, 2011), pp. 91-116, 92.

¹² De Vaus et al, above n 7, p. 42.

¹³ Belinda Fehlberg, Christine Millward and Monica Campo, 'Post-separation parenting arrangements, child support and property settlement: Exploring the connections' (2010) 24 *Australian Journal of Family Law* 214.

¹⁴ While not our focus in this chapter, it is clear that many women in Australia cannot pursue property settlements due to paucity of legal aid for family property matters and absence of avenues other than courts and lawyers for resolving cases involving low assets: see Women's Legal Service Victoria, above n 10.

¹⁵ See section 5.

abuse in this context,¹⁶ along with the operation of the Child Support Program),¹⁷ it is timely to also reflect on the operation of the current Australian family property regime.

2. Existing Framework

The starting point for Australian family property law is a separate property regime, under which no automatic co-ownership arises from being married or in a de facto relationship.¹⁸ Under the FLA, judges have considerable power to reallocate interests in property of spouses and of separating de facto partners.¹⁹ First, ‘property’ is defined broadly, to mean property to which the parties, or either of them, ‘are entitled, whether in possession or reversion’ (FLA s. 4(1)) and has been given a broad construction by the family law courts.²⁰ Second, the jurisdiction of courts under the FLA extends to all of the property of the parties at the date of the trial, whether acquired before their relationship began, during their relationship or after their relationship ended.²¹ Third, the discretion to alter interests of the parties in their property is cast very broadly. Specifically, the legislation provides that, ‘In property settlement proceedings, the court may make such order as it considers *appropriate*...altering the interests of the parties to the marriage in the property’ (s. 79(1)(a) (spouses); s. 90SM(1)(a) (de factos)). The FLA further provides that, ‘The 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’ (s. 79(2) (spouses), s. 90SM(2)(a) (de factos)). (Emphases added.)

¹⁶ Ibid.

¹⁷ Most recently, see: Parliament of Australia, House of Representatives Committees, Standing Committee on Social Policy and Legal Affairs, *From conflict to cooperation: Inquiry into the Child Support Program* (Canberra: Parliament of Australia, 2015); *Australian Government response to the House of Representatives Standing Committee on Social Policy and Legal Affairs report: From conflict to cooperation – Inquiry into the Child Support Program*, Tabled in the House of Representatives 5 September 2016.

¹⁸ In contrast to an immediate (or full) community property regime, in which ‘property defined as being matrimonial and acquired during marriage is immediately and automatically owned equally by husband and wife throughout the marriage, and each takes an equal share if the marriage ends’: Harrison, above n 5, p. 19.

¹⁹ The requirement of relationship breakdown in the case of de facto partners (but not spouses: *Stanford v. Stanford* (2012) 247 CLR 108) reflects the terms of the referral of powers from the state to the Commonwealth, which provided the basis for the federal Parliament to legislate in 2009. A referral of power was required due to the marriage-focussed content of the federal Parliament’s legislative power under s 51 of the Constitution: Commonwealth of Australia Constitution Act (The Constitution), s. 51 (xxi), (xxii), (xxxvii).

²⁰ The case often cited for this point is *In the Marriage of Duff* [1977] FLC 90-217: the Full Court of the Family Court of Australia (the Full Court) gave its support to a broad definition of ‘property’ found in *Jones v. Skinner*, an old English case: ‘Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have’ ((1835) 5 LJ Ch 90 cited in *In the Marriage of Duff* [1977] FLC 90-217, 76,133). The Full Court considered that ‘property’ for the FLA extended to real and personal property, and choses in action (i.e. that is, property that comprises a bundle of rights but has no physical form – e.g. company shares).

²¹ This is in contrast to the more limited definition of matrimonial property in many other jurisdictions, including Scotland, New Zealand and British Columbia. In Scotland, for example, ‘matrimonial property’ for the purposes of the ‘sharing principle’ (but not the remaining four principles) does not include property acquired by the parties before their relationship began (unless acquired ‘for use by them as a family home or as furniture or furnishings for such home’), after their cohabitation ended, or ‘by way of gift or succession from a third party’: Family Law (Scotland) Act 1985, ss. 9 and 10.

The legislation includes some guidance regarding the exercise of discretion, by means of a checklist of factors that ‘the court shall take into account’ in ‘considering what order (if any) should be made’ (s. 79(4) (spouses); s. 90SM(4) (de factos)). The list refers first to contributions (financial and non-financial, direct and indirect) made by or on behalf of the parties to property of either or both of them (including property they have ceased to own since making the contribution) and to the welfare of their family. The list then refers to additional factors relating to the parties’ respective futures (in particular, s. 79(4)(e), incorporating s. 75(2) (spouses); s. 90SM(4), incorporating s. 90SF(3) (de factos); these factors are also relevant to spousal and de facto maintenance, which can be ordered if the respondent has the capacity to pay and the applicant (usually female) is unable to support herself adequately (s. 72(1) (spouses); s. 90SF(1) (de factos)). Responsibility for care of children of the parties under age 18 is included as a factor relevant to the parties’ financial futures.

The physical structure of the legislation thus *encourages* (but does not *require*) contributions to property to be considered first (an encouragement reinforced by the inclusion of two property-related contributions, followed by only one in relation to contributions to welfare to the family), followed by needs (mainly through reference to the additional factors). Our point here is that the ordering of the list encourages a perception²² that contributions to property are the first concern, a point backed up by jurisprudence: judgments most commonly involve consideration of contributions before needs. Express consideration of compensation for costs of investing in the relationship or to enable loss sharing more broadly is possible but much rarer.²³ The form of the legislation is thus in marked contrast to the position in England and Wales under the Matrimonial Causes Act 1973, where one list of factors applies to determine property and spousal maintenance disputes with ‘first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen’ (s. 25(1)); matters relating to the parties’ futures, their contributions, and questions of fault are also to be considered (s. 25(2)).

In 2012 in *Stanford v. Stanford*,²⁴ the High Court of Australia underlined the breadth of the s. 79 discretion, encouraging increased uncertainty regarding how it would be exercised from case to case. The Court emphasised the centrality of the requirement in FLA s. 79(2) that it must be ‘just and equitable’ for a court to make a property settlement order, while also conveying the amplitude of that expression:

²² Consistent with this, see Karl Teigen, Gisela Böhm, Susanne Bruckmüller and Olivier Luminet, ‘Long live the King! Beginnings loom larger than endings of past and recurrent events’ (2017) 163 *Cognition* 26, who ‘argue that beginnings loom larger than endings by attracting more attention, being judged as more important and interesting, warranting more explanation, and having more causal power’.

²³ *Waters & Jurek* [1995] FamCA 101.

²⁴ (2012) 247 CLR 108. The case has been applied to de facto property disputes: *Watson & Ling* [2013] FamCA 57.

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.²⁵

Stanford reminded family law courts of the requirement to determine whether it is just and equitable to make *any* order departing from existing interests in property (although the High Court indicated that 'in many cases' involving separation the requirement would be 'readily satisfied', as 'there is not and will not thereafter be the common use of property by the husband and wife' (Court's emphasis)).²⁶ The High Court also underlined that the 'just and equitable' requirement is fundamental to *the* property orders (if any) that are made. More broadly, at least in decisions of the Full Court of the Family Court of Australia (Full Court), *Stanford's* emphasis on the centrality of the 'just and equitable' requirement has discouraged the use of formulaic approaches that may risk pre-determining the outcome.²⁷ The impact of the latter message has been seen, for example, in the Full Court's abandonment of the 'doctrine of special skill' (which accorded special recognition to 'stellar' income earners in cases involving very high assets),²⁸ and increased ambivalence regarding formulaic approaches where property has been dissipated by a party before trial²⁹ and in relation to property acquired pre and post-relationship.³⁰

Before *Stanford*, the suggestion had sometimes been made that fundamental legislative reform to limit the breadth of the discretion afforded by s. 79 should be considered.³¹ Detailed consideration of the possibility of legislative reform last occurred at the governmental level in 1999,³² when the federal Attorney General's Department released a discussion paper suggesting two options for reform of family property law, the first involving the introduction of a legislative starting point of equal contributions and the second involving a starting point of equal sharing of property accumulated by spouses during their

²⁵ Ibid [36].

