Public Submission Australian Law Reform Commission Inquiry Review of the Family Law System

Dr. Christopher Turnbull

Public Submission

Australian Law Reform Commission Inquiry

Review of the Family Law System

Dr Christopher Turnbull PhD (QUT)

4 May 2018

# **Introduction**

I write in a personal capacity. My interest in the issues arises from my experience as a legal practitioner in family law, a teacher of family law, and from postgraduate research.

My admission as a Solicitor was in the year 2000 and, until September 2017, I worked in various private practise roles. In 2017 I obtained a Doctor of Philosophy from Queensland University of Technology. My thesis title was ‘Family Law Property Settlements: Principled Law Reform for Separated Families’. [[1]](#endnote-1) The thesis is available online. It is accessible through a direct link: <https://eprints.qut.edu.au/113831/>. This submission draws upon (but does not repeat) that thesis.

Previously, I was in private practise in family law. I was an Accredited Specialist (Family Law), Family Dispute Resolution Practitioner, and an Accredited Family Law Arbitrator. I am a contributing author to the book Harland et al. *Family Law Principles* (2015, Thomson Reuters). I teach family law at Griffith University and the Queensland University of Technology (QUT). I also teach dispute resolution at QUT.

Presently, I am a Registrar of the Federal Circuit Court of Australia / Family Court of Australia, in the Brisbane Registry. However, this submission is entirely unconnected with my employment and subject to essential declarations which follow.

**This submission’s focus is mostly on financial matters. It addresses (only) the following questions:**

* **Question 1 – Role and Objectives.**
* **Question 2 – Principles for Redevelopment.**
* **Question 17 – Principles for Property Division.**
* **Question 19 – Financial Agreements.**

**This submission offers procedural and substantive reform recommendations. Also, many of this submission’s recommendations are for further research. This submission identifies unknowns about how the family law system works and its cumulative effect.**

# **Declaration**

I am an Australian Public Service (APS) employee, bound by legislation governing my conduct.[[2]](#endnote-2) I acknowledge my obligations to take reasonable steps to avoid any conflict of interest (real or apparent), to disclose details of any material personal interest. I must not improperly use inside information. I must preserve the integrity and good reputation of the Commonwealth Law Courts and the APS.

Before delivery of this submission, I consulted with the Family Court of Australia and Federal Circuit Court of Australia about the process for this submission. I provided to the Principal Registrars of each Court a preliminary draft to ensure compliance with the APS code of conduct.

I state the following:

* My views are on my behalf and do not represent any other person or organisation.
* My submission is not on behalf of either Court. It is entirely in a personal capacity.
* My views do not necessarily reflect the view of either Court.
* This submission was prepared entirely outside my role as a registrar.
* This submission does not use, refer to, or rely upon, any information obtained during my employment as a registrar, including (but not limited to) court files or court policy or procedures.
* Any queries about current court processes, or any matters concerning the operation of either Court are answerable by the proper Judicial or management officer representing each Court.
* In making this submission, the intention is to do so in compliance with my obligations under the APS code of conduct.
* This submission contains a discussion of and reporting on the results of, quantitative research into property settlements decisions. All the cases used for this research came from public sources. Completion of the research (and analysis) occurred before my appointment as a registrar.

# **Executive Summary**

|  |  |
| --- | --- |
| **Question 1** | **What should be the role and objectives of the modern family law system?** |
|  | **Discussion Summary:**   * The proportion of families in the family law system compared to families with separated spouses overall is not well known. * The available evidence suggests court applications for parenting orders apply to a small fraction of children with separated parents. Moreover, the most prevalent form of pathway appears to be direct discussions or unspoken agreements. * Even if matters proceed to court, most matters (whether parenting or property) resolve without a judicial decision. * Unpublished data exists (held by the Department of Human Services) about the number of children overall in shared parenting or other parenting arrangements. Obtaining this data is very important in evaluating the overall effect of the family law system. * Any potential reform should consider the impact of proposed changes on most families (with separated spouses) who do not interact with the family law system. |
|  | ***Recommendation 1****: That the Commission appoints, as part of this review, an organisation (for example AIFS) to obtain quantitative data about the number of children in Australia whose living arrangements are, at any one time, the subject of a parenting order (consent or otherwise) or a parenting plan.*  ***Recommendation 2****: That the Commission consider the impact of its findings and recommendations on the families who manage their arrangements without interacting with the family law system.*  ***Recommendation 3:*** *That the Commission call upon the Department of Human Services (Commonwealth) to retrieve, then publish (in a manner akin to its previous ‘facts and figures’ documents), particulars of the present numbers (including percentages) of children living with mothers and fathers. The data is presentable in each percentage of care band for calculating a child support assessment.*  ***Recommendation 4****: That in developing a future ‘role and objectives’ of the Family Law System, the Commission consider the data pointing to most separated spouses, even within the family law system, reaching an agreement by themselves about their parenting or property arrangements.* |
| **Question 2** | **What principles should guide any redevelopment of the family law system?** |
|  | **Discussion Summary:**   * There is no need to have a single set of principles guiding the whole of the development of the family law system. * There are presently few identifiable principles underpinning the statutory system for alteration of property interests. * The *Act*, as far as its overall structure is concerned, already reflects liberal philosophical values, in that it prioritises financial agreements (if properly made), *and*, the regime for enforceability of financial agreements comprises (mostly) traditional (and philosophically liberal) principles of contract and equity. * Applying a liberal theory of justice to alteration of property interests produces several principles available to guide redevelopment of the family law (property division) system, being: * The rule of law, * Non-discrimination between spouses, * Adequate recognition of financial disadvantage, * Priority to dependent children as future economic and social members of society**.** |
|  | ***Recommendation 5:*** *That, in respect of property settlement cases the following principles inform any redevelopment of the family law system:*   * *The rule of law.* * *Non-discrimination between spouses.* * *Recognition of a significant economic disparity between spouses, and the differences between wealthier families and less affluent families.* * *Promotion of equality of children as future members of society by maximising their opportunities in each household for accommodation, education, and health.* |
| **Question 17** | **What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?** |
|  | **Discussion Summary:**   * New Zealand’s family property system is currently under review. Their system is very different from the Australian system. The New Zealand review, when completed, will provide highly valuable evidence about the advantages and disadvantages of potential reform. * There is insufficient quantitative data about how spouses presently reach agreement on court-approved property settlements. Unpublished information exists about the percentage and dollar results that spouses receive – from the ‘Application for Consent Orders’ process. Having this data (or a representative sample of it) would dramatically increase our understanding of ‘normal’ family property settlements, and the overall effect of the family law system. * Various published studies of results of property settlements show that Mothers / Wives / Female spouses receive a small majority of property overall. The author’s exploratory quantitative analysis of 200 Federal Circuit Court decisions showed a median result of 55% to Mothers. There was a significant spread of overall results. Mean contribution-based entitlements were very close to equal. Section 75(2) (or equivalent) adjustments mostly favoured mothers. The mean results showed an overall transfer of property from Fathers to Mothers. * There remains a need for further quantitative research into judicial decisions. * Reform alternatives come from a study of regimes in New Zealand, the United Kingdom and Canada. New Zealand has legislative objects and principles. The United Kingdom objective of ‘fairness’ comes from various decisions. * Components of the New Zealand legislation, combined with elements of the United Kingdom law, produces workable objects and principles for alteration of property interests under the *Act.* * There are options for including or excluding property from consideration, such as ‘relationship property’ or ‘family property’ or retaining the existing system. * Other options include presumptions or rules for equal sharing. * Alternatives for the disparity of wealth include additional factors for consideration or a separate cause of action for adjustment or compensation. * Contributions are an outdated and unhelpful concept. * If section 79 of the *Act* is to stay as it is, then a detailed statutory guidance document (much like the ‘Parenting Orders – What you need to know’ book) (or the United Kingdom property guidance document) provides a mechanism for clarity and consistency. * The guidance document requires incorporation into legislation and rules, and ongoing education for practitioners in all parts of the family law system. A great deal of information from the case law is available to include in the guidance document. * We still do not know, cumulatively, if the family law system causes financial disadvantage or ameliorates it. If the Commission is satisfied that the family law system presently delivers unfair results, then it is time to consider radical change. * One option is a wholly new cause of action for alteration of property interests for separated spouses with children. This cause of action – reflecting the values discussion – involves including all property of the parties or each of them (irrespective of the circumstances of acquisition), equal division, further adjustment based on economic disparity and costs of children, and a separate discretion for the composition of the order. This new cause of action also requires an associated statutory guidance document. * The discretion in section 79 of the *Act* would remain for families not falling within this cause of action. |
|  | ***Recommendation 6:*** *That the Commission delay its final considerations of reform concerning alteration of property interests until (a) The Law Commission (New Zealand) has completed its inquiry into the Property (Relationships) Act 1976 (NZ), and (b) Australian stakeholders have had a further opportunity to make submissions in light of the findings and recommendations made by the Law Commission (New Zealand).* ***Recommendation 7:*** *That, before making substantive changes to section 79 of the Act (including section 90SM), the Commission:*   1. *Propose amendments to the ‘Application for Consent Orders’ process to enable anonymised data to be used to understand the quantum and composition of agreed property outcomes, (with the ability for parties to prevent the use of their data if they wish) and* 2. *Recommend that an organisation (such as – but not necessarily limited to AIFS) undertake further quantitative research of consent order applications (including percentages and dollar results).*   ***Recommendation 8:***  *That, before making substantive changes to section 79 of the Act (including section 90SM), the Commission recommends that an organisation (such as – but not necessarily limited to AIFS) undertake further quantitative research of judicial decisions.*  ***Recommendation 9****: That the Commission recommends insertion of specific objects and principles into the Family Law Act 1975 (Cth) for alteration of property interests (whether the spouses have children of their marriage or de-facto relationship or not). These are:*   1. *The role of a court in altering property interests between spouses is to address, to the greatest extent practicable, economic disadvantage.* 2. *The principles underlying this role are:* 3. *Wherever possible, spouses should reach agreement on their division of property after separation,* 4. *Spouses are equal in status, and continuation of such equality is optimal,* 5. *Financial outcomes following separation may be different for financially disadvantaged families compared to wealthier families, and* 6. *The financial interests of dependent children have priority, irrespective of any child support paid or payable, having regard to children’s role as future economic and social members of society.*   ***Recommendation 10****: That a provision is added to section 79(4) of the Act to require a Court to consider and give weight to the objects and principles mentioned above.*  ***Recommendation 11:*** *That, in considering fairer outcomes, the Commission avoid contributions as a primary conceptual means to determine spouse’s entitlements, or recommend amendments to sections 79(4)(a)-(c) to reflect the New Zealand definition of ‘contributions’.*  ***Recommendation 12:***  *That the Commission recommend insertion into the Act and the Rules provisions enabling a property settlement guidance document, then mandating the use of that guidance in consent and contested property applications. That, also, the Act strongly encourage parties to utilise such a document in negotiation, even if the ultimate agreed outcome is different.*  ***Recommendation 13:***  *That the Commission recommend widespread, and continuing, education (to all of the identified stakeholders) on the use of the suggested statutory property settlement guidance document.*  ***Recommendation 14****:*  *That if the Commission is satisfied that the family law system produces unfair property settlement outcomes, (and an objects and principles provision is insufficient), then the Commission consider a new cause of action for alteration of property interests in Part VII of the Act (and its de-facto relationship equivalent) containing the following elements:*   * *A separate cause of action applying to families where:* * *The spouses are in a marriage or de-facto relationship (using the existing requirements), and* * *There is a child of the relationship, and* * *The parties have not otherwise sought to regulate their arrangements through a financial agreement covering some or all their property, then,* * *Property is all property acquired before during or after the marriage or de-facto relationship.* * *Property is divided equally as a rule.* * *Only if a person applies for an unequal division does a Court have discretion, governed by:* * *Statutory objects and principles.* * *Costs of dependent children in each household.* * *The disparity in income and earning capacity of the spouses.* * *The health of the spouses.* * *Financial resources of the spouses.* * *Ensuring a dignified standard of living in retirement.* * *A cap on the percentage division at 80%/20% for wealthier families, but,* * *For less affluent families the percentage division extends to 100%/0%.* * *The Court retains a discretion concerning the composition of an award (within the scope of the % entitlement), using the following:* * *The nature of property (e.g. superannuation).* * *The desire to retain specific property.* * *Proximity (of real property) to children’s schools and family members.* * *The emotional impact of selling real property.* * *In conjunction with this additional cause of action a statutory guidance document (as recommended for the existing regime) issue, with procedural amendments to put it into effect, and extensive education take place, and* * *The current provisions of section 79 of the Act (and equivalents) remain as a fall-back provision for other types of families.* |
| **Question 19** | **What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?** |
|  | **Discussion Summary:**   * This question overlaps with the previous inquiry in 2015 / 2016 into financial agreements. * The Commission should have the benefit of all the reports and submissions from that inquiry (including submissions on the exposure draft). * In any event, because any changes will have to be prospective, reforms will add (even meritorious ones) another layer of complexity to an already tricky statutory scheme. * Despite the problems with the legislation, there should be no further changes. |
|  | ***Recommendation 15***  *That the Commission considers the Commonwealth of Australia, Legal and Constitutional Affairs Legislation Committee Report, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, February 2016, and the public submissions.*  ***Recommendation 16***  *That the Commission calls upon the Department of Justice and Attorney-General to Produce:*  *• Binding Financial Agreements Amendments – Civil Law and Justice Legislation Amendment Bill 2015 (Cth) (“The Consultation Draft”), and*  *• The public submissions made in response to the exposure draft.*  ***Recommendation 17****: That there be no change to the existing financial agreements regime.* |

