**Submission to the Australian Law Reform Commission’s Review of the Family Law System**

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We welcome the Federal Government’s ongoing concern regarding how Australia’s family law system can be improved, and its referral of this Inquiry to the Australian Law Reform Commission.

The Inquiry’s Terms of Reference are understandably wide-ranging. Given our preference for evidence-based reform, we focus in our submission on two areas of our recent research of relevance to the Inquiry, namely:

1. The influence of formal equality – and more specifically, formal gender equality (that is, treating men and women the same) – in central areas of major Australian family law reform over the past 20 years, and its negative impact on vulnerable women and their dependent children, and
2. Examination of possible change to the broad discretion under *Australia’s Family Law Act* 1975 (Cth) (FLA) to reallocate interests in property of spouses and separating de facto partners, to better address the consistent empirical research finding that women, particularly mothers with dependent children, experience significant economic disadvantage post-separation.

Both projects have resulted in fully-written papers, available on request to the ALRC. The first is under review. The second is forthcoming in (2018) 31(2) AJFL and in shorter form in *The Cambridge Companion to Comparative Family Law* (S Choudry and J Herring (eds), CUP, 2018).

1. **The influence of formal equality on Australian family property reform**

The genesis of this paper was our view that, at a time when Australia is once again contemplating family law reform, there is significant value in revisiting past reform initiatives and patterns. Doing so offers a longer-term perspective regarding the evolution of our law, the interests at play in its amendment, and the impacts of amendment on vulnerable parties within the family law system, who are most commonly women and their dependent children, due to the greater likelihood that they will experience family violence and abuse, and post-separation economic disadvantage.[[1]](#footnote-1) Re-acquainting ourselves with what has happened in the past places us in a stronger position to formulate legislative change that will better protect their interests.

The premise for our paper is that formal equality – and more specifically, formal gender equality – has had significant influence in Australian family law changes over the past 20 years. Despite its apparent benefits of simplicity and fairness, our concern is that formal equality has not served the interests of vulnerable women and their dependent children well in Australian family law amendment. This is because change based on formal equality is invariably underpinned by a male standard that assumes an equal starting point and does not take sufficient account of the specific interests of vulnerable women and children.

Our paper begins where Reg Graycar and Jenny Morgan’s analysis of family law amendment from 1975 to 2004[[2]](#footnote-2) ended. That analysis led Graycar and Morgan to conclude that amendment over that timeframe had increasingly ‘demonstrate[d] the Australian commitment to formal equality and gender neutrality’.[[3]](#footnote-3) Our detailed analysis of major family law amendments from 2004 to the present in the areas of parenting, child support and binding financial agreements indicates an overall continuation and strengthening of the formal gender equality theme they identified, to the cost of vulnerable women and their dependent children.

For example, although the FLA has remained on its face a gender-neutral legislative scheme and for parenting disputes the principle remains that ‘the best interests of the child [are] the paramount consideration’,[[4]](#footnote-4) substantive law and process amendments in 2006 (‘the 2006 amendments’) included a distinct shift away from an open-ended ‘best interests’ approach to a more directive approach that encourages shared parenting outcomes (regarding both decision-making on major issues and time). This was done mainly through the introduction of a legislative presumption of equal shared parental responsibility, and a linked requirement that if such orders are made the court must consider ordering shared time.[[5]](#footnote-5) The 2006 amendments reflected a formal equality approach that most clearly benefitted fathers: given their usually lesser involvement in the daily care of children in intact families,[[6]](#footnote-6) shared parenting laws facilitate a greater parenting role for them than they commonly have prior to separation. In so doing, the amendments resulted in concerning outcomes for vulnerable women and children. For example, 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*’,[[7]](#footnote-7) (emphasis added) and that shared parenting messages were outweighing safety messages, to the cost of women and children. This led to further amendment in 2012 to improve the family law system’s identification and responses to family violence and abuse.[[8]](#footnote-8) However, provisions encouraging shared parenting outcomes remain in place and problems remain. Most recently, an Australian Institute of Family Studies evaluation of the 2012 amendments observed 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’.[[9]](#footnote-9) 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’.[[10]](#footnote-10)

Our analysis leads us to consider whether equality-based arguments should be abandoned entirely, at least in the family law context. Here, we agree that alternatives to equality still ‘implicitly rely on notions of equality or at least include equality as part of their analysis’, but that ‘the insights offered [from critique of formal equality] could be, and have been fruitfully used to enrich equality concepts’. [[11]](#footnote-11) One strategy for doing this is to develop alternative concepts to describe elements of importance to women’s and children’s experience (in family law).[[12]](#footnote-12) Our work in relation to the development of alternative concepts in family property law illustrates how this might be done.