²⁶ Ibid [42]. So far, *Stanford* has had greatest impact in less usual fact scenarios, for example a spousal relationship that had not broken down (*Stanford v. Stanford* (2012) 247 CLR 108), representations by a husband to a wife during their relationship that the property is hers along with delay in pursuing his property claim (*Bevan & Bevan* [2013] FamCAFC 116), and relationships without children in which parties have maintained separate finances, and one has made significantly greater contributions than the other (*Watson & Ling* [2013] FamCA 57; *Elford & Elford* [2016] FamCAFC 45).

²⁷ See further: Fehlberg et al 2015, above n 1, pp. 548-573.

²⁸ *Hoffman & Hoffman* [2014] FamCAFC 92, [52]: '[T]here is no principle or guideline (or indeed anything else emerging from s. 79), that renders the direct contribution of income or capital more important – or "special" – when compared against indirect contributions and, in particular, contributions to the home or the welfare of the family'.

²⁹ *Bevan & Bevan* [2013] FamCAFC 116, [79], cf *Vass & Vass* [2015] FamCAFC 51, [135]-[140].

³⁰ *Dickons & Dickons* [2012] FamCAFC 154, [20]-[22]; *Marsh & Marsh* [2014] FamCAFC 24, [62]-[67], [107].

³¹ E.g. Patrick Parkinson, 'Unfinished Business: Reforming the Law of Property Division' (2000) 14(4) *Australian Family Lawyer* 1.

³² Commonwealth of Australia, *Property and Family Law: Options for Change*, above n 5. Change along similar lines was proposed in 1987 and 1992. See further Harrison, above n 5 and Parkinson (2000), above n 31. See also: Rosemary Hunter, 'Decades of Panic' (2005) 10 *Griffith Review*.

marriage. Neither proposal gained much support so no fundamental change to property division under the FLA occurred.

Following *Stanford*, discussion regarding the breadth of discretion afforded by s. 79/90SM has again been evident.³³ In 2014 the Productivity Commission, an independent Commonwealth review and advisory agency on Federal government microeconomic policy and regulation, looked briefly at family property law and recommended a presumption of equal sharing in its Report on *Access to Justice Arrangements*.³⁴ It is possible that renewed interest post-*Stanford* was a temporary ‘blip’ as the implications of the decision were digested. However, the many years that have passed since fundamental property law reform was last considered in Australia, the impact of *Stanford*, at least in the Full Court, and the review into the family law system now being conducted by the Australian Law Reform Commission³⁵ suggest value in reflecting on the current operation of the discretion and whether there is a case for change.

3. The overarching ‘just and equitable’ requirement (s. 79(2)): Are ‘just and equitable’ outcomes being achieved?

As noted in section 2, the High Court in *Stanford* emphasised that the ‘just and equitable’ requirement must be satisfied before the court can make *any* order altering property interests and further, that this requirement informs *the* orders made (if any). The Court provided very little guidance as to the substantive meaning of ‘just and equitable’, but it is clear that the requirement will not be satisfied by reference merely to the factors set out in s. 79(4)/90SM(4). Indeed, it is not essential that these factors be considered at all in determining the threshold question whether it is ‘just and equitable’ for any order to be made.³⁶

It is perhaps surprising that the content and meaning of the ‘just and equitable’ requirement is relatively undeveloped in Australian family law jurisprudence. The answer partly lies in the pre-*Stanford* tendency to conclude that it was just and equitable to make an order for s 79(2) if matters referred to in s 79(4) were evident – an approach the High Court rejected: ‘The requirements of the two sub-sections are not to be conflated’.³⁷ In our view, further development and articulation of the ‘just and equitable’ requirement provides an existing

³³ See in particular Patrick Parkinson, ‘Why are decisions on family property so inconsistent?’ (2016) 90 *Australian Law Journal* 418. In terms consistent with his pre-*Stanford* concerns, Parkinson argues that the law on family property in Australia is ‘plagued with uncertainty at its very core’ for reasons including ‘the lack of objects and principles in the legislation’. He concludes that ‘The best option is statutory reform’ (p. 523).

³⁴ Productivity Commission, *Access to Justice Arrangements: Volume 2*, Inquiry Report No. 72 (Canberra: Australian Government, Productivity Commission, 2014) p. 874. The Commission made no reference whatsoever to *Stanford*.

³⁵ Brandis, above n 4.

³⁶ *Chapman & Chapman* [2014] FamCAFC 91, [25].

³⁷ *Stanford v Stanford* (2012) 247 CLR 108, [35].

legislative basis for the development of principled and appropriate family property law outcomes.

A sensible first step in attempting to articulate the substantive content of the ‘just and equitable’ requirement is to consider what the available empirical research evidence tells us about the economic consequences of separation and divorce on the basis of the law as it stands, and the relevance of law to those outcomes. To that end, we first look at the broader socio-economic context in which Australian family property law operates, before considering what existing research tells us about property division in the separating population. We then consider research on approaches of family lawyers to property division, and the available research on adjudicated property cases. A key theme to emerge is that we lack current empirical data about the relevance and impact of the current legislation in the way property is divided in all these contexts. However, the available empirical data demonstrates the significant economic disadvantage of women after separation – particularly mothers with dependent children – and suggests that their interests are attracting insufficient attention in Australian family property law, a pattern which also has negative flow-on effects for children.

3.1 The socio-economic context

The broader empirical context for our analysis, which focuses on the operation of family property law, is ongoing empirical work indicating disproportionate poverty rates for women and children in Australia,³⁸ and adverse economic consequences of separation and divorce for women, particularly women with dependent children. Indeed, the most recent data³⁹ suggests that this overall pattern has not changed since the 1980s, the consistent

³⁸ The Australian Council of Social Service, *Poverty in Australia 2016*; Davis De Vaus, Matthew Gray, Lixia Qu and David Stanton, ‘The Economic Consequences of Divorce in Australia’ (2014) 28 *International Journal of Law, Policy and the Family* 26.

³⁹ While there is US research suggesting that over time the position for women experiencing relationship separation has improved for reasons including women’s increased paid employment after having children and after relationships end, most is some years older than the Australian research discussed in our paper. We also note recent UK research finding that after separation, ‘the costs of divorce have been mitigated for women over time and more recent divorces have not led to the same falls in household income as earlier divorces’ (Hayley Fisher and Hamish Low, ‘Who wins, who loses and who recovers from divorce?’ in J. Miles & R. Probert (eds) *Sharing Lives, Dividing Assets*, Hart: Oxford, 2009, Ch 11, pp 241-270, p. 255). However, in this and a more recent article Fisher and Low find that the financial impact of divorce continues to be greater for women than for men, that women’s recovery is mainly the result of re-partnering (with women’s likelihood of re-partnering being less than men’s) and that, ‘There is no significant response in labour supply for men or for women’: Hayley Fisher and Hamish Low, ‘Recovery from Divorce: Comparing High and Low Income Couples’ (2016) 30 *International Journal of Law, Policy and the Family* 338, 339). For US examples, see: Matthew and Nicholas H. Wolfinger, ‘Shifting fortunes in a changing economy: Trends in the economic well-being of divorced women’, in L. Kowaleski-Jones and N. H. Wolfinger (Eds.), *Fragile families and the marriage agenda* (pp. 127–157). (New York: Springer, 2005) pp 127-157; Sanford L. Braver, Jenessa R. Shapiro and Matthew R. Goodman, ‘The Consequences of Divorce for Parents’ in Mark A. Fine & John H. Harvey (eds) *Handbook of Divorce and Relationship Dissolution*, Lawrence Erlbaum Associates Inc, New Jersey, US, 2005); Christopher R. Tamborini, Kenneth A. Couch, and Gayle L. Reznik, ‘Long-term impact of divorce on women’s earnings across multiple divorce windows: a life course perspective’ (2015) 26 *Advances in Life Course Research* 44–59.

finding in Australia (and other western countries, including the United Kingdom) being that 'the financial impact of divorce is greater for women than it is for men'.⁴⁰

More broadly, a 2016 Report on Poverty in Australia conducted by the Australian Council of Social Service found that women are more likely than men to live in poverty as a result of their 'lower employment rates and lower wages ... and a greater caring role both for children and for other family members'.⁴¹ The Report also found that 'poverty in lone parent households has increased from 25.7% in 2003-04 to 29.1% in 2013-14'⁴² and that the percentage of children living in poverty in Australia is increasing (17.4%), with 40.6% of children in sole parent households living in poverty.⁴³ The authors of the Report concluded that