# **List of Abbreviations**

|  |  |
| --- | --- |
| **Full Description** | **Abbreviation** |
| Australian Law Reform Commission | The Commission |
| Australian Bureau of Statistics  Australian Institute of Family Studies | ABS  AIFS |
| *Family Law Act 1975* (Cth) (as amended) | The *Act* |
| Family Court of Australia  Federal Circuit Court of Australia  Federal Magistrates Court of Australia  Full Court of the Family Court of Australia | Family Court  Federal Circuit Court  Federal Magistrates Court  Full Court |
| Household Income and Labour Dynamics in Australia Survey | HILDA |
| High Court of Australia | High Court |
| Issues Paper ‘Review of the Family Law System’ Australian Law Reform Commission Issues Paper 48, March 2018. | Issues Paper |
| *Matrimonial Causes Act 1959* (Cth) | *Matrimonial Causes Act* |
| *Matrimonial Causes Act 1973* (UK) | *MCA* |
| *Property (Relationships) Act 1976* (NZ) | *PRA* |

**Table of Contents**

[**Introduction** 1](#_Toc512895925)

[**Declaration** 3](#_Toc512895926)

[**Executive Summary** 4](#_Toc512895927)

[**List of Abbreviations** 14](#_Toc512895928)

[**Question 1: What should be the role and objectives of the modern family law system?** 17](#_Toc512895929)

[I How does the ‘Family Law System’ impact on Australian Society? 17](#_Toc512895930)

[II Parenting Orders Applications v Children with Separated Parents 18](#_Toc512895931)

[*Recommendation 1* 22](#_Toc512895932)

[*Recommendation 2* 22](#_Toc512895933)

[III Shared Care and Equal Time: Available (unpublished) Data 22](#_Toc512895934)

[*Recommendation 3* 25](#_Toc512895935)

[IV Research: Settlement Rates and Case Populations in Property Settlements 25](#_Toc512895936)

[*Recommendation 4* 28](#_Toc512895937)

[**Question 2: What principles should guide any redevelopment of the family law system?** 29](#_Toc512895938)

[I Thinking Outside the Traditional Bases 29](#_Toc512895939)

[II Different Principles for Parenting and Property Cases 31](#_Toc512895940)

[III The *Act* (Concerning Finances) Already Reflects Liberal Philosophical Values 32](#_Toc512895941)

[IV A (Philosophically) Liberal Values Framework for Property Settlements 33](#_Toc512895942)

[*Recommendation 5* 35](#_Toc512895943)

[**Question 17: What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?** 36](#_Toc512895944)

[I Two Part Question: Current Legislation and Reform Options 36](#_Toc512895945)

[*Recommendation 6* 36](#_Toc512895946)

[*Recommendation 7* 37](#_Toc512895947)

[II What is the Practical Effect of the Current Provisions Governing Property Division? 38](#_Toc512895948)

[*Recommendation 8* 44](#_Toc512895949)

[III Reform Options: Australia’s System v Comparable Common Law Systems 44](#_Toc512895950)

[*Recommendation 9* 47](#_Toc512895951)

[*Recommendation 10* 47](#_Toc512895952)

[IV Contributions: Outdated and Unhelpful 50](#_Toc512895953)

[*Recommendation 11* 52](#_Toc512895954)

[V Reform Proposal #1: A (Statutory) Guide for Transparency and Clarity 52](#_Toc512895955)

[*Recommendation 12* 58](#_Toc512895956)

[*Recommendation 13* 59](#_Toc512895957)

[VI Reform Proposal #2: Radical Change 59](#_Toc512895958)

[*Recommendation 14* 66](#_Toc512895959)

[**Question 19: What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?** 68](#_Toc512895960)

[I New Question but Similar Issues 68](#_Toc512895961)

[*Recommendation 15* 69](#_Toc512895962)

[*Recommendation 16* 69](#_Toc512895963)

[II No Substantive Changes: A Summary 69](#_Toc512895964)

[*Recommendation 17* 72](#_Toc512895965)

[Other Publications 73](#_Toc512895966)

[Endnotes 74](#_Toc512895967)

# **Question 1: What should be the role and objectives of the modern family law system?**

1. Before we reform the ‘family law system’ we need to know what the ‘family law system’ is, and what it does, both for individual families and cumulatively for Australian society.
2. This part does the following:

* Demonstrates that we do not yet know enough about the broader impact of the ‘family law system’ on Australian society.
* Identifies some unknowns about how families with separated parents; and points to data that could greatly assist with understanding agreed on arrangements for children’s living and spending time with each parent.
* Discussed the writer’s research on the volumes of financial cases, comparing the large number of agreed outcomes to the small volume of judicial decisions.
* Turns to values and theoretical discussion, mainly applying liberal theories of justice to develop a set of values to underpin property matters, at least where there are children of the marriage or de-facto relationship.

## I How does the ‘Family Law System’ impact on Australian Society?

1. The Commission adopts a definition of the ‘family law system’ in the Issues Paper that includes courts, post-separation services (including dispute resolution services), private legal services, legal aid organisations and the community legal sector.[[3]](#endnote-3) This definition correctly recognises courts form only one part of a complex, inter-related service network.
2. The Commission rightly identifies that ‘most separating couples are able to work out their arrangements with limited or no recourse to the family law system.’[[4]](#endnote-4) The Commission’s statement is important because of the number of separated spouses that reach agreements within, or outside of, the family law system.

## II Parenting Orders Applications v Children with Separated Parents

1. This section sets out to demonstrate the large number of families with separated spouses that *do not* have dealings with the family law system. The reasons are as follows:

* There are likely to be submissions on the suitability or otherwise of shared parenting or equal time arrangements. There is a risk that some of those submissions will make broad statements about the prevalence of equal time arrangements.
* There may be some who submit that Australian families (or families with separated spouses) are in crisis and that the responsibility for this falls on the family law system.
* Before the Commission turns to questions of reform, the Commission should have the best possible understanding of:
  + How the family law system operates (regarding agreements and decisions); and,
  + The relationship between the family law system and the rest of Australia’s society, especially families where children have separated parents.

1. My PhD research relied upon data from 2012-2013. Rather than do the research again, I rely on my previous inquiries. Department of Human Services statistics set out that in 2012–2013, the child support system handled approximately 1.2 million children.[[5]](#endnote-5) In that same financial year, about 74,700 new child support assessments issued.[[6]](#endnote-6) The Australian Bureau of Statistics estimated that, as of 2013, 1.506 million Australian children lived in one-parent families, comprised of 1.274 million children in lone mother families and 232,000 children in lone father families.[[7]](#endnote-7) This was out of a total estimated population of 7.194 million children.[[8]](#endnote-8) The number of children equates to approximately one in five of all Australian children living in separated families.
2. In the context of around 1.5 million children with separated parents, consider the number of children affected each year by parenting proceedings or new parenting orders. In the 2012-2013 year, the Federal Circuit Court had 17,364 applications for family law final orders filed.[[9]](#endnote-9) Of those, 67% sought parenting orders.[[10]](#endnote-10) This equals 11,634 applications. For the Family Court, 2012-2013 saw a total of 1,323 applications for contested final parenting orders.[[11]](#endnote-11)
3. In that same year, there were 11,331 applications to the Family Court for consent orders.[[12]](#endnote-12) The Family Court does not break down it's reporting on consent orders into content, but the AIFS has examined on the breakdown of the applications for consent orders by type.[[13]](#endnote-13) According to the AIFS, at 2013, 71% of applications for consent orders were for property only, and a further 12% were for parenting and property orders combined.[[14]](#endnote-14) In other words, 29% of applications included a parenting order. This totals 3,286 applications.
4. A total emerges of the applications for parenting orders to Commonwealth Courts in 2013. They are:
   1. Applications for parenting orders in the Federal Circuit Court: 11,364.
   2. Applications for consent parenting orders in the Family Court: 3,286.
   3. Applications for contested/argued parenting orders in the FCA: 1,323.
   4. Total: 15,973 applications.
5. Neither court publishes data about the total children the subject of orders. Census data (albeit from 2016), suggests that there are 1.8 children per couple family on average.[[15]](#endnote-15) Using this multiplier permits a (very) rough estimation of the number of children the subject of court applications. The result is (1.8 children x 15,973 applications) 28,752 children. This figure excludes state courts of summary jurisdiction and the Family Court of Western Australia.
6. Subject to these assumptions, around 29,000 children (in 2013) were the subject of some form of family law parenting order, out of 1.506 million children with separated parents. This, in percentage terms, represents 1.9% of all children with separated parents. A proportionate visual comparison (conditional upon essential qualifications about the data) follows:

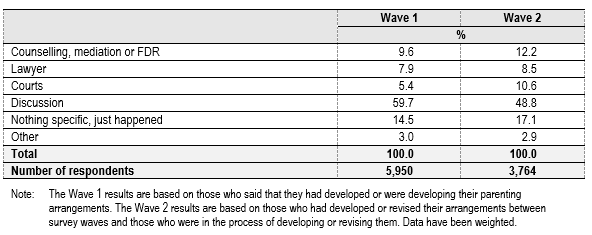
**2013: Estimated Number of Children the Subject of Family Law Applications v Total Children in Australia with Separated Parents**

DHS Data - Children with Separated Parents 2013 (1.506 million)

Estimated Children Subject of Family Law Applications (Including consent applications) (2013) (29,000) (1.9% of children with Separated Parents).