1. **Australian family property law: ‘Just and equitable’ outcomes?**

Two of us (Fehlberg and Sarmas) have recently considered the broad discretion under the FLA to reallocate interests in property of spouses and separating de facto partners 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 research finding that women, particularly mothers with dependent children,[[13]](#footnote-13) but also older divorced mothers whose children are no longer dependent (a smaller group that has received less research focus)[[14]](#footnote-14), victims of family violence[[15]](#footnote-15) and women leaving low-asset relationships,[[16]](#footnote-16) 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’ material 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’.[[17]](#footnote-17)

1. **Conclusion**

In summary, our research suggests that Australian family law amendment has over many years been informed by formal equality discourse, contrary to empirical research clearly demonstrating that gender equality has not been achieved, and to the resulting disadvantage of vulnerable women and their dependent children. This pattern needs to be addressed if we are to have an Act that ‘meets the contemporary needs of families and individuals who need to have resort to the family law system’ (Terms of Reference). If family property reform were to proceed, the most urgent need is to better address the significant economic disadvantage that continues to be commonly experienced by women and their dependent children after relationship separation. This need is addressed by our proposed approach.

1. There is much research establishing these points. In Australia, recent examples include: 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: AIFS, 2015); Lixia Qu, Ruth Weston, Lawrie Moloney. Rae Kaspiew and Jessie Dunstan, *Post-separation parenting, property and relationship dynamics after five years*, (AIFS, Melbourne, 2014); 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; Laurie Brown, ‘Divorce: For richer, for poorer’ (AMP.NATSEM Income and Wealth Report Issue 39, 2016). [↑](#footnote-ref-1)
2. Reg Graycar and Jenny Morgan, ‘Examining understandings of equality: One step forward, two steps back?’ (2004) 20 *Australian Feminist Law Journal* 23, p 23. [↑](#footnote-ref-2)
3. Ibid 25. [↑](#footnote-ref-3)
4. FLA s 60CA. [↑](#footnote-ref-4)
5. FLA ss 61DA and 65DAA. [↑](#footnote-ref-5)
6. See further: Belinda Fehlberg, Rae Kaspiew, Fiona Kelly, and Juliet Behrens, Australian Family Law: the contemporary context (Oxford: OUP, 2015), pp 179-182. [↑](#footnote-ref-6)
7. 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* (Melbourne: Australian Institute of Family Studies, 2009); Richard Chisholm, *Family Courts Violence Review* (Sydney: Family Court of Australia, 2009). [↑](#footnote-ref-7)
8. Family Law Amendment (Family Violence and Other Matters) Act 2011 (Cth). [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
10. Ibid, p xii. [↑](#footnote-ref-10)
11. Elsje Bonthuys, ‘Equality and difference: Fertile tensions or fatal contradictions for advancing the interests of disadvantaged women?’ in Margaret Davies and Vanessa E. Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Farnham: Ashgate: 2013), pp 85-104, p 86. [↑](#footnote-ref-11)
12. A strategy similar to that proposed by Rosemary Hunter, ‘Introduction: Feminism and Equality’, in R Hunter (ed) *Rethinking Equality Projects in Law* (Oxford: Hart Publishing, 2008) pp 1-10. [↑](#footnote-ref-12)
13. Above n 1. [↑](#footnote-ref-13)
14. 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). [↑](#footnote-ref-14)
15. 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. [↑](#footnote-ref-15)
16. While most separating spouses and de facto partners have low or modest property to divide (Qu et al, above n 1), 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* (Melbourne: Women’s Legal Service Victoria, 2018). [↑](#footnote-ref-16)
17. FLA ss 79(2) and 90SM(3). [↑](#footnote-ref-17)