The high rate of poverty experienced by children in lone parent households is a result of high rates of poverty among lone parent households overall.⁴⁴

Most lone parent households are female-headed: in Australia, '[t]here were 780 thousand single mother families in June 2012, making up the vast majority of one parent families (81%)'.⁴⁵

While lone parent households do not always arise from parental separation, nearly half (48 per cent in 2015) of divorces in Australia involve children aged under 18, and following divorce most children live for most of the time with their mothers (97 per cent).⁴⁶ There is therefore a close connection between women's and children's poverty and the negative economic consequences of divorce for women and children, and this has been identified over many years now in Australian research. This includes recent analysis by Davis De Vaus and colleagues of data from the first 10 years of an ongoing panel survey of Australian families, 'to estimate the impact of divorce (a term they used to also include separated but not divorced spouses and de facto separations) on income and assets'⁴⁷ for separating men

⁴⁰ Fisher and Low, above n 39, p. 338. See further: Richard Neely, 'The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed' (1984) 3 *Yale Law and Policy Review* 168, 179; A Sørensen, 'Estimating the Economic Consequences of Separation and Divorce: A Cautionary Tale from the United States' in Lenore Weitzman and Mavis Maclean (eds), *The Economic Consequences of Divorce: The International Perspective*, Clarendon Press, Oxford, 1991; Ruth Weston, 'Changes in Household Income Circumstances' in Peter McDonald (ed.), *Settling Up: Property and Income Distribution in Australia*, Prentice-Hall of Australia, Australian Institute of Family Studies, Sydney, 1986, p 100.

⁴¹ The Australian Council of Social Service, above n 38, p. 32. For discussion of the Report see: Adam Gartrell, "'Our 'national shame': 730,000 Aussie kids living in poverty', *The Age*, 16 October 2016.

⁴² The Australian Council of Social Service, above n 38 p. 19.

⁴³ *Ibid* p.22.

⁴⁴ *Ibid* p.23.

⁴⁵ Australian Government, Australian Bureau of Statistics, 'One Parent Families', 6224.0.55.001 - Labour Force, Australia: Labour Force Status and Other Characteristics of Families, Jun 2012.

⁴⁶ Laurie Brown, 'Divorce: For richer, for poorer', AMP.NATSEM Income and Wealth Report Issue 39, December 2016, p. 5.

⁴⁷ De Vaus et al, above n 7.

and women aged between 20 and 54 years. De Vaus and colleagues found that women experienced a fall in income post-divorce while men experienced a significant increase:

For women who divorce, equivalent household income fell sharply from \$36,200 pre-divorce to \$27,900 at the first interview after divorce. It then increased steadily to be \$41,300 after 6 years (an increase of 14 per cent over the 7-year period). While this represents a recovery in real income after a short-term post-divorce decline, these women fell behind their married counterparts who did not divorce (who had an increase in real income of 19 per cent). For men who divorced, equivalent household income increased in the year after divorce and grew by 29 per cent over the 7-year period, a much faster rate of growth than that experienced by couples who remained together (whose income increased by 18 per cent in real terms over this period).⁴⁸

De Vaus and colleagues found that the negative impact of divorce on women's income was significantly exacerbated when women lived with dependent children. They found that for these women the initial drop in income post-separation was 'substantially larger' and that while their position improved over time (for reasons including their increased paid employment post-separation, re-partnering, and receipt of government benefits) 'the recovery in income is much slower and the gap in income 6 years after separation is still substantially greater than it was pre-separation'.⁴⁹ While this research suggests (in contrast to recent analysis in the UK context by Hayley Fisher and Hamish Low)⁵⁰ that women's increased workforce participation after divorce has an impact in alleviating financial disadvantage, it also finds (consistent with Fisher and Low)⁵¹ that significant disparity continues.⁵²

The finding that women and children bear the brunt of economic disadvantage post-separation was once again confirmed in Australia in 2016, in the 'Divorce: For richer, for poorer', AMP.NATSEM Income and Wealth Report (NATSEM Report), which looked at the financial impact of divorce using economic modelling of longitudinal data collected during 2001-2014.⁵³ The NATSEM Report found, in relation to divorces involving couples with no dependent children under 16 living with them, that '[o]verall, divorced women are worse off than both divorced men, and married women',⁵⁴ on the basis of analysis of income, home ownership, household asset, debt, and superannuation data.. In contrast, the Report found that '[d]ivorce has little impact on the employment status and income of men [without dependent children] aged 25–64 years'.⁵⁵ The Report further found that the negative

⁴⁸ Ibid 33-34 (footnote omitted).

⁴⁹ Ibid 34.

⁵⁰ Fisher and Low, above n 39.

⁵¹ Ibid.

⁵² See also above n 39.

⁵³ Brown, above n 46.

⁵⁴ Ibid p. 6.

⁵⁵ Ibid p. 6.

financial consequences of divorce are ‘most marked for mothers’⁵⁶ with consequent negative flow-on effects for children:

Nearly half of all divorces each year involve children. Divorced mothers experience financial hardship more than couple families or families headed by a father who has been divorced. And with 97 per cent of divorced households headed by divorced mothers in Australia, *Divorce: For richer, for poorer* shows divorce has a negative impact on the financial wellbeing of children of divorced families.⁵⁷

While there is very little research on the extent to which property settlements can reduce women’s economic disadvantage after separation, research on the positive impact of the payment of child support in reducing economic disadvantage of mothers and children suggests this would be so.⁵⁸

Of course, women’s economic disadvantage relative to men does not solely result from relationship separation: it is a function of a range of systemic factors, including the ongoing gender pay gap between men and women in Australia (hitting a record high of 18.8% in February 2015),⁵⁹ which is then reflected in men’s much higher superannuation savings compared to women’s (especially mother’s) superannuation savings,⁶⁰ both of which are in turn reflective of direct and indirect discrimination, stereotypes about what men and women ‘should’ do, and ongoing social and cultural expectation that women will tailor their workplace participation around their domestic, childcare and other informal care commitments.⁶¹ As these systemic disadvantages operate to the benefit of the community – and in particular to the significant economic benefit of men as a group⁶² – it follows that they are disadvantages which should be more equitably shared between men and women, including on relationship breakdown.

All of this suggests the wisdom of legislative amendment that de-emphasises the current contributions-based focus and addresses the economic disadvantage faced by women and

⁵⁶ Ibid p. 24.

⁵⁷ Ibid p25.

⁵⁸ Christine Skinner, Kay Cook and Sarah Sinclair, ‘The potential of child support to reduce lone mother poverty: comparing population survey data in Australia and the UK’ (2017) 25 *Journal of Poverty and Social Justice* 79.

⁵⁹ Sarah Sedghi, ‘Gender pay gap hits record high, prompting calls for Government action’ (Melbourne: ABC News, 27 February 2015).

⁶⁰ David Hetherington and Warwick Smith, *Not So Super, For Women: Superannuation and Women’s Retirement Outcomes* (Per Capita Australia Limited in partnership with Australian Services Union, 2017): ‘The superannuation system is systematically biased against half the population. Women are simply not being assisted by super towards a reasonable standard of living in retirement. Women’s superannuation balances at retirement are 47% lower than men’s. As a result, women are far more likely to experience poverty in retirement in their old age. Superannuation is failing women’ (p 6). Similar patterns have been identified in England and Wales (Hilary Woodward with Mark Sefton, *Pensions on Divorce: An Empirical Study* (Cardiff Law School, 2014) p. 5).

⁶¹ Australian Government, Workplace Gender Equality Agency, ‘What is the Gender Pay Gap?’.

⁶² See for example: Deloitte Access Economics, *The economic value of informal care in Australia in 2015* (Deakin, ACT: Carers Australia, 2015).

children. However, as the next section makes clear, our lack of current empirical knowledge regarding the relevance and impact of the current legislation to family law property settlements, along with research underlining the significant role of non-legislative matters in influencing property settlement, makes the position considerably more complicated.

3.2 Property division outcomes in the broader separating population

The research on property division in the broader separating population – and particularly recent research by the Australian Institute of Family Studies – suggests an absence of clear or discernible patterns in, and reasons for, the way property is divided after separation, yet also a majority perception that outcomes are ‘fair’.