1. Removing the applications for consent orders leaves 12,687 contested parenting applications in that year. Again, using the rough multiplier of 1.8, the total is around 22,900 children. On those estimates, the number of children with parents in dispute in a Commonwealth Court represented about 1.5% of all children with separated parents. Even if these estimates are out by 10,000 children or 20,000 children, the point is that the number of children affected by family law proceedings in any given year is a tiny proportion of all families with separated parents.
2. There are many qualifications and unknowns:
   1. There is, to my knowledge, no quantitative data about how many children in Australia are the subject of operative parenting orders or parenting plans at any point in time.
   2. Similarly, we do not appear to know how many separated parents reached agreement about their children at family dispute resolution, notably:
      1. How many parents reached a written agreement (parenting plan or informal agreement), or
      2. How many parents reached an oral agreement.
   3. Outside the dispute resolution process, the unknowns include how many families had one parent who no longer sought to be involved in the child or children’s lives, and
   4. For court proceedings, other unknowns include:
      1. How many children affected by family law proceedings compares to the numbers of spouses with children who separate each year.
      2. What proportion of court applications are for variation (or discharge) of existing parenting orders.
      3. The number of children dealt with by state courts of summary jurisdiction.
      4. The number of children the subject of family law applications in family law courts in Western Australia.
3. There is a benefit in knowing the reach of the family law system into Australia’s population. Some of the best data is the number of children’s arrangements (at any one time) covered by a parenting order (consent or otherwise), a parenting plan, or an oral agreement reached either at or after Family Dispute Resolution.
4. The existing evidence is that there is already a situation where most parents who separate reach agreement about their children’s arrangements without having to apply to a Court. AIFS research shows that, notwithstanding changes in percentages from time to time, utilisation of the Court system (which means an application to a Court – not a judgment), is somewhere in the order of 5-10% of separated families. In that same research, the AIFS shows the total of parents falling into the ‘discussion’ or ‘just happened’ category is consistent at around 65% of all parents. The AIFS summary of their pathways for settlement research (as of 2010) appears below:

**AIFS Research Results: Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms – Pathway Results**

[[16]](#endnote-16)

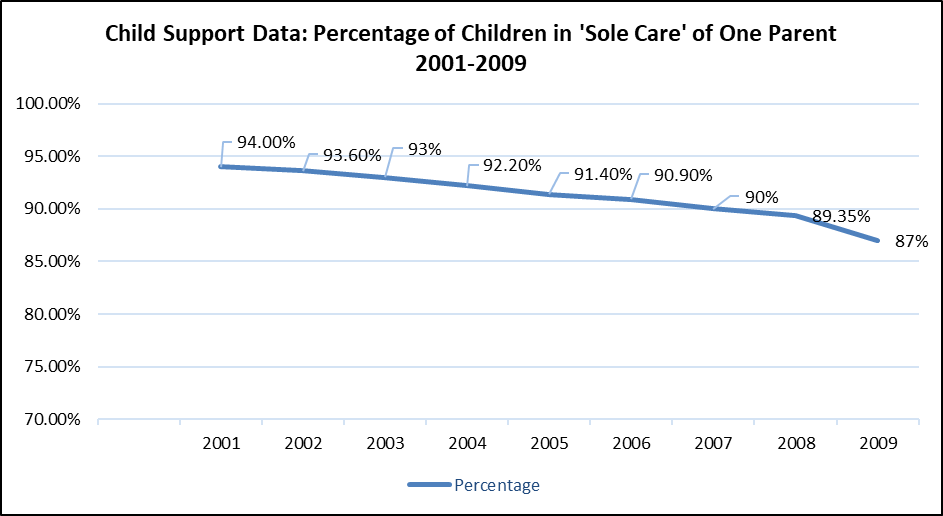
1. The family law system, therefore, comprises all the services the Commission identifies, but potentially also the volume of private arrangements between parents. At the very least, the Commission should consider the impact of its findings on those families who do not directly interact with the family law system.
2. On that basis that (a) there is not sufficient information about the numbers of children affected by family law orders (whether consent or otherwise) or agreements, and that it appears many parents reach an agreement without interacting with the family law system, I recommend:

|  |
| --- |
| *Recommendation 1* *That the Commission appoints, as part of this review, an organisation (for example AIFS) to obtain quantitative data about the number of children in Australia governed, at any one time, by a parenting order (consent or otherwise) or a parenting plan.* |

|  |
| --- |
| *Recommendation 2* *That the Commission considers the impact of its findings and recommendations on the families who manage their arrangements without interacting with the family law system.* |

## III Shared Care and Equal Time: Available (unpublished) Data

1. Many of the matters in the Issues Paper (for example Questions 14, 15 and 16) touches upon the appropriateness, or otherwise, of types of parenting arrangements (such as equal time arrangements). There is good historical data on the prevalence of different types of arrangements. Very useful data on current arrangements exist, but it is not in the public domain.
2. First, consider the historical data. For the years ending 30 June 2001-30 June 2009 the Child Support Agency published statistics about the breakdown of child support assessments by care arrangement. At that time the child support agency used ‘care codes’. Sole care was (at that time) described as 70% of the year (that is, 255 or 256 nights per year and above). The following table shows the percentage of children in that 70% or above care band for all years 2001-2009:

[[17]](#endnote-17)

1. The chart shows a steady but not dramatic decline. As at 2009, 87% of children spent more than 255 nights per year with one parent, compared to 94% in 2001. The same exercise is available for shared parenting. For this data, ‘shared’ was between 40% and 59.9% of the year with one parent. In other words, where children spent between 146 nights and 219 nights per year with one parent. This next table shows a continued increase in shared arrangements from a low of 3.5% in 2001 to 8.4% in 2009.

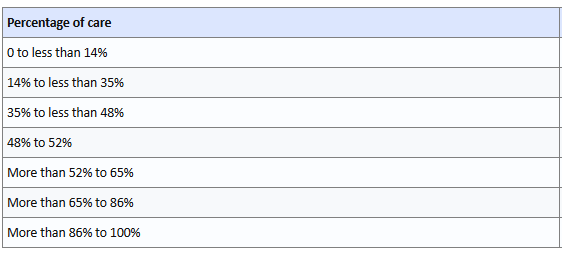
[[18]](#endnote-18)

1. The care codes subsequently changed because of legislative amendments to the child support scheme in 2008.[[19]](#endnote-19)
2. The equivalent data, from 2009 is not, to my knowledge, publicly available. During my PhD research, I tried to obtain the data. In May 2014, I made an application to the Child Support Agency, under freedom of information legislation, for production of updated data. The request sought the care percentage tables (or their equivalent document) for June 2010 to June 2013. The Department of Human Services declined the application on 17 June 2014. Amongst the reasons given, the department confirmed that the data the existed, commenting:

*I am advised by the Internal and External Gateway section and the Families and Transformation Section that the data relevant to your request is still collected by the Department from its service users. However, as this data is not ordinarily required by external or internal stakeholders, regular reports containing this data are not routinely produced. Therefore, this data is not readily available.* [[20]](#endnote-20)

1. The Department confirmed that the “facts and figures” branch no longer existed and that a program would need to be written to extract the data with an estimated (then) cost of $4,000.00.[[21]](#endnote-21) I could not fund the costs and therefore could not see the data.
2. There is a framework issued by the Department of Human Services to seek information for research.[[22]](#endnote-22) The Department of Human Services is highly likely to have updated data. The *Child Support (Assessment) Act 1989* (Cth) still requires, to complete an assessment, the percentage of care a child has with each parent.[[23]](#endnote-23) The child support guide helpfully sets out the currently prescribed care bands:

**Current Child Support (Legislative) Percentage of Care Bands**

[[24]](#endnote-24)

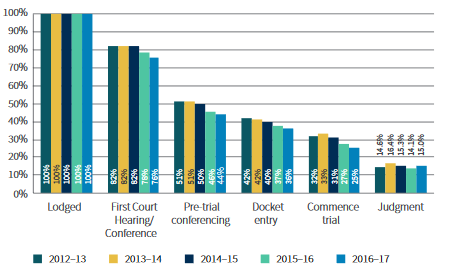
1. If the Commission had the data from the Department of Human Services, then the Commission has a start point about the actual prevalence of equal time (or similar) arrangements from which to begin the discussion. The data will not be ‘like-for-like’ but provides a comparison from the baseline (from the time of the 2006 amendments) of 5.6% of children in shared care arrangements, to compare to now. From that quantitative data, the Commission may draw inferences about the overall impact of the 2006 amendments to the *Act*.
2. On these bases I recommend:

|  |
| --- |
| *Recommendation 3* *That the Commission calls upon the Department of Human Services (Commonwealth) to retrieve, then publish (in a manner akin to its previous ‘facts and figures’ documents), particulars of the present numbers of children living with mothers and fathers. Presentation of the data will be in each percentage of care band used in calculating a child support assessment.* |

## IV Research: Settlement Rates and Case Populations in Property Settlements

1. Both publicly available data and my research for my thesis show that most proceedings resolve without a final judicial decision. The Family Court reports in detail on its attrition rates, that is, the percentage of cases that settle without a trial or a judgment. The Federal Circuit Court does not appear to report in the same way. The Family Court’s reporting includes both parenting and property matters. The Family Court’s reporting for its attrition rates for 2012-13 to 2016-17 is as follows:

**Family Court of Australia Attrition Rates**

[[25]](#endnote-25)

1. This data shows that, presently, about 25% of filed cases start a trial and around 15% of cases require a final judicial decision. This data is in the context of the Family Court’s work, which is the more complicated cases involving questions of jurisdiction or law, and likely a higher proportion matters much more difficult to resolve by consent (for example issues of unacceptable risk of abuse, family violence, or relocation). [[26]](#endnote-26)
2. As part of my thesis, I undertook an exploratory quantitative review of 200 first-instance property judgments, mostly comprised of decisions from the Federal Circuit Court but with some from the Family Court. The research covered decisions from 2012-2015. As part of examining the significance of the sample, I estimated the number of overall property settlement judgments over that time.
3. The number of total judgements by each Court (as reported) over a three-year period from 2012–2015 comes to 6,072 decisions. The numbers of decisions by year follows:

**Estimated Final Judgments Delivered by the Family Court and Federal Circuit Court 1 July 2012-30 June 2015 (Parenting and Property)**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 2012-2013 | 2013-2014 | 2014-2015 | Total by court |
| Family Court | 459[[27]](#endnote-27) | 453[[28]](#endnote-28) | 419[[29]](#endnote-29) | 1331 |
| Federal Circuit Court | 1629[[30]](#endnote-30) | 1517[[31]](#endnote-31) | 1595[[32]](#endnote-32) | 4741 |
| Totals by year | 2088 | 1970 | 2014 | **Overall Total:** 6072 |

1. Updated figures show the consistency of judgment numbers. In 2015–2016, the Federal Circuit Court delivered 1479 family law judgments,[[33]](#endnote-33) and the Family Court finalised 319 cases by judgment.[[34]](#endnote-34) In 2016-2017, the Federal Circuit Court delivered 1349 judgments in written format,[[35]](#endnote-35) the Family Court 349 final trial judgments.[[36]](#endnote-36)
2. Neither Court reports a breakdown of judgments into financial, parenting or both. However, they report on the percentage of applications filed. Assuming (without any supporting evidence) that the number of judgments reflects the number of applications, I estimated the potential population of financial decisions over that time, using the following formula:
   1. Federal Circuit Court:
      1. Percentage of applications in the Federal Circuit Court seeking financial orders (at 2015): 46 %.[[37]](#endnote-37)
      2. Total judgments in the Federal Circuit Court 2012-2015: 4,741.
      3. Calculation: 46 % of 4,741 judgments = 2,180 judgments.
   2. Family Court:
      1. Percentage of applications in the Family Court seeking financial orders: 66 %. [[38]](#endnote-38)
      2. Total judgments in the Family Court 2012-2015: 1,331.
      3. Calculation: 66 % of 1,013 judgments equals 669 judgments.
   3. Totalling 669 judgments and 2,180 judgments equal 2,849 decisions.
   4. Dividing this by three equals around ***950*** final property settlement judgments in total per year.
3. The rest of the property settlement applications, whether to the Family Court or Federal Circuit Court, resolved by a consent order. Rough estimates are possible of the overall number of property consent orders made. In the 2015–2016 financial year, the Family Court received 13,457 applications for consent orders, including parenting orders.[[39]](#endnote-39) Using the same calculation style as that used above for judgments, if 83 % of applications for consent orders involved financial matters, then applying that number to the 2015–2016 Family Court figures, the Family Court made around **11,100** **financial consent orders** (on joint application) for the year ending 30 June 2016.
4. It is even more difficult to establish how many matters resolved by consent after the commencement of contested proceedings but before a final judgment. In 2015–2016, the Family Court received approximately 2,050 financial applications,[[40]](#endnote-40) and the Federal Circuit Court 7,900 financial applications.[[41]](#endnote-41)
5. Using the same assumptions as before, an estimate of the number of financial consent orders (following the commencement of contested proceedings but before a trial) follows:
   1. Federal Circuit Court:
      1. Total financial applications in the Federal Circuit Court (2015-2016): 7,900.[[42]](#endnote-42)
      2. Total estimated financial judgments in the Federal Circuit Court (average yearly 2012-2015): 726 (2,180 divided by three).
      3. Likely financial consent orders in the Federal Circuit Court (per year) (7,900 less 726): **7,174 consent orders.**
   2. Family Court:
      1. Total financial applications in the Family Court (2015-2016): 2050.[[43]](#endnote-43)
      2. Total estimated financial judgments in the Family Court (average yearly 2012-2015): 443 (1,331 divided by three).
      3. Likely financial consent orders in the Family Court after filing but before trial (per year) (2050 less 443): **1607 consent orders.**
6. Applying these estimates results in a working number of around 7,600 consent financial orders per year finalising contested proceedings before a trial. Adding these 7,600 consent orders to the estimated 11,100 consent financial orders made (without commencing contested proceedings) equals around **18,700** consent financial orders per year.
7. In summary, my estimates suggest the Family Court and Federal Circuit Court produce 19,650 orders per year comprised of around 950 financial judgments 18,700 financial consent orders.
8. ***The inference from these estimates is that about 5% of property settlement cases are judicially determined, and about 95% of cases resolve by consent***.
9. This conclusion is consistent with the published data of the Family Court, which shows around 85% of matters resolving by consent (even including parenting and the Family Court’s complicated matters). In summary, of those families who enter the court system, the available evidence points to most matters resolving without final judicial determination. On that basis, I recommend:

|  |
| --- |
| *Recommendation 4* *That in developing a future ‘role and objectives’ of the Family Law System, the Commission consider the data pointing to most separated spouses, even within the family law system, reaching an agreement by themselves about their parenting or property arrangements.* |

# **Question 2: What principles should guide any redevelopment of the family law system?**

## I Thinking Outside the Traditional Bases

1. This part examines the theoretical. It focuses on property settlements. The discussion comes mainly from my thesis, albeit in a summary form. Any reference to a provision in Part VIII of the *Act* includes its de-facto relationship equivalent.
2. I use the term ‘separated families’. It means “married and de-facto couples where there is a child or children of that marriage or de-facto relationship”. It includes where there is a child of the relationship using an artificial conception procedure.[[44]](#endnote-44) It excludes relationships (married or otherwise) where there are no children. It excludes families with the care of dependent children from prior relationships (only) (‘blended families’).
3. I argue that specific principles can, and should, apply to property settlements for separated families (as defined). In brief, the justifications for this approach are:

* the specific economic choices required (in intact relationships) with a child,
* the likely ongoing parental and financial relationship after separation for parents with dependent children, and
* the difficulty in an analysis based on two different types of relationships (marriages and de-facto relationships).

1. It is uncontroversial to say that couples with children make decisions with significant financial consequences that couples without children do not make. These decisions include whether one parent should leave the workforce altogether, or one or both parents continue in full-time work or part-time work or take a short or long period of leave. Longer-term decisions include whether to rely upon paid or unpaid day-care arrangements or accept or decline opportunities for promotion.
2. The couple relationship changes but continues in a different form post-separation. The *Act* provides that, in parenting cases, one of its objects is to ensure children have, consistent with their best interests, a meaningful involvement with each of their parents.[[45]](#endnote-45) Scholarly literature recognises the continuing nature of the parental relationship post-separation.[[46]](#endnote-46) Legal financial obligations continue. Child support will be payable until the youngest child reaches 18.[[47]](#endnote-47) If any of the children continue a course of education or suffer from a disability, a court may order a parent to continue to pay child maintenance after a child turns 18.[[48]](#endnote-48)
3. Basing potential reform on the nature of marriage presents several problems. Past suggestions for law reform include founding division of property on the status of spouses to marriage and the quality of the marriage relationship.[[49]](#endnote-49) The *Act* already applies to de-facto relationships and has done so since 2009.[[50]](#endnote-50) If marriage were the (only) rationale for alteration of property interests, then the whole of the *Act* (as it stands) concerning de-facto relationships is without a policy basis.
4. De-facto relationships form a significant component of types of couple relationships. ABS data for de-facto couples (2006) suggests de-facto couple families make up around 15 % of all families.[[51]](#endnote-51) Other data points to increases in the ex-nuptial birth rates in the last half-century. In 1959, the ex-nuptial birth rate was 4.71 %; by 2007, it was 33.33 %, and 34.51 % in 2012.[[52]](#endnote-52) A noticeable minority of children are therefore born to parents in a de-facto relationship.
5. An option is to treat marriages and de-facto relationships as equivalent and use the nature of the spouse’s relationship as a policy basis to justify alteration of property interest. Marriages and de-facto relationships are different legal concepts,[[53]](#endnote-53) with jurisdictional threshold requirements in the *Act* applying only to de-facto relationships.[[54]](#endnote-54)
6. There is some evidence to suggest Australian adults may treat the nature of their de-facto relationships different to marriages. The 2015 book *Family Formation in 21st Century Australia* reported on research into survival rates of marriages and de-facto relationships. [[55]](#endnote-55) This data showed that at the 15-year mark approximately 65% of de-facto relationships continue to subsist, compared to more than 90% of married couples and those couples that cohabited before marriage. [[56]](#endnote-56) If this evidence is correct, then de-facto couple relationships and married couples are distinct relationship types. Treating them as the same, therefore (potentially) artificially inflates two separate family types.
7. In summary, if policy (or principles) debate centres around the value (or otherwise) of marriage or de-facto relationships the likely result is an impasse.
8. This submission’s discussion tries to break that mould by treating relationships where there are children of a marriage or a de-facto relationship differently to other types of couple relationships.

## II Different Principles for Parenting and Property Cases

1. There is no need to have one set of guiding principles covering all areas. The issues paper refers to section 43 of the *Act* as it applies to all cases.[[57]](#endnote-57) The parenting provisions of the *Act* state that one object is to operate consistently with the *Convention on the Rights of the Child*.[[58]](#endnote-58) Therefore, the parenting provisions in Part VII of the *Act* expressly situate themselves in a rights context. There are no provisions in Part VIII of the *Act* that explicitly set out the objects and principles to which a court may have regard, whether on a rights basis or otherwise. Therefore, as the *Act* stands, specific principles apply to parenting cases that do not apply in other types of cases.
2. The difficulty in adopting a singular policy framework for all family law matters is the variety of systems. In financial matters, family law comprises (at least) the differing systems for alteration of property interests, agreements about future arrangements for property, child support, and spousal maintenance.
3. There does not appear to be a settled academic view about the present policy justifications for alteration of property interests. There is a large a body of literature.[[59]](#endnote-59) Suggested justifying principles include financial dependency by a wife,[[60]](#endnote-60) the distinctive features of marriage, including the intention of marriage to last for life,[[61]](#endnote-61) or (a form of) technocratic liberalism.[[62]](#endnote-62) Parkinson considered the marriage as a partnership, especially in determining contributions.[[63]](#endnote-63) Parkinson has also argued that the case law reflects an implicit doctrine of deferred community property.[[64]](#endnote-64) Fehlberg considered the Full Court jurisprudence fell into a divide between a partnership theme and an evaluative theme.[[65]](#endnote-65)
4. In summary:

* There are no specific legislative principles explicitly guiding property settlement cases.
* However, there can be different principles for property cases, distinct from parenting. This is because the parenting provisions of the *Act* expressly rely on rights principles, distinct from principles applying to all cases.
* Scholarly discourse discusses a partnership, liberal, and moral bases as existing rationales for alteration of property interests.
* Given the absence of a settled academic view, there is need to develop relevant principles or values.
* Principles or values are developable specifically for property settlement cases.
* Principles or values for property cases with children are distinguishable from relationships without children.

## III The *Act* (Concerning Finances) Already Reflects Liberal Philosophical Values

1. This section argues:

* The financial agreements regime reflects liberal philosophical values of contract and equity;
* Section 79 of the *Act* is subservient to the financial agreements regime; [[66]](#endnote-66)
* Accordingly, unless the system for financial agreements dramatically changes (and this submission later argues against it), the *Act* is already philosophically liberal.