There is no requirement in Australia to obtain court orders for property (or parenting). By far, the majority of property division on separation occurs outside the formal adjudication context.⁶³ Recent Australian Institute of Family Studies research conducted by Lixia Qu and colleagues, involving telephone interviews conducted with 10,000 separating parents, found that the majority described ‘discussions’ as their main pathway for resolving property issues (39.5 per cent), with a further 18.5 per cent responding that there had been ‘no specific process’.⁶⁴ The researchers found that lawyers were described by a significant minority of respondents as their main pathway for resolving property issues (29.1 per cent), but very few described courts as their main pathway (7 per cent).⁶⁵ Private settlement was thus the norm, although with greater use of formal pathways (especially lawyers) as the value of the parties’ property increased. Reasons for these patterns include that property pools are usually low or modest,⁶⁶ and a paucity of legal aid or other free or inexpensive legal advice for financial disputes.⁶⁷ Taxation relief on transfer of assets available to separating couples who formalise their property settlements means that consent orders are often sought and made,⁶⁸ which partly explains the use of lawyers by a significant minority in this context.

In relation to outcomes Qu and her colleagues found that:

On average, based on both fathers’ and mothers’ reports, mothers received 57% of assets and fathers received 43%. The most common division reported was a share

⁶³ Fehlberg et al (2015), above n 1, pp. 476-79.

⁶⁴ Qu et al, above n 6, p. 98, Table 6.9.

⁶⁵ Ibid.

⁶⁶ Ibid, p. 93, Table 6.2: Qu and colleagues found that among their sample, 19.6 per cent had no assets, 1.3 per cent had only debts, 18.5 per cent had assets of less than AUD\$40,000, and 10 per cent had assets of more than AUD\$500,000.

⁶⁷ Belinda Fehlberg, Christine Millward, Monica Campo and Rachel Carson, ‘Post-Separation Parenting and Financial Settlements: Exploring Changes Over Time’ (2013) 27 *International Journal of Law, Policy and the Family* 359. See also Productivity Commission, above n 34.

⁶⁸ Parties who wish to avoid state tax (stamp duty) on transfer of real property, and federal tax (capital gains tax) on the transfer of certain assets (in essence, investments) need to obtain court orders or enter a binding financial agreement. See further Fehlberg et al (2015), above n 1, p. 483

for the mother of between 40% and 59% (one-third), and about a quarter of parents reported a higher share for the mother of between 60 and 79%.⁶⁹

While this suggests a general pattern of mothers receiving the majority share of property, closer analysis indicated a more complex story, due to differential reporting between mothers and fathers: 'On average, fathers estimated 65% going to the mother, compared with mothers' estimates of 49%'.⁷⁰ There was thus no clear indication that mothers were receiving a major share of what was usually modest property, at the end of relationships averaging 10 years' duration, during and following which mothers were usually majority time parents (across all three waves - parent interviews were conducted in 2008, 2009 and 2012 - around three-quarters of children were in the care of their mother for the majority of nights or all nights per year; that is, 66–100% of nights).⁷¹ Similarly, longitudinal qualitative research by Fehlberg and colleagues conducted between 2009-11 found no clear link between parenting arrangements and property settlement, although 'as a group, mothers in our sample fared worse than fathers in relation to share of property received relative to their level of care of children'.⁷²

This is unsurprising given that the current legislation does not prioritise the needs of children and their carers. Perhaps, then, legislative reform to encourage this may be a good idea. However, the position is complicated by the fact that Australian empirical studies have consistently found that a range of factors not referred to in the legislation influence property settlements on relationship separation,⁷³ and that this is the case whether or not family law professionals and processes are accessed.⁷⁴ For example, Qu and colleagues noted that:

[T]he evidence suggests the strongest influences on the proportionate share of property were: the size of asset pools, the dynamics surrounding the separation (who initiated separation, who left the house), a history of family violence/abuse and care-time arrangements. The influence of the effects of a history of family violence/abuse and the role played in the separation decision on the shares received by each [parent] were mediated by who left the house at separation. There was no association between property division and children's age.⁷⁵

The full range of factors that the research indicates are likely to impact on financial settlements are thus not reflected in the checklist of factors in s. 79(4)/90SM(4), in particular: who left the family home, who initiated separation, being a target of family

⁶⁹ Qu et al, above n 6, Executive Summary, xvii.

⁷⁰ Ibid, p. 102.

⁷¹ Ibid, p. 79, Table 5.1.

⁷² Fehlberg et al (2010), above n 13, p 230.

⁷³ For England and Wales, see Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (University of Bristol, 2013).

⁷⁴ See Fehlberg et al (2010), above n 13, pp 229-36; Fehlberg et al (2013), above n 67, pp 397-401.

⁷⁵ Qu et al, above n 6, p. 105. See also Fehlberg et al (2013), above n 67.

violence or abuse, and the quality of the post-separation relationship. It is also not clear whether the legislation is being used at all, or whether the combined effect of broad discretion and the checklist of factors limit its utility.

As a result, the 'extent to which law does or does not influence the behaviour and actions of people who do not engage with the formal legal system and even those who do'⁷⁶ is at best variable and unclear,⁷⁷ notwithstanding continued heavy use in Australia of legislative amendment (at least in the parenting context) as a mechanism for attempting to influence the behaviour of separating parents outside the courts.⁷⁸ There is a distinct possibility that legislative reform will be misunderstood or ignored altogether. We return to this issue in section 5.

Qu and colleagues' research also explored the extent to which parents considered that their property division was fair, both at the time it was finalized and at the time of interview. They found that the majority considered the result was fair at both points, although significant minorities (especially fathers) thought it was unfair:

There were three main themes from parents' comments of unfairness: the perception that a fair outcome required an even split; inadequate consideration of the respondents' contributions during the relationship, with many comments suggesting values attaching greater weight to income-earning and financial contributions than homemaker contributions; and inadequate apportionment of liability debts and the inclusion of resources provided by the parents' own families (e.g., their own parents or grandparents) in the asset pool. Other comments include the assertion that the system is biased against men (fathers' reports), and that it is unable to handle one party behaving dishonestly in disclosures relating to property and financial resources.⁷⁹

The themes identified in the above passage suggest a perception of a substantial minority – mainly fathers who reported receiving a minority share of the property – that financial contributions are given insufficient weight. The researchers observed that '[a]t a conceptual level, the responses reinforce ... that fairness is an inherently subjective concept. It was

⁷⁶ Matt Harvey, Maria Karras and Stephen Parker, *Negotiating by the Light of the Law* (Themis Press: Law and Justice Foundation, Sydney, 2012), p. 4.

⁷⁷ For example, Ira Ellman, 'Why Making Family Law Is Hard' (2003) 35 *Arizona State Law Journal* 699, John Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible Citizen' in Mavis Maclean (ed.), *Making Law for Families*, Hart Publishing, Oxford, 2000, pp 9–28; John Dewar, 'Can the Centre Hold?: Reflections on Two Decades of Family Law Reform' (2010) 24 *Australian Journal of Family Law* 139, Rae Kaspiew, Matthew Gray, Lixia Qu and Ruth Weston 'Legislative Aspirations and Social Realities: Empirical Reflections on Australia's 2006 Family Law Reform' (2011) 33 *Journal of Social Welfare and Family Law* 397.

⁷⁸ See for example FLA ss. 65DAC and 65DAE, which direct parents regarding consultation in relation to major long-term issues and other issues.

⁷⁹ Qu et al, above n 6, Executive Summary, xvii.

evident that a range of issues, including personal values and expectations of the relationship, influenced perceptions of unfairness'.⁸⁰

In summary, research on property outcomes in the broader separating population suggests that most separating parents consider that 'fair' results are being achieved, but that outcomes do not clearly provide for a greater share to mothers – even though they are the usual primary carers of children before and after separation – over fathers. Yet fathers are nevertheless more likely than mothers to think outcomes are unfair. Importantly, this pattern is consistent with previous research finding 'that divorced men were more likely than divorced women to say they were poor or very poor. This is despite the fact that divorced men had higher incomes than divorced women and were less likely to experience financial hardships',⁸¹ and conversely, women's greater satisfaction with their post-separation financial circumstances despite their greater poverty.⁸² It is a pattern that should warn us of the dangers of accepting subjective claims of economic disadvantage at face value when considering reform. It is also possible that encouragement of shared parenting (see section 5) has fueled formal equality discourse, including a perception that equal division of property is 'fair' – a point we return to in section 3.3. Finally and unsurprisingly, previous research also confirms that a range of factors not referred to in the legislation will be relevant when property is divided (a reality not confined to family property law, or indeed to family law). Overall, the research suggests the challenges of – but need for – legislation that focuses our attention on post-separation economic disadvantage of women and their dependent children as an issue fundamental to our definition of 'just and equitable' outcomes.

3.3 The impact of family lawyers

There is very little recent research to inform our understanding of how s 79/90SM is being interpreted and applied by family lawyers. The main research – that of John Wade,⁸³ and Rosemary Hunter and colleagues⁸⁴ – was conducted, respectively, in the early 2000s and late 1990s, well before a number of significant family law changes in Australia, including the 2006 shared parenting amendments (the relevance of which is discussed in the next paragraph), the inclusion of de facto financial disputes in the FLA from 1 March 2009, and superannuation (or pension) splitting reform from 2002 (allowing splitting at the

⁸⁰ Ibid p. 112.

⁸¹ Australian Institute of Family Studies, Media Release, 'The long-lasting financial impacts of divorce for women' (Melbourne, Australian Institute of Family Studies, 8 July 2009).

⁸² Smyth and Weston, above n 8, pp. 14-17.

⁸³ John Wade, 'Arbitral decision-making in family property disputes – lotteries, crystal balls, and wild guesses' (2003) 17 *Australian Journal of Family Law* 224; Rosemary Hunter, with Ann Genovese, Angela Melville and April Chrzunowski, *Legal Services in Family Law* (Sydney: Justice Research Centre, Law Foundation of NSW, 2000).

⁸⁴ Rosemary Hunter, with Ann Genovese, Angela Melville and April Chrzunowski, *Legal Services in Family Law* (Sydney: Justice Research Centre, Law Foundation of NSW, 2000) p. 162.

accumulation (pre-retirement) phase).⁸⁵ In summary, this research is consistent with that involving the broader separating population, in that it suggests outcomes do not substantively favour mothers (as the usual primary carers of children before and after separation) over fathers, along with the relevance when dividing property of a range of factors not referred to in the FLA.

More recently, an online survey of family lawyers conducted as part of the Australian Institute of Family Studies Evaluation of the 2006 shared parenting amendments⁸⁶ suggested that post-amendment there has been a reduction in the share of property received by mothers. About half of the 319 family lawyers surveyed in 2008 said that property settlements had changed in favour of fathers and that the average property division allocated to mothers had decreased by about 7 per cent (from 63 per cent to 57 per cent) post-2006.⁸⁷ This appears to represent a shift away from the position that had developed from the mid-1990s, when more significant adjustments on the basis of the additional factors (that is, factors relating to the parties' respective financial futures: section 2) began to be made.⁸⁸ It was not unusual to see adjustments of around 10–15 per cent in favour of mothers with children living with them, on the basis of care of children of the marriage along with reduced income earning capacity due to parenting and homemaker responsibilities during marriage, in combination with their enhancement of the husband's economic position, which sometimes allowed the mother and children to stay in the family home. The researchers suggested several reasons for this apparent change, including that bargaining dynamics/trade-offs may have been affected by the shared parenting amendments (for example, mothers trading away property to resist shared time claims by fathers) and that shared time arrangements reduced the likelihood and extent of adjustments to take account of the parties' different economic positions. These findings have so far not been accompanied by any systematic empirical analysis of reported cases or court files to determine whether lawyers' observations are in fact being played out in reality. The reports of lawyers are certainly concerning, given the empirical evidence discussed in section 3.1 regarding the economic disadvantage of women and children.

3.4 Property division outcomes in adjudicated cases

⁸⁵ Although the research suggests that women's property settlements have not increased as a result of this change: Grania Sheehan, April Chrzanowski, and John Dewar 'Superannuation and Divorce in Australia: An Evaluation of Post-Reform Practice and Settlement Outcomes' (2008) 22 *International Journal of Law Policy and the Family* 22.

⁸⁶ Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kellie Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Government: Australian Institute of Family Studies, December 2009, p. 225.

⁸⁷ Ibid.

⁸⁸ Eg *Waters & Jurek* [1995] FamCA 101, per Fogarty J.

There is no recent empirical research analysing property cases decided by family law courts, either pursuant to consent orders or adjudication. As a result, we do not know how the legislation is being applied by courts.

Previous research conducted in 2004 and 2005 by Helen Rhoades and colleagues on adjudicated property outcomes suggested that a settled approach existed in standard cases that accorded with a 'norm' involving modest assets accumulated over the course of a relationship of reasonable duration due to the joint efforts of the parties.⁸⁹ Rhoades found that within the Family Court of Australia, property division was approached differently in cases involving assets of modest value compared with cases involving high assets. Her analysis of 60 unreported Family Court judgments found that the detailed examination of the parties' contributions that occurred in high asset cases rarely occurred outside that context. Rather, the approach of judges in cases involving modest assets was usually to treat the contributions of spouses as 'roughly equal' and to focus on the needs of the spouses and their dependent children. Rhoades further found that 'judges regularly abandoned the requirement to consider the parties' contributions in favour of a needs-based approach where there were limited assets and dependent children to house'.⁹⁰ However, these findings were based on research conducted before the 2006 shared parenting amendments, before *de facto* financial disputes were brought within the FLA in 2009, and well before *Stanford*. There is much we do not know about the impact of these changes. At present, all we have is the suggestion that the 2006 shared parenting amendments appear to have led to a reduction in the likelihood and extent of s. 75(2) adjustments (section 3.3), in the face of ongoing empirical evidence of women's post-separation financial disadvantage (section 3.1).

In summary, our analysis in section 3 suggests that there is considerable diversity in – and much we do not know about – property division outcomes across the broader separating community, including among those who receive legal assistance, and in adjudicated cases. This is consistent with John Dewar's observation that the Australian family law system is:

a system polarised by pathways, by the dispositions of parties to agreement, by associated disparities of bargaining power, and disparities in access to legal advice and processes. The fundamental features of horizontalisation and the relative autonomy of multiple sites of interpretation are intensified in ways that seem to have more diverse results—positively in some cases, but negatively in others.⁹¹

Diverse outcomes are precisely what we would expect in a 'horizontalised' system (i.e. one in which people have available to them a variety of family law processes to resolve the issues arising on relationship breakdown) and in the context of a discretionary legislative

⁸⁹ Helen Rhoades, 'Equality, Needs and Bad Behaviour: The 'Other' Decision Making Approaches in Australian Matrimonial Property Cases' (2005) 19 *International Journal of Law, Policy and the Family* 194.

⁹⁰ *Ibid* p. 194.

⁹¹ Dewar, above n 77, p. 147.

framework (no two families are the same). However, it is concerning that the interests of women and children appear to be attracting, if anything, decreasing attention in the context of the disproportionate poverty rates for women and children in Australia and the particularly adverse economic consequences of separation and divorce for them (section 3.1).

4. Reform of the s. 79(4) factors – substantive considerations

Our analysis so far suggests the need for further empirical research to inform our understanding of how the broad discretion under s. 79/90SM is being interpreted and applied, particularly by lawyers and courts, and that a wide range of factors extending well beyond the s. 79(4)/90SM checklist influence both property outcomes and the socio-economic context in which they occur.

Given these challenges, we would argue that any proposal for legislative amendment should be approached with caution in the absence of a solid research base. What *is* clear, however, is the research evidence regarding women's and children's economic disadvantage post-separation. On this basis, our view is that, if legislative reform were to be considered, it should aim to address this disadvantage. Therefore our preferred approach, drawing on English approaches and proposals,⁹² would first address the reasonable housing needs of children, followed by the material and economic security of the parties, followed by compensation for relationship-generated losses and finally, equal division of any residue, unless exceptional circumstances are established. We would favour preserving a broad and nuanced discretion, but providing guidance regarding key principles underpinning the exercise of that discretion, with these principles being based on what we know to be the significantly economically disadvantaged position of women and their dependent children. This approach offers the best way of encouraging 'just and equitable' outcomes as conceptualised by us throughout this chapter.