1. The formalities for entering into a financial agreement are well known.[[67]](#endnote-67) Limited grounds also exist for setting aside a financial agreement including a material change in circumstances relating to a child,[[68]](#endnote-68) and impracticability of implementing the financial agreement.[[69]](#endnote-69) None of these grounds addresses the content of the financial agreement.
2. Positive satisfaction of the enforceability requirements of law and equity (and the absence of a ground to set aside) is a necessary pre-requisite to considering statutory formalities.[[70]](#endnote-70) A court has the same powers and may grant the same remedies as apply to contracts, both in law and equity.[[71]](#endnote-71) If an agreement is a financial agreement within the meaning of the *Act,* the property the subject of the financial agreement cannot be the subject an order under section 79 of the *Act*.[[72]](#endnote-72)
3. Nothing in the *Act* prevents spouses entering, without supervision or approval by a court, an imbalanced bargain, or an outcome inconsistent with likely court orders on property division. What this means is that the jurisdiction of a court is subservient to a financial agreement. Moreover, regulation of such agreements is, with only some departures, achieved applying traditional formation principles of contract and equity. This system, with its reliance on historical legal principle, reflects a classically liberal approach for enforcement of agreements with only limited exceptions.[[73]](#endnote-73)
4. On that basis, given the combination of the primacy of the financial agreement provisions, and their grounding in traditional principles of contract and equity, liberal values already inform the financial provisions of the *Act*.

## IV A (Philosophically) Liberal Values Framework for Property Settlements

1. This part argues that a liberal philosophical approach successfully informs potential redevelopment principles for property settlements. It sets out (in summary form):

* A theory: Rawls’ theory of justice,
* Links that theory to family law (property settlements),
* Draws specific values exploration of the theory, and
* Develops a framework for principles guiding the redevelopment of the legislation for alteration of property interests.

1. John Rawls’ substantial works[[74]](#endnote-74) fall under a liberal umbrella. Scholars in New Zealand and the United Kingdom use Rawls’ theory to evaluate family law. Such an analysis has not been (save for one exception),[[75]](#endnote-75) a feature of Australian discussion. George’s book, *Ideas and Debates in Family Law*,(written in an English legal context) significantly influenced the choice of Rawls’ theory.[[76]](#endnote-76)
2. Rawls’ liberal theory of justice provides for the supremacy of (and non-interference with) political liberties, particularly at a constitutional level. However, the doctrine permits distribution of social goods (including opportunities, income, and wealth),[[77]](#endnote-77) subject to meeting pre-conditions and with limitations on the amount distributed.
3. There are two basic principles. The first principle is that ‘each person has a claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme, the equal political liberties, and only those liberties, are to be guaranteed their fair value.’[[78]](#endnote-78)
4. The second principle is that the optimal arrangements of social and economic inequalities are that they are both: (a) to the greatest expected benefit of the least advantaged, subject to (b) providing the greatest possible benefit for the least well-off (the difference principle).[[79]](#endnote-79) The full analysis of how the theory applies appears in my doctoral thesis.
5. In summary form, the combination of two persons:
   1. marrying – or being in a de-facto relationship, *and*
   2. not otherwise regulating their arrangements by way of a financial agreement, *and*
   3. having a child or children *of that relationship*,
   4. *cumulatively* implies principles of equal status between spouses, equal sharing of all property (howsoever acquired), and long-term equalising of opportunity to attain wealth.
6. Taking Rawls’ theory of justice and applying it to family relationship property delivers principles for the delivery of just outcomes. Assuming the retention of some form of judicial discretion, so long as predictability and certainty characterise that discretion, procedural rules, neutral principles, and the avoids of any generalised notion of fairness.[[80]](#endnote-80)
7. The following values, therefore, should inform the redevelopment of the law and procedural elements of financial cases:

* meeting the rule of law,
* offering equality between spouses (that is, non-discrimination and the promotion of equal status);
* recognition of differentials in earning capacity and financial circumstances, both as between spouses and wealthier families compared to less wealthy families, and
* prioritises the economic interests of dependent children.

1. Applying this brief theoretical analysis produces the following recommendation:

|  |
| --- |
| *Recommendation 5* *That, in respect of property settlement cases the following principles inform any redevelopment of the family law system:*  *• The rule of law.*  *• Non-discrimination between spouses.*  *• Recognition of a significant economic disparity between spouses, and the differences between wealthier families and less affluent families.*  *• Promotion of equality of children as future members of society by maximising their opportunities in each household for the stability of accommodation, the best possible education, and health.* |

# **Question 17: What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?**

## I Two Part Question: Current Legislation and Reform Options

1. This question has two elements which may (or may not) interlink. They are:

* Clarity and comprehensibility of the law for parties, and
* Promotion of fair outcomes.

1. This submission treats the question on the basis that discussion of clarity and comprehensibility is about the current property division provisions. The promotion of fair outcomes is, therefore, an examination of potential alternatives to the current law.
2. The Commission should consider some international context. New Zealand is presently undertaking a comprehensive, broad-based review of its family property legislation, with a final report due in November 2018.[[81]](#endnote-81) New Zealand’s inquiry encompasses multiple components of the substance and procedure in resolving relationship property matters.[[82]](#endnote-82) New Zealand’s system is one of the potential alternatives, but the forthcoming report will identify potential risks and pitfalls of reform.
3. Because of this, I recommend:

|  |
| --- |
| *Recommendation 6* *That the Commission delay its final considerations of reform concerning alteration of property interests until (a) The Law Commission (New Zealand) has completed its inquiry into the Property (Relationships) Act 1976 (NZ), and (b) Australian stakeholders have had a further opportunity to make submissions in light of the findings and recommendations made by the Law Commission (New Zealand).* |

1. Obtaining data from applications for consent orders provides a way of finding out what (if any) are the ‘usual’ or ‘common’ arrangements for property settlement. In the discussion of **Question 1**, I set out that the Family Court made 11 100 financial consent orders (on joint application) for the year ending 30 June 2016. Approval of an application is not automatic. It still must be just and equitable.[[83]](#endnote-83)
2. The risk in amending section 79 of the *Act* without data about consent orders (which represents most outcomes) is that any amendments will substantially affect negotiated settlements (the clear majority of cases) without knowledge of what those settlements currently are.
3. To my knowledge, there is no quantitative data drawn from the applications for consent orders. This is not a criticism of researchers or the Family Court. One of the (potential) reasons for the absence of data is the difficulty in gaining access to Court files. To examine registry files requires leave of the court. Such leave may include the imposition of conditions: for example, consent of each party.[[84]](#endnote-84)
4. Amending the application for consent orders form to permit parties to consent to use their anonymised financial data (including the ability for a party or parties to not agree to use of their data) facilitates substantial research without infringing on privacy. I recommend as follows:

|  |
| --- |
| *Recommendation 7* *That, before making substantive changes to section 79 of the Act (including section 90SM), the Commission:*   1. *Propose amendments to the ‘Application for Consent Orders’ process to enable anonymised data to be used to understand the quantum and composition of agreed property outcomes, (with the ability for parties to prevent the use of their data if they wish) and* 2. *Recommend that an organisation (such as – but not necessarily limited to AIFS) undertake further quantitative research of consent order applications (including percentages and dollar results).* |

## II What is the Practical Effect of the Current Provisions Governing Property Division?

1. This section briefly examines the existing published studies on property settlement results and reports (in a summary way) on my research into property settlement reasoning processes and outcomes. [[85]](#endnote-85)
2. Many studies examine the outcomes of property settlement cases.[[86]](#endnote-86) However, 1994 was seemingly the last time published research used a sample comprised of only judicially determined cases. [[87]](#endnote-87) Comparison of the literature does not necessarily suggest a pattern of results. It provides background. Recent reporting in the study *Property Division after Separation* showed a median result of 57% to women,[[88]](#endnote-88) with a considerable spread over results. Comparing the mean outcomes from some of the best-known literature shows the following:

**Literature comparison Mean Results to Women / Mothers / Wives by Percentage Distribution (Where Superannuation Excluded)**

|  |  |
| --- | --- |
| **Particulars** | **Women / Wives / Mothers** |
| *A Survey of Family Court Property Cases in Australia / Matrimonial Property* (Range of means reported)[[89]](#endnote-89) | 50.6 %-56.6 % |
| *Settling Up* (Younger respondents)[[90]](#endnote-90) | 60 % |
| *Settling Up* (Older respondents)[[91]](#endnote-91) | 57 % |
| *Division of Matrimonial Property in Australia*  (Low asset marriages)[[92]](#endnote-92) | 58 % |
| *Division of Matrimonial Property in Australia*  (High asset marriages)[[93]](#endnote-93) | 50 % |

**Literature Comparison: Mean Results to Women / Mothers / Wives by Percentage Distribution (Superannuation Included)**

|  |  |
| --- | --- |
| **Particulars** | **Women / Wives / Mothers** |
| *Settling Up* (Younger respondents)[[94]](#endnote-94) | 53 % |
| *Settling Up* (Older respondents)[[95]](#endnote-95) | 50 % |
| *Superannuation and Divorce in Australia*[[96]](#endnote-96) | 50.3 % |

1. In this literature context, I conducted for my thesis an exploratory analysis of 200 property settlement decisions. Statistical tests for reliability suggested that a sample of around 330 cases would have been more reliable. My resources did not stretch to such a sample size. Accordingly, the study is exploratory. The results should be read accordingly. The composition of my research sample was as follows:

**Exploratory Quantitative Analysis Sample Details**

|  |  |
| --- | --- |
| Type of Analysis: | Cross-Sectional Study |
| Sample Type: | Selected |
| Databases: | Austlii – Cth Case Law - Federal Circuit Court  2013-  Austlii – Cth Case Law - Federal Magistrates Court of Australia – Family Law 2000-2013  Austlii – Cth Case Law - Family Court 1982- |
| Search type: | Boolean Query |
| Search term: | Property Settlement AND Child |
| Date Ranges: | Specific: 30 November 2012- 11 April 2013  (Federal Magistrates Court of Australia – Family Law)  12 April 2013 – 31 December 2015  (Federal Circuit Court of Australia)  23 October 2015 – 31 December 2015  (Family Court of Australia) |
| Data type: | Published decisions on *Austlii* |
| Number of cases returned from research: | 550 |
| Number excluded (not meeting search term) | 350 |
| Sample size: | 200 |
| Requirements for inclusion: | Final Order (Section 79 or 90SM), Children of the Marriage or De-Facto Relationship (Dependent or Independent) |
| Cases chosen | Every case in the date range that met the requirements for inclusion |

1. The measured variables were:

* Separate non-superannuation property of each party by legal title at dollar value,
* Superannuation of each party at dollar value,
* Total value of net non-superannuation property,
* Total value of superannuation,
* Total net property including superannuation,
* Contribution-based entitlement to each party for:
  + Superannuation,
  + Non-superannuation property,
* Section 75(2) adjustment in percentage terms,
* Person to whom the adjustment flows, and
* Dependent or independent children.
* Percentage and dollar outcomes in superannuation, non-superannuation and overall, and
* Dollar differential result between the parties.

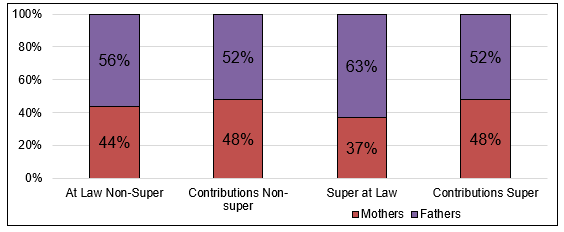
1. As a start point and using multiple assumptions (which are set out in the full study) I estimated what the value of each of the parties’ property was (using their legal title only). I argue in the study that legal title (as between the spouses) is the appropriate start point. Using that comparable legal title, the mean results were:

**Mean Start Values of Mothers and Fathers: Legal Ownership (*n*=200) (% Rounded)**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mothers | Fathers | Total |
| Non-super Property | $418 905 (44 %) | $529 768 (56 %) | $948 674 |
| Superannuation | $117 191 (37 %) | $197 826 (63 %) | $315 018 |
| Total property including super | $534 079 (42 %) | $726 018 (58 %) | $1.26million |

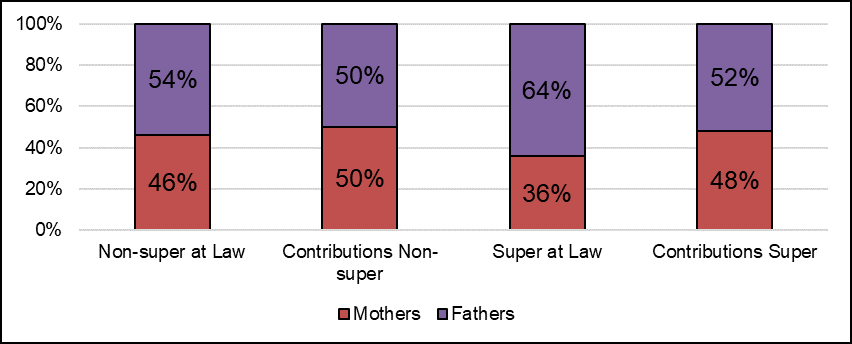
1. Using legal ownership, mothers had 42% of total net property (including superannuation) by value and fathers 58%. I then measured the contribution-based entitlement in percentage terms. The assumptions used about contributions appear in the full study. The contribution results were:

**Mean Percentage Ownership at Law v Contribution-Based Entitlement *Sample* (*n=*200)**

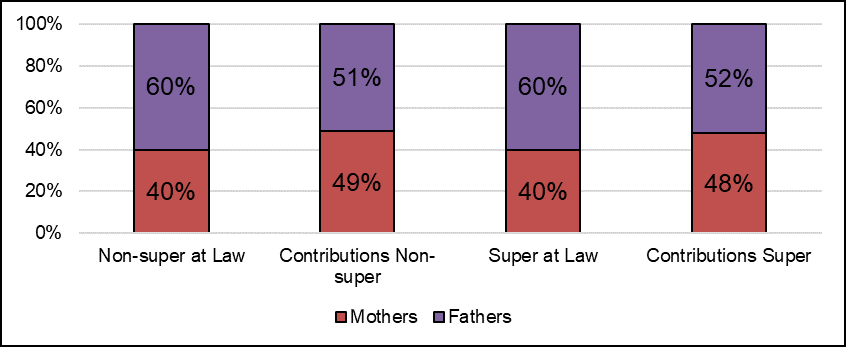


Next is the contribution-based entitlements result by categories of dependent and independent children:

**Mean Percentage Ownership at Law v Contribution-Based Entitlement: Dependent Children**

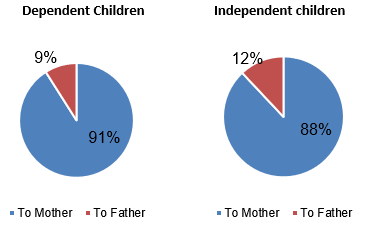
****

**Mean Percentage Ownership at Law v Contribution-Based Entitlement: Independent Children (*Sample)* (*n*= 37)**

****

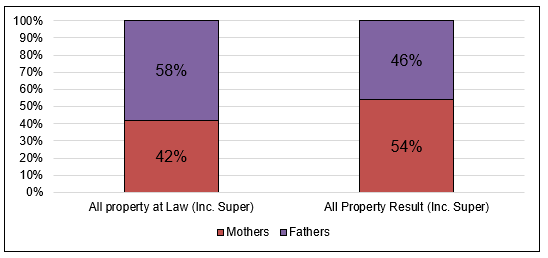
1. There was no significant difference between the contribution-based entitlements whether the children were dependent or not. The overall mean contribution-based entitlement remained (just) in favour of fathers for contributions to superannuation, albeit within the high margin of error (6%). The results showed that the contribution-based entitlement improved the position of mothers. Mothers started with 44% of the non-superannuation property and 37% of superannuation. On measuring contributions, the situation of mothers improved to 49% for non-superannuation property and 48% for superannuation. I examined both the occurrence rates and the quantum of section 75(2) (or 90SM) adjustments. The mean adjustment (irrespective of to whom the adjustment flowed) was 13%. The median was 10 %. What stood out was the differences in occurrences. Those results were:

**Comparative Occurrence of Section 75(2) Adjustments (*n=*139 Dependent Children, 25 Independent Children Cases) (*Sample*)**



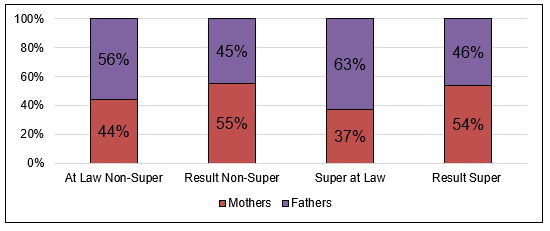
1. I examined the overall results by percentages and dollar terms. The median result was 55% to mothers. The reporting of mean results commences with all property including superannuation:

**Mean Percentage Outcomes – Ownership at Law v Ultimate Discretionary Result (All Property Including Superannuation): *Sample* (*n=*200)**



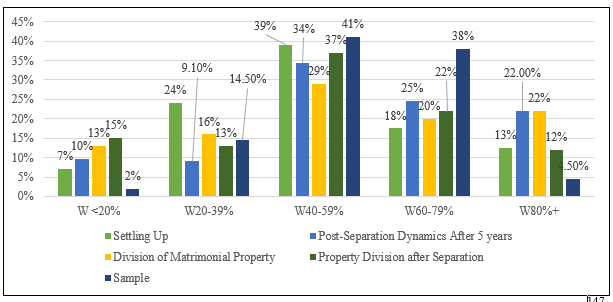
1. The standard deviation for all property (including superannuation) was 16 %. The range was 0% to 100 %. The mean results follow by superannuation and non-superannuation property:

**Mean Percentage Outcomes – Ownership at Law v Ultimate Discretionary Result (Super and Non-Super Separately): *Sample* (*n=*200)**



1. Breaking down the reporting into superannuation and non-superannuation property had no significant effect. The result was still that mothers received a small majority. Even with the sample size, the mean (54% for mothers) was consistent with previously published studies. The median (55% to mothers) was consistent with the recent study *Property Division after Separation*.[[97]](#endnote-97)
2. I also undertook a comparison by 20% bands, as another way of testing the reliability of the data. There were two standout inconsistencies. The first is the cases where one party or the other receives less than 20 % of the property is much higher in the other studies than it was in the sample*.* The sample results showed only 4.5 % of cases where a mother received more than 80 % of the net property. In *Post-Separation Dynamics after Five Years* and *Division of Matrimonial Property,* 22 % of mothers (or wives) received more than 80 % of the property. In *Settling Up*, 13 % of mothers (or views) received more than 80 % of the property.
3. The second inconsistency is in the 60-79 % band. The sample result (38 %) was larger than the other studies. In *Settling Up*, only 18 % of mothers (or wives) received amounts in this band. In *Division of Matrimonial Property,* 20 % of mothers/wives were in this result band, and the result was 25% in *Post-Separation Dynamics after Five Years*.
4. The consistency is that in all five studies (including mine) many cases had results somewhere between 40 % and 80 % to the mother (or wife). The sample’s cases had 79 % in this range, *Settling Up* had 57 %, *Division of Matrimonial Property* had 49 %, *Post-Separation Dynamics after Five Years* had 59 %, and *Property Division After Separation* had 57 %. The comparison results follow:

**Comparison of 20 % Result Bands (Net Property Received by Value Including Superannuation) Settling Up, Division of Matrimonial Property, Post-Separation Dynamics after Five Years, Property Division After Separation, Sample (W= Wife or Mother) (Rounded)**

[[98]](#endnote-98)

1. To my knowledge, my research is the first quantitative analysis of judicial decisions using (in effect) elements of the ‘four-step’ process. My view is that it is worthwhile extending (or reproducing) this research over a more substantial number of judicial decisions to provide the best possible understanding of judicial decision-making.
2. The reason is that unless we know whether current judicial decisions are unfair, it is difficult to understand how to make decisions fairer. On that basis I recommend:

|  |
| --- |
| *Recommendation 8* *That, before making substantive changes to section 79 of the Act (including section 90SM), the Commission recommends that an organisation (such as – but not necessarily limited to AIFS) undertake further quantitative research of judicial decisions.* |

## III Reform Options: Australia’s System v Comparable Common Law Systems

1. This section looks at potential alternative laws, in particular:

* New Zealand
* The United Kingdom, and
* Some provincial Canadian law.

1. This comparison method is not new. The Commission’s 1987 report, *Matrimonial Property*, examined the laws in Ontario and New Zealand.[[99]](#endnote-99) The 1999 Australian Government discussion paper, *Options for Change,* described the comparable laws in New Zealand, Canada, some states in the United States, and the United Kingdom.[[100]](#endnote-100) In 2014, the Australian Productivity Commission examined the New Zealand property settlement legislation.[[101]](#endnote-101)
2. The comparisons follow under sub-components:

* Objects and principles,
* Types of property covered by the regimes,
* Non-discrimination and rules of equality, and recognition of financial disadvantage,
* Giving priority to the economic interests of children.

#### Objects and Principles

1. There are no clear, readily ascertainable purposes to section 79 of the *Act.* There are no specific objects or principles in Part VIII compared to Part VII. There are some provisions in the *Act* and in the *Federal Circuit Court Act 1999* (Cth), which encourage the use of streamlined processes without undue formality.[[102]](#endnote-102)
2. In comparison, New Zealand’s legislation has long had express objects. The matrimonial property legislation was previously called the *Matrimonial Property Act 1976* (NZ). The 1976 legislation expressed an intention to recognise the equal contribution of parties to a marriage, provide a just division of property, and consider the interests of children. [[103]](#endnote-103) The amending of the *Matrimonial Property Act 1976* in 2001 (including renaming it the *PRA*) included additional objects and principles. They are that men and women have equal status,[[104]](#endnote-104) equality of all forms of contribution,[[105]](#endnote-105) regard to the economic advantages or disadvantages to the parties arising from the relationship,[[106]](#endnote-106) and resolving disputes as simply and inexpensively as justice permits.[[107]](#endnote-107)
3. Ontario’s legislation states that its objects include the recognition of the equal position of spouses within marriage as a form of partnership.[[108]](#endnote-108) Judicial consideration of the purpose of Alberta’s legislation suggests that it recognises that the husband and wife carry on their married life for their mutual benefit, with such an arrangement accepted by each spouse.[[109]](#endnote-109)
4. In the United Kingdom, there are no legislative objects. There are two principles, expressed as duties: first, to consider the welfare of any child of the family who has not attained the age of eighteen; [[110]](#endnote-110) and second, to terminate the financial relationship between the parties as soon as is just and reasonable.[[111]](#endnote-111) In the absence of legislative guidance, courts have discerned a purpose. Lord Nicholls, in the 2001 House of Lords decision of *White v White*,[[112]](#endnote-112) observed that in preceding legislationthe stated objective was to place the parties in the financial position in which they would have been if the marriage had not broken down.[[113]](#endnote-113) Those provisions were repealed.[[114]](#endnote-114) In their absence, Lord Nicholls concluded that, implicitly, the objective was to achieve a fair outcome.[[115]](#endnote-115)
5. Then in *Miller v Miller; McFarlane v McFarla*ne,[[116]](#endnote-116) Lord Nicholls considered that the first requirement of fairness was to make provision for the parties' housing and financial needs.[[117]](#endnote-117) On the meeting of such needs, the second component of fairness was to compensate for any significant economic disparity between the parties.[[118]](#endnote-118) Third, a principle of ‘equality permeating a marriage’ applied, irrespective of the duration of the marriage.[[119]](#endnote-119) In *Miller*, Baroness Hale considered that there must be some rationale for redistribution from one party to another.[[120]](#endnote-120) The first rationale was each spouses’ need, which commonly arose on future responsibilities to look after children.[[121]](#endnote-121) The second rationale was economic compensation for a person who has given up a potentially successful career.[[122]](#endnote-122) The third rationale was the principle of equal sharing, arising from the ‘widespread perception that marriage is a partnership of equals.’[[123]](#endnote-123)
6. The options therefore include:
   1. No express objects and principles (retention of the status quo),
   2. Multiple objects – including the equality of status of spouses, and recognition of economic disadvantage,
   3. One object with multiple components (reflecting – for example - the elements of fairness),
   4. One object recognising the nature of marriage (for example married life is for mutual benefit).
7. Based in part on the New Zealand legislation, and applying the values discussion from **Question 1**, my recommendations are:

|  |
| --- |
| *Recommendation 9* *That the Commission recommends insertion of specific objects and principles into the Family Law Act 1975 (Cth) for alteration of property interests (whether the spouses have children of their marriage or de-facto relationship or not). These are:*   1. *The role of a court in altering property interests between spouses is to address, to the greatest extent practicable, economic disadvantage.* 2. *The principles underlying this role are:* 3. *Wherever possible, spouses should reach agreement on their division of property after separation,* 4. *Spouses are equal in status, and continuation of such equality is optimal,* 5. *Financial outcomes following separation may be different for financially disadvantaged families compared to wealthier families, and* 6. *The financial interests of dependent children have priority, irrespective of any child support paid or payable, having regard to children’s role as future economic and social members of society.* |
|  |
| *Recommendation 10* *That a provision is added to section 79(4) of the Act to require a Court to consider and give weight to the objects and principles mentioned above.* |

#### Property for Division

1. In Australia, there is no delineation between property acquired before, during or after the marriage in consideration of the exercise of discretion.[[124]](#endnote-124) Property includes property owned jointly by the parties or either of them. An Australian court may also treat a discretionary family trust as if it were the property for section 79 of the *Act*.[[125]](#endnote-125) The House of Lords has been clear that, as a starting point, there is no distinction in English law between matrimonial property and any other form of property.[[126]](#endnote-126) In Alberta, the legislative provision responsible for the division of property states that a court may make a distribution of ‘all the property owned by both spouses and by each of them.’[[127]](#endnote-127)
2. In New Zealand, an equal sharing rule applies to all relationship property. Only if property falls outside of the definition of relationship property are entitlements determined by contributions. The meaning of relationship property is broad. Without repeating the entire list, it includes the family home,[[128]](#endnote-128) family chattels,[[129]](#endnote-129) all property owned by the parties in joint names whether in equal shares or not,[[130]](#endnote-130) life insurance policies referable to the relationship,[[131]](#endnote-131) superannuation referable to the relationship,[[132]](#endnote-132) and property otherwise deemed by statute to be relationship property.[[133]](#endnote-133) However, The *PRA* expressly provides for trusts, as far as capital is concerned, to prevail over relationship property rights.[[134]](#endnote-134)
3. British Columbia has two categories of property: family property and excluded property. Family property is real and personal property owned by at least one spouse and includes a beneficial interest in property.[[135]](#endnote-135) Excluded property is property acquired before the relationship, inheritances, gifts, and discretionary trusts.[[136]](#endnote-136) Ontario has three categories: the matrimonial home,[[137]](#endnote-137) net family property (everything else owned by the parties or of each of them except for excluded property),[[138]](#endnote-138) and excluded property (a gift or inheritance, damages, life insurance policies, and specific pension entitlements).
4. The options include:

* Including all property as a start point (the existing position).
* Defining relationship property very broadly (New Zealand), or
* Some other definition of family or marriage or relationship property (e.g. British Columbia).

#### Equal Sharing and Non-Discrimination

1. In New Zealand, subject to multiple exceptions, parties share equally in relationship property.[[139]](#endnote-139) British Columbia and Ontario legislation provide that each of the spouses have a right to an equal division of all family property.[[140]](#endnote-140) However, Ontario defines net family property as property after deducting the value of the property, other than a matrimonial home, that a spouse owned at the date of marriage.[[141]](#endnote-141) British Columbia excludes from family property any property acquired before the relationship, inheritances, gifts, damages awards, and specific categories of discretionary trusts.[[142]](#endnote-142) In Ontario, a court may make an order varying terms equalising the net family property only if it a net equal division was unconscionable.[[143]](#endnote-143)
2. The United Kingdom legislation is silent on non-discrimination between men and women (or between spouses). The property division provisions do not contain any presumption or rule of equality. However, Lord Nicholls wrote in *White v White:*

…a judge would always be well advised to check his [sic] tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.[[144]](#endnote-144)

1. While equality remains a yardstick, a string of English decisions provides examples of approaches other than equal sharing. A line of authorities’ label classes of property as non-matrimonial.[[145]](#endnote-145) Another departure from equality arises where there are special or extraordinary contributions.[[146]](#endnote-146)
2. The alternatives therefore include:

* No equal sharing of property,
* Equal sharing of some property,
* General recognition of non-discrimination without necessarily applying a rule or principle of equal division,
* Including a presumption of equal sharing with exceptions.

#### Compensation or Adjustment for Financial Disparity

1. New Zealand provisions provide for the court to order compensation (out of relationship property) owing to the income and living standards of one spouse is significantly higher because of the effects of the division of functions within the marriage.[[147]](#endnote-147)
2. Two factual scenarios are likely to give rise to a compensatory order because of income and living standards:

* The first scenario arises where a person has supported the other to obtain an earning capacity or an increase in earning capacity; and
* The second where a person has foregone career opportunities to undertake the care of children.[[148]](#endnote-148)

1. In determining the amount of a compensatory order, a court may have regard to the likely earning capacity of each spouse or partner, the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the relationship, and any other relevant circumstances.[[149]](#endnote-149)
2. There are four elements to this type of compensatory order. They are:

* The disparity in income and living standards must be significant in comparison to the other party.[[150]](#endnote-150)
* Causation.[[151]](#endnote-151) Where there are no children of the relationship, the performance of household duties is not likely to establish causation.[[152]](#endnote-152) Only on the establishment of the two elements of disparity and causation on the balance of probabilities can a court turn to matters relevant to the exercise of discretion.[[153]](#endnote-153)
* Whether or not there should be an award.[[154]](#endnote-154)
* If a court chooses to make an award, quantum will be determined. A court may use a broad-brush approach if necessary but will often use a formula. [[155]](#endnote-155) The formula uses net present earnings, a time-value discount, and a non-collection contingency.[[156]](#endnote-156) It appears to require expert evidence to calculate.

1. In British Columbia, the discretion to divide property unequally considers a spouse's contribution to the career or career potential of the other spouse, duration of the marriage, the extent of spousal support, and the terms of any prior agreement between the parties.[[157]](#endnote-157) For a trial judge to justify an exercise of discretion, there must be real unfairness in an equal outcome.[[158]](#endnote-158) In Ontario, the discretion is limited to unconscionability. Unconscionable is a high bar in this context, interpreted as ‘…repugnant to anyone's sense of justice, or shocking to the conscience of the court.’[[159]](#endnote-159)
2. Potential structural approaches to the disparity in earning capacity therefore include:

* The retention of the status quo.
* Combining factors like section 75(2) into one (new) cause of action.
* Providing for compensatory factors as an exception to equal sharing or rebutting a presumption of equal sharing, or
* A separate cause of action for compensation (like New Zealand).

## IV Contributions: Outdated and Unhelpful

1. The idea of trying to ‘fix’ the contributions concept permeates multiple previous inquiries. This submission argues in favour of abandoning the concept.
2. The 1980 Joint Select Committee recommended a presumption of joint ownership of the matrimonial home.[[160]](#endnote-160) In 1987, the Commission prepared a proposed new part for the *Act* with three underpinning principles: the equal status of spouses, the nature of marriage relationship (being one of nurturing of children, management of the household and acquisition of property), and a just distribution.[[161]](#endnote-161) The proposed starting point for division of property was equality.[[162]](#endnote-162) Adjustment to the starting point of equality came from substantially greater contributions by one party to the marriage, actions about property or child care after separation, one party’s financial resources, or that one party brought some property into the marriage or acquired property by gift or inheritance. [[163]](#endnote-163)
3. A 1992 Joint Select Committee recommended equality of sharing be the starting point or, if there was a financial agreement, the terms of the agreement be the starting point.[[164]](#endnote-164) The Commonwealth Government’s response to the 1992 Joint Select Committee report was a 1994 bill and a further exposure draft bill.[[165]](#endnote-165) The proposed provisions in the exposure draft bill required a court to assume equal contributions.[[166]](#endnote-166)
4. In the 1999 discussion paper, *Options for Change,* the Commonwealth Attorney-General’s Department offered two options. The first was a change to a statutory presumption of equality of contributions. A court would be able to depart from that assumption if one party was able to demonstrate that contributions were unequal.[[167]](#endnote-167) The second option was a deferred community property regime. Any property acquired during the marriage would be a communal asset, as well as the net increase in the value of pre-cohabitation assets.[[168]](#endnote-168) There would be an equal division of communal assets.[[169]](#endnote-169)
5. In its response to *Options for Change*,the Family Law Council supported a presumption of equal contributions on the basis it would make the law more transparent.[[170]](#endnote-170) The Council strongly opposed the community property option on the basis that a court would need to determine the value of community property from the time of acquisition to separation, which involved detailed factual determinations.[[171]](#endnote-171)
6. In examining reform, the Commission should note that the contributions ‘concept’ in New Zealand is quite different to Australia’s in that it does not require any connection to property either direct or indirect.[[172]](#endnote-172) Insofar as it relates to financial contributions, the concept includes the provision of money, including the earning of income for the purposes of the marriage, civil union, or de-facto relationship.[[173]](#endnote-173)
7. The author’s experience in private practise was that litigation often focused on contributions and the weight attributable to them. The passage of time and the fact of separation often resulted in substantial differences in perspective and highly emotive evidence. The issue often descended into a contributions competition, with each party attempting to prove they did more, or what they did was of more value, during their marriage. Spouses, while maximising their contributions, often slipped into minimising (or denigrating) the other party’s contributions. Such behaviour occurred more often when examining homemaker and parenting contributions. Obtaining evidence of the detail of care of children for many years was (understandably) difficult. In marriages with a primary breadwinner, that breadwinner often used the lack of precision in that evidence to attempt to discredit the homemaker.