In arriving at this conclusion, we have gained particular assistance from English developments following the House of Lords ruling in 2000 in *White v White*⁹³ and *Miller; McFarlane*,⁹⁴ particularly the work of Joanna Miles⁹⁵ and in broader terms that of Alison Diduck.⁹⁶ Drawing together these elements, Rob George⁹⁷ suggests that it is important that the parties' needs are calculated first, followed by taking into account any compensable

⁹² Rob George, *Ideas and Debates in Family Law*, Hart Publishing, Oxford, 2012; Joanna Miles, 'Principle or pragmatism in ancillary relief?' (2005) *International Journal of Law, Policy and the Family* (Special issue) 242; Joanna Miles, 'Charman v Charman: making sense of need, compensation and equal sharing after Miller/McFarlane' (2008) *Child and Family Law Quarterly* 378; A. L. Diduck, 'What is Family Law For?' (2011) 64 *Current Legal Problems* 287; Law Commission of England and Wales, (2014) *Matrimonial Property, Needs and Agreements*, Law Com No 343.

⁹³ *White v White* [2000] UKHL 42.

⁹⁴ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

⁹⁵ Miles (2004) and Miles (2008), above n 90.

⁹⁶ Diduck, above n 92.

⁹⁷ George, above n 92.

losses (that go beyond need) and only then calculating if there is any surplus and if so then this is to be divided equally.⁹⁸ In our view this approach has considerable merit and provides a workable basis for the development of Australian family law jurisprudence on the substantive content of our own ‘just and equitable’ requirement.

In terms of suggesting a specific reform proposal suited to the Australian context, we are influenced, first, by the fact that while Australia has a well-established (and much reviewed) child support program, child support, ‘was never intended to meet the housing needs of children, only day to day expenses.’⁹⁹ The problematic absence of any focus in Australian family property law on the housing needs of children has been rightly emphasised by Parkinson,¹⁰⁰ and the case for amending the FLA property provisions to provide for special treatment of the family home has also been strongly made in the past.¹⁰¹ Similar to the position in England and Wales, we envisage that this requirement would not direct decision makers toward a specific outcome, but would rather encourage courts to consider what orders would facilitate the provision of appropriate housing for children, with a focus on the home in which children spend most time.¹⁰² While it is arguable that our proposed approach may increase the risk of parents seeking time with their children in order to maximise their financial outcomes, this risk has been present in Australia since major Child Support amendment in 2008 reducing payers’ child support once they spend 14 per cent of nights with their children.

Our suggested next priority is the attainment of material and economic security of the parties. We are drawn to the possibility of addressing material and economic security more broadly (that is, ‘needs’ or disadvantage that exists including that arising from circumstances not directly connected with the relationship) on the basis that this is consistent with our view that systemic disadvantage should be more equitably shared (section 3.1), and the reality that other forms of advantage or disadvantage not arising from the relationship (for example, good health and illness) may well be a matter of good or bad luck, so should also be shared on relationship breakdown to the extent to which this is just and equitable to do so.¹⁰³ Here, we agree with Alison Diduck’s view that ‘family law is about determining responsibility for responsibility’.¹⁰⁴ We share Diduck’s concern with caring responsibilities

⁹⁸ George, above n 92, pp. 95-102

⁹⁹ Parkinson (2000), above n 31, p. 5.

¹⁰⁰ Ibid.

¹⁰¹ Tom Altobelli, ‘Submission to the Family Law Pathways Advisory Group’ in *Family Law in Australia: Principles & Practice*, T. Altobelli (Ed), (Chatswood, LexisNexis Butterworths, 2003), p. 525.

¹⁰² *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FCR 218; Family Justice Council (April 2016) *Sorting Out Finances on Divorce*. We are mindful of the possibility that this might lead to a minority of parents attempting to ‘game’ the system (by seeking to maximise the amount of time that a child spends with them) in order to get a larger share of the property. Research suggests that financial motives are already relevant for parents working out property settlement and child support (e.g. Fehlberg et al (2010) above n 13), so this is an issue which professionals and courts will continue to grapple with.

¹⁰³ On the issue of the extent to which it may be just and equitable to do so, see the discussion in Miles, above n 92, p. 106-107.

¹⁰⁴ Diduck, above n 92, p. 292.

within families, and with what value is placed ‘on those compromises and on that care work, and who is responsible for paying for them’. We agree with her conclusion that ‘Ultimately, answering those questions is what ... family law is for.’¹⁰⁵

We acknowledge, however, that the notion that one is ‘responsible’ for the economic security of their ex-partner is perhaps controversial in the sense that it may be at odds with the limited sense of financial obligation to ex-partners that research suggests exists in the broader community¹⁰⁶ and to some extent in legal discourse as evidenced by the low incidence of spousal and de facto partner maintenance in Australia,¹⁰⁷ and in recent consideration in England and Wales of ‘the proposal that needs should embody incentives towards independence’,¹⁰⁸ while also recognising that ‘in a significant number of cases independence is not possible’.¹⁰⁹ In this context we note recent English work directed at more closely defining the concept of ‘need’, suggesting that even when principles appear simple, their interpretation and application may present considerable challenges in practice.¹¹⁰ We also note Joanna Miles’ analysis underlining that ‘responsibility’ does not simply exist along the single axis of partner to partner but is shared along *three* axes: individual (‘local’), partner (‘horizontal’) and State (‘vertical’) and that ‘[t]he key task is to determine the appropriate distribution of responsibility between these three’.¹¹¹

While the issue of allocating responsibility for the material and economic security of the parties clearly requires further discussion and analysis, as a tentative initial suggestion we would expect that addressing the material and economic security of the parties within the property provisions of the FLA would in most cases focus on housing and income (with current research on the minimum income to live a healthy life providing a *minimum* starting point),¹¹² informed by what is reasonable given the available property.¹¹³ We would also anticipate that in many cases, provision of appropriate housing for children and addressing the material and economic security of the parties would absorb and indeed exceed the property available for division. Spousal or de facto partner maintenance would remain an option if, after property division, a party is unable to support herself adequately and the other party has the capacity to pay (s. 72(1)/90SF(1)), although here we would agree with Parkinson that ‘there is merit in the idea that spousal [and now de facto partner]

¹⁰⁵ Ibid p. 314. Like Diduck, we take the view that this concern applies to parties with and without children.

¹⁰⁶ Ibid.

¹⁰⁷ Juliet Behrens and Bruce Smyth, *Spousal Support in Australia: A Study of Incidence and Attitudes*, Working Paper no. 16, AIFS, Melbourne, 1999.

¹⁰⁸ Law Commission of England and Wales, above n 92, [3.47].

¹⁰⁹ Ibid [3.67].

¹¹⁰ Family Justice Council, (1 July 2016) *Guidance on Financial Needs on Divorce*; Family Justice Council (April 2016) *Sorting Out Finances on Divorce*.

¹¹¹ Miles, above n 92, p. 92.

¹¹² Peter Saunders and Megan Bedford, *New Minimum Income for Healthy Living Budget Standards for Low-Paid and Unemployed Australians*, Social Policy Research Centre, UNSW Sydney (August 2017). See also, *Poverty Lines: Australia*, published by Melbourne Institute of Applied Economic and Social Research, The University of Melbourne (June 2016).

¹¹³ Family Justice Council, above n 110.

maintenance should be dealt with according to just one set of principles'¹¹⁴ (as articulated in section 5).

In addition to dealing with economic disadvantage, our preferred approach would also extend, as Joanna Miles has explored in the context of England and Wales, to 'an element of compensation, as distinct from need, to the extent that the relevant losses exceed the applicant's needs'¹¹⁵ and the property available for division allows. In addition, in cases involving family violence, courts should 'be empowered to award compensation for pain and suffering and economic loss as a result of a history of family violence during the marriage [or de facto relationship]'.¹¹⁶ More generally, given the complexities in calculating compensation,¹¹⁷ we would like to see further consideration of possible models for taking into account the effects of role division within marriage and de facto relationships in property settlements, perhaps with the general objective of assisting the economically dependent party to recover in the short-to-medium term although not limited to this, depending on what the justice and equity of the case requires.¹¹⁸ Once again, spousal or de facto partner maintenance would remain an option if the available property was insufficient to meet the claim.¹¹⁹

The final step in our approach would involve equal division of any remaining property, unless there was good reason to do otherwise. This approach is consistent with the 'partnership' approach commonly adopted during relationships: previous research over many years tells us that during marriage, and following the arrival of children in de facto relationships, financial pooling is likely.¹²⁰ This, however, raises questions regarding the position of couples without children, and more generally the need for new research in this

¹¹⁴ Parkinson (2000), above n 31, p. 6.

¹¹⁵ Miles, above n 92, p. 389.

¹¹⁶ Parkinson (2000), above n 31, pp. 4-5. Currently, family violence is treated as a matter that can result in the contribution of the victim being accorded additional weight (*Kennon and Kennon* [1997] FamCA 27) but the formulation is difficult to satisfy and adjustments are minor at best: Patricia Easteal, Catherine Warden and Lisa Young, 'The *Kennon* 'factor': Issues of Indeterminacy and Floodgates' (2014) 28 *Australian Journal of Family Law* 1. In our view, there is merit in the view that compensation for family violence in the family property division context should reflect an amount that would be awarded as damages in a civil suit for assault: Parkinson (2000), above n 31, p. 6.

¹¹⁷ Miles, above n 92.

¹¹⁸ See for example, Kate Funder's work in the 1980s at the Australian Institute of Family Studies. Funder and her colleagues put forward a model for calculating the opportunity costs for mothers, in contrast with women of the same age and educational attainment with no children, proposing that this cost be shared between the parents. Funder acknowledged the difficulty of making such calculations (including the problem of working out what might have been the woman's workforce trajectory if had she not had children): Margaret Harrison, Kate Funder and Peter McDonald (ed), 'Principles, Practice and Problems in Property and Income Transfers' in Kate Funder, Margaret Harrison and Ruth Weston (eds), *Settling Down: Pathways of Parents after Divorce* (Melbourne: AIFS, 1993), pp 204-209. This problem leads Parkinson to suggest that 'it is better to give the courts a broad discretion to compensate for a 'serious' economic disadvantage as a result of the circumstances' (Parkinson (2000), above n 31, p. 8) – an understandable conclusion, but one which does not really progress us from the current position.

¹¹⁹ Here, consideration might be given to models developed for courts to assist in the achievement of more predictable and consistent outcomes, e.g. the Canadian Spousal Support Advisory Guidelines.

¹²⁰ For a summary of the literature, see Fehlberg et al (2015), above n 1, pp. 393-397.

area, as much of the research on financial sharing in marriage was conducted in the early 1990s. Equal sharing also is admittedly at odds with the subjective perception of individual entitlement that is likely to occur or increase after couples separate. In our view, however, a law promoting 'just and equitable' property outcomes should, once 'needs' or economic security of the parties and compensation issues are addressed, as a general principle support the more positive pattern of financial sharing commonly adopted (on the basis of available evidence) during relationships, while allowing for departure from this position in exceptional circumstances. Given the broad definition of 'property' for the purposes of the FLA (section 2), departure would be likely to be argued, for example, in cases involving short-term relationships without children where assets had been acquired pre or post relationship.

Section 79(4) /90SM(4) as drafted does not overtly encourage our preferred approach, due to its primary focus on contributions. While the High Court has made clear that the Full Court may develop non-binding guidelines for lower family law courts,¹²¹ the approach we suggest involves significant change to the order and content of the current list of factors in s. 70(4)/90SM(4), requiring legislative reform, particularly given that after *Stanford* the Full Court seems (understandably) less likely than ever to provide such guidance.

The question then becomes: what form should that legislation take?

5. What *form* might guidance take?

As regards the form of the approach we envisage, we are influenced by the reality that to be effective Australian family law must speak to 'multiple fora' and to multiple actors.¹²² As our preceding discussion makes clear, the FLA property provisions may be applied and interpreted by a range of actors in a range of contexts, predominantly *outside* the formal adjudication system. As we would prefer that the legislative reform we propose was utilised to a greater extent by legal actors and separating spouses and de facto partners in the negotiation of property outcomes, the guidance we envisage needs to be readily intelligible.

At present, it is abundantly clear that Australian family law is far from achieving that goal. Across the board, the shift has been toward more, and more complex, legislation since the 1990s in the areas of parenting, child support and financial matters. As Dewar has argued, '[f]amily law presents primarily a regulatory rather than an adjudicative task, in the sense that it provides guidance mostly to lay people in the practical resolution of issues or disputes', but:

this fact is not recognised in the way we write family laws....current law in Australia is so complex that many lawyers struggle to make sense of it. The law that non-

¹²¹ *Norbis* [1986] 161 CLR 513.

¹²² Dewar, above n 77 pp. 147-148 (Note that while Dewar makes observations in relation to family law generally, his focus in this article is on parenting law rather than family property law).

lawyers, acting in informal settings to resolve disputes, *think* they are applying, to family law issues may bear only a tangential relationship to what the law actually is.¹²³

Thus while Dewar acknowledges that factors outside of the legislation influence outcomes, he also suggests that the form of legislation will influence the extent to which it is understood and the extent to which it is applied.¹²⁴

More recently, in its 2014 Report on *Access to Justice Arrangements*, the Productivity Commission noted that:

Given that very few family law disputes are resolved through the courts, there is value in ensuring that those seeking to resolve disputes outside the courts have a reasonable degree of clarity about what the law is and what their entitlements are. However there is a question as to whether the current *Family Law Act 1975* (Cth) provisions applying to the division of property limit the effective use of informal dispute resolution mechanisms by making it difficult for parties to know what their obligations or entitlements in a property division are.¹²⁵

The Report suggested that this might be due to the ‘complexity of the Act’s property provisions’ and the ‘discretionary approach’ giving judges ‘wide powers’.¹²⁶ The Report recommended that the property provisions be reviewed ‘with a view to clarifying how property will be distributed on separation’ and suggests the review should consider introducing a presumption of equal sharing.¹²⁷ While we appreciate the possible advantages of such an approach (namely, its simplicity, and its capacity to possibly improve the bargaining position of particularly vulnerable parties, including victims of family violence, who might otherwise settle for less than half), it is an option that concerns us, given our analysis in section 3. In our view, research on the economic consequences of relationship separation suggests such a significant level of disparity between men and women that an equal sharing model would in most cases produce outcomes that are far from ‘just and equitable’ for women and children. We are concerned that this form of simplicity would come at the risk of producing further injustice, given that the significant economic

¹²³ Ibid p. 148.

¹²⁴ A similar observation to that of Dewar regarding the limited role of law is reached by Matt Harvey and colleagues, who studied the effects of discretion in laws on the negotiation of disputes governed by those laws. (Harvey et al, above n 76, p. 2.) They concluded that ‘It is clear that many factors other than norm form play a part in determining the outcome of negotiations’ (ibid p. 71) including financial calculation, emotion, and the extent to which the facts and the law give power to the negotiators. They further concluded that ‘If anything, [their study tended] to support the conclusion that factors *other* than the governing law can be more significant in enabling resolution of disputes’ (ibid p. 73). However, despite their reservations, Harvey and colleagues in the end concluded that, ‘Decision-makers would clearly benefit from an unambiguous statement of the goal to be achieved when the discretion is exercised. With such a clearly stated purpose, preferably with examples, coherent guidelines for the discretion’s exercise can evolve’ (ibid p. 10).

¹²⁵ Productivity Commission, above n 34, p. 873.

¹²⁶ Ibid 874

¹²⁷ Ibid.

disadvantage of women and children may well point to women's receipt of property exceeding a half share.

The importance of some form of simplification becomes apparent, however, when we have regard to what the research tells us about the *form* of legislation that is *most likely to be understood and applied by various actors*. Of relevance here is recent research in the context of English civil procedure rules by Inbar Levy.¹²⁸ Drawing on a behavioural psychology perspective, Levy concludes that a preferable approach to the checklist or 'laundry list' approach (also seen in s. 79(4)/90SM(4)) (which leads to 'factor overload' – that is, the ability to identify relevant factors but the inability to weigh them up in a systematic way) would be to provide a small number of considerations (up to four) and to make clear the overriding goal or principle. Levy's research does not necessarily point to a preference for a more formulaic, as opposed to discretionary, approach. Rather, it is 'factor overload' generated by the 'laundry list' of too many factors (and the lack of a clear overriding principle) that is problematic and that makes it difficult to predict what a court will decide (and arguably difficult to negotiate a private settlement as a result).