|  |
| --- |
| *Recommendation 11* *That, in considering fairer outcomes, the Commission avoid contributions as a primary conceptual means to determine spouse’s entitlements, or recommend amendments to sections 79(4)(a)-(c) to reflect the New Zealand definition of ‘contributions’.* |

## V Reform Proposal #1: A (Statutory) Guide for Transparency and Clarity

1. This section assumes the continuation of the current substantive law and focuses on improving comprehensibility and clarity.
2. In April 2016, the United Kingdom Family Justice Council issued a guidance document on sorting out finances on divorce. It contains an explanation on how to divide capital assets, dealing with pensions (superannuation) on divorce and includes hypothetical examples.[[174]](#endnote-174) This guide sets out in plain English, principles from the legislation and the case law. These include that the purpose of the law is to be fair to both spouses;[[175]](#endnote-175) first consideration to children of the family,[[176]](#endnote-176) and the meeting of needs.[[177]](#endnote-177) The guide also explains the ability of a court to consider financial misconduct,[[178]](#endnote-178) the need to include all property, whether in joint names or separate names and the relevance of income earning capacity.[[179]](#endnote-179)
3. This guidance document has a history. The United Kingdom Law Society recommended in 2003 a guidance document for parties and inclusion of it in legislation. The basis for supporting inclusion in the legislation was because of a risk that a non-statutory document would not have sufficient authority.[[180]](#endnote-180) However, a 2014 United Kingdom Law Commission report recommended guidance to parties in plain English from an authoritative source (such as the United Kingdom Family Justice Council – but not a court).[[181]](#endnote-181) It seems that the latter recommendation was the one implemented. It does not appear that the guidance document is compulsory to consider before filing an application or making orders. The financial statement filed with a property settlement application (and the accompanying notes) do not appear to refer to the guidance document.[[182]](#endnote-182) There does not seem to be any scholarly study on the use of this document.
4. The attractions of the guidance document are two-fold. First, it provides a predictable framework for the negotiated resolution of (most) cases. Second, it expressly contains the details of the purpose and principles of the law to those who wish to avail themselves of it.
5. In October 2016, the Commonwealth Attorney-General’s Department released a guide on legal principles and draft orders in parenting cases. [[183]](#endnote-183) This provides a useful template. The Attorney-General’s department’s parenting book is an excellent resource, but it has no statutory basis. If there is to be a guidance document, it is essential to incorporate it into Court and negotiation procedure and consistently enforce its use.
6. A property guidance document should contain:
   1. A discussion about the non-legal factors to take into account in reaching an agreement, such as:
      1. the financial costs of litigation,
      2. emotional impact on the spouses, children and any other family members,
      3. delay,
      4. adverse impact upon an ongoing post-separation parental relationship,
      5. diversion of time from paid employment or care of children, and
      6. the benefit in finality of financial arrangements.
   2. An explanation of legal principles;
   3. Workbooks for the process of working out entitlements, and
   4. Standardised precedent orders.
7. Any guide on legal principle will include the existing legislative provisions. Incorporating principles from case law completes the picture. The following is not a complete list, but provides examples of the type of information:

* A Court may make any order it considers appropriate altering the property of parties to a marriage.[[184]](#endnote-184)
* There is no binding rule or principle that a court must make an order altering the property of spouses. In some circumstances, a court may choose not to make any order at all.[[185]](#endnote-185)
* An order (if made) must be just and equitable.[[186]](#endnote-186) The requirement for an order to be just and equitable is overriding.[[187]](#endnote-187) The concept of a just and equitable order is broad. It is not possible to place specific boundaries on the meaning of the expression just and equitable.[[188]](#endnote-188)
* Before any order can be just and equitable (and even if the ultimate result includes not altering property at all), the process must include consideration of the following matters (‘the seven factors’):[[189]](#endnote-189)

1. Direct and indirect financial contributions to property,[[190]](#endnote-190)
2. Direct and indirect non-financial contributions to property,[[191]](#endnote-191)
3. Homemaker and parenting contributions,[[192]](#endnote-192)
4. Any effect of the proposed order on earning capacity of a spouse (for example sale of a business),[[193]](#endnote-193)
5. The ‘section 75(2) factors’ (explained below),[[194]](#endnote-194)
6. Any other court orders (such as parenting orders),[[195]](#endnote-195) and
7. Child support.[[196]](#endnote-196)

* While not a binding rule, there is a convenient way to structure a negotiation or a case to achieve a just and equitable result.[[197]](#endnote-197) The structure has four parts:

(1) Identifying and valuing all property at the date of hearing,

(2) Determining contributions and allocating an overall percentage entitlement to each party for those contributions,

(3) Adjusting (if required) that percentage entitlement based on the remaining factors, including the ‘section 75(2) factors’.

(4) Taking a final step back to ensure that the terms of the proposed order are just and equitable.[[198]](#endnote-198)

* It may be appropriate in some circumstances to set out a separate list of superannuation.[[199]](#endnote-199) However, if both parties consent, one list is acceptable.[[200]](#endnote-200)
* The relevant date for determining ownership (and value) for the first step (identifying property) is the date of hearing (or the date of reaching agreement).[[201]](#endnote-201) ‘Property’ includes property acquired before, during or after the marriage, whether in the name of both parties or of one party.
* Each spouse has a positive obligation to make full and frank disclosure of all their financial circumstances (both property and financial resources) up to and including the date of the hearing or the date of lodgement of an application for a consent order.[[202]](#endnote-202) ‘Property’ includes any property acquired after separation or after divorce.[[203]](#endnote-203)
* The consequences of non-disclosure include that a court may not believe the evidence of the person who has not disclosed and may give more property to the other party because of that failure to make full disclosure.[[204]](#endnote-204) Other consequences of non-disclosure include a costs order or contempt of court.[[205]](#endnote-205) An order can be set aside or varied if a miscarriage of justice arises and the cause is a failure to disclose relevant information.[[206]](#endnote-206)
* Deduction of liabilities is the usual approach to determine net property for the division. However, if unsecured debt is uncertain or unreasonably incurred, a court may not include that liability.[[207]](#endnote-207)
* There does not need to be some direct link (such as the payment of mortgage payments) between the contribution and specific property.[[208]](#endnote-208) Put another way, a financial and non-financial contribution to property is different from paying expenses for a property. It is a broader concept.
* Homemaker and parenting contributions deserve substantial and not token weight.[[209]](#endnote-209) There is no requirement for a link between homemaker and parenting contributions and any property.[[210]](#endnote-210)
* There is no rule or presumption about how a court determines contributions. There is no starting point for a 50/50 division.[[211]](#endnote-211) The appropriate course is to assess all contributions and give them proper weight in the context of the rest of contributions during the marriage and since.[[212]](#endnote-212) In some cases, a court might give weight to property brought into the marriage and the use of that property.[[213]](#endnote-213)
* A court can give weight to different types of contributions, such as a gift or inheritance (included in the list of property).[[214]](#endnote-214) However, there is a variety of ways to treat gifts and inheritances. They might be a contribution on behalf of the person who inherited the funds,[[215]](#endnote-215) or they might be relevant as part of an adjustment under section 75(2) of the *Act*.[[216]](#endnote-216) The intention of the person who bestowed the funds may be relevant.[[217]](#endnote-217)
* Contributions do not stop at separation. A Court may give weight to contributions made post-separation. However, consideration of these contributions is in the context of all the other facts and circumstances of the marriage.[[218]](#endnote-218)
* The ‘section 75(2) factors’ include the income, earning capacity and financial resources of each spouse,[[219]](#endnote-219) age and health of each spouse,[[220]](#endnote-220) care of children and desire to retain a role as a parent,[[221]](#endnote-221) duration of the marriage,[[222]](#endnote-222) and a reasonable standard of living in all the circumstances.[[223]](#endnote-223) There is no specific rule about how much any adjustment should be. There is no ‘standard’ adjustment of 10% to 20 %.[[224]](#endnote-224) It is essential to calculate the actual dollar amount of any adjustment for the section 75(2) factors, [[225]](#endnote-225) as well as the effect of that adjustment on the overall proposed result.[[226]](#endnote-226)
* Once a court determines an entitlement using the seven factors, a court may go further and change the amount received by each party based on a fact or circumstance not mentioned in the *Act*, conditional upon the specification of the circumstance and transparent reasons.[[227]](#endnote-227)
* Factors that might be relevant, not mentioned in the seven factors, including a desire for a person to retain a home for the benefit of children,[[228]](#endnote-228) the emotional impact on a person of having to sell their home or the way in which parties have conducted their finances.[[229]](#endnote-229)
* Independent of deciding the financial result for each party, a court has the power to determine the mix of property received. For example, a court may determine that one party or the other should receive their entitlement entirely as superannuation, or a combination of superannuation and non-superannuation property, or solely as non-superannuation property.[[230]](#endnote-230)
* Other cases may have similar results or different results. There is no requirement for a court to match, in dollar terms, one case with another. However, a court should strive for consistency, and other cases can help inform a court to achieve this.[[231]](#endnote-231)

1. The next part of this proposed guide contains (physically or electronic) worksheets. The start point is a schedule of the parties’ current assets, liabilities, and superannuation. Next is a percentage/dollar entitlement component worksheet using the relevant components of section 79(4) and 75(2). Last is a composition worksheet showing which property and adjustment required, showing the effect of the outcome.
2. The last part reflects the Attorney-General’s parenting document containing example plain English parenting order. Getting consistency of use is achievable by:
   1. Incorporating into the *Act* and *rules*, and
   2. Widespread education.
3. Key amendments to implement a guide include the following:

* Incorporating into section 79 of the *Act* a provision requiring parties to consider and use their best endeavours to complete the worksheet components of, a statutory guidance document.
* Adding an obligation in section 79 of the *Act* for legal practitioners to provide a client with a copy of the statutory guidance document, and to complete the relevant worksheets (and hold on file and update) as soon as practicable.
* Amending Part 10.4 of the *Family Law Rules 2004* (Cth) and the ‘Application for consent orders’ form to incorporate worksheets.
* Amending rules 2.02 and 13.05 of the *Family Law Rules 2004,* rule 24.02 of the *Federal Circuit Court Rules 2001* (Cth) and the ‘Financial Statement’ document to enable annexure of each party’s calculation of their entitlements to their financial statement.
* Adding