In the s. 79/90SM context, the existing overriding goal or principle is the 'just and equitable' requirement (s. 79(2)/90SM(3)). In our view, and following the implications of Levy's research, affording courts a discretion to reallocate property interests under this guiding principle is desirable and should be maintained. It is arguable, however, that the long list of factors in s. 79(4)/90SM may well contribute to 'factor overload'. Given that the emphasis and ordering of the s. 79(4)/90SM factors sit, in our view, rather incongruously with the concept of 'just and equitable' as we have articulated it in this paper (on the basis of available empirical data), we consider that any reform proposal is better targeted at both reducing the number of factors and prioritising them so that the material and economic security of parties and their children is better addressed, while also retaining a broad discretion regarding the application of those factors in individual cases to achieve contextually 'just and equitable' outcomes.

Great care, however, needs to be taken with any reform proposal. The challenge is to address the goal of simplicity while also achieving outcomes that are substantively just and equitable. Australian family law reform has generally failed in this regard. In essence, formal equality discourse has consistently trumped substantive equality considerations. The 2006 Australian shared parenting amendments provide a case in point. The amendments included the introduction of a presumption of equal shared parental *responsibility* along with provisions regarding protection of children from family violence and abuse. Research conducted after the amendments found that complex legislation had led to professional and community misunderstanding that the law said, 'The starting point is shared *time*',¹²⁹

¹²⁸ Inbar Levy, 'Lightening the overload of CPR Rule 3.9' (2013) 32 C.J.Q 139.

¹²⁹ Kaspiew et al (2009), above n 86; Richard Chisholm, *Family Courts Violence Review* (Sydney: Family Court of Australia, 2009).

(emphasis added) and that shared parenting messages were outweighing messages regarding children's safety. This led to further amendment in 2012 to improve the family law system's identification and responses to family violence.¹³⁰ Most recently, however, an Australian Institute of Family Studies evaluation of the amendments suggested that, 'courts remained concerned to ensure that, wherever possible, children's relationships with both parents were maintained after separation, except in cases where the evidence was unambiguously in favour of an outcome inconsistent with this approach'.¹³¹ Family law professionals participating in the study were generally of the view that less 'adequate priority' was placed on 'protection from harm' than on 'meaningful relationship'.¹³² Australia's experience of legislating in the shared parenting domain conveys that several factors are crucial to the achievement of outcomes that are in line with legislative intent, including: the form of law, cultural attitudes within the family law system¹³³ and the broader community, and adequate resourcing of the family law system so that well-informed decisions are made.¹³⁴ Added to this is Australia's experience with child support reform: constantly reformed¹³⁵ and increasingly rule-based, to the cost of women and their dependent children.¹³⁶

In the property context, further lessons may be learned from the Scottish approach to financial orders, which is based on five principles, the first being fairness. A recent review of the legislation found that, despite the presence of five principles, the default position is equal sharing, and this was the result in most of the adjudicated cases.¹³⁷ An understandable tendency to distil a simple message¹³⁸ seems evident here. While lawyers interviewed for the study considered that the five principles worked well in providing guidance as well as flexibility, it was clear from the study vignette that practice approaches varied, and unclear how varying practices affected both the application of the principles and substantive outcomes – although under-use of key principles relevant to economic disadvantage was evident.

¹³⁰ Family Law Amendment (Family Violence and Other Matters) Act 2011 (Cth).

¹³¹ See further: Rae Kaspiew, Rachel Carson, Jessie Dunstan, Lixia Qu, Briony Horsfall, John De Maio et al., *Evaluation of the 2012 family violence amendments: Synthesis report* (Melbourne: Australian Institute of Family Studies, 2015), p. xi.

¹³² *Ibid*, p. xii.

¹³³ Rosemary Hunter, *Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence*, Unpublished PhD thesis, Stanford University, 2005.

¹³⁴ Penny Timms, 'Legal Aid Matters: Lack of government funding 'destroying lives', Law Council says', ABC News, Melbourne, 14 May 2016.

¹³⁵ See the references cited at note 17, above.

¹³⁶ Bruce Smyth and Paul Henman, 'The Distributional and Financial Impacts of the New Australian Child Support Scheme: A "Before and Day-After Reform" Comparison of Assessed Liability' (2010) 16 *Journal of Family Studies* 5.

¹³⁷ Jane Muir, Enid Morduant and Fran Wasoff, *Built to Last: The Family Law (Scotland) Act 1985* (Nuffield Foundation, 2016).

¹³⁸ Ellman, above n 77.

In summary, then, the available evidence supports the view that if legislative reform were to occur, decision-makers, family law professionals and the broader separating population would be most assisted by a simplified approach that articulates up to four principles to guide determination of what property outcome would be 'just and equitable'. To this end, and following on from the discussion of substantive considerations in section 4, we would suggest, as a basis for further discussion, the following amendment to s. 79(4)/90SM(4):

(4) In determining what order (if any) is just and equitable in property settlement proceedings the court shall consider the following principles, in the order of priority listed below:

- (a) the reasonable housing requirements of any dependent child of the parties;
- (b) the material and economic security of each of the parties;
- (c) whether an adjustment should be made in favour of one of the parties by way of compensation for relationship-generated loss;
- (d) equal division of any surplus remaining after consideration of (a), (b) and (c), in the absence of exceptional circumstances.

We would emphasise that this approach is a proposed order of priority for applying the 'just and equitable' requirement in a way that addresses more closely the position of those most economically disadvantaged post-separation, rather than an approach dictating particular outcomes in individual cases. Much more work would need to be done to determine the application of these principles in particular contexts often referred to in commentary, including short relationships, relationships without children, economic disadvantage not directly arising from the relationship (for example, illness), and the relevance of fault. For reasons outlined earlier in this section, our preference is for appellate courts (the High Court and the Full Court), broadly consistent with the concept of precedent within the common law tradition, to provide this guidance.

6. Conclusion

Achieving consensus on the meaning of 'just and equitable' and on the appropriate guidance to be provided in s. 79/90SM in Australian family property law is likely to prove difficult, if not impossible in the current social and legal context of family law in Australia, in which debate continues to be polarised along gender lines. The history – and indeed the form – of the Australian shared parenting amendments reflect this tension, promoting both shared parenting outcomes and protection from harm in a manner that reflected the competing claims of fathers' groups and groups concerned to protect women and children from family violence.¹³⁹ In the current context, any departure from the predominantly

¹³⁹ Chisholm, above n 129.

‘contributions focussed’ model which currently exists would be likely to meet significant opposition.

Difficulty and opposition should not, however, inhibit the putting forward of reform proposals that are more likely to achieve just and equitable outcomes and that are intelligible and relevant to the range of actors in family law. In this spirit – and on the basis of current empirical evidence – we have suggested an approach that prioritises children’s housing needs, followed by the material and economic security of parties, followed by compensating for any losses and *lastly*, equal division of any surplus in the absence of exceptional circumstances.

Yet we would also emphasise that introducing further legislative guidance may not of itself lead to more just and equitable outcomes without encouragement of social and cultural change supporting the principles implemented – a factor that is also of key relevance to judicial interpretation of law.¹⁴⁰ In the end, the key issue surrounds achieving greater consensus on what family property law is for.¹⁴¹ In this regard, the on-going – and apparently increasing – challenge is to achieve greater understanding and recognition of the economic consequences of separation and divorce for women and children in a social environment that prefers to believe that gender equality has been achieved, despite clear evidence to the contrary.

¹⁴⁰ See, for example, Stanley Fish, *Is there a Text in this Class?: the authority of interpretive communities* (Cambridge, MA: Harvard University Press, 1992): interpreters are not constrained by the ‘text’ but also are not free to read into the text whatever they like, as they are constrained by their tacit awareness of what is possible and not possible to do. The source of this tacit awareness is the relevant interpretive community – in the case of judges, primarily the legal, but also the broader, community, whom they seek to persuade that they have decided the case correctly. The constraint on interpretation is therefore the persuasiveness of any particular interpretation, in the first instance, to the legal interpretive community and then more broadly, to the community at large.

¹⁴¹ Diduck, above n 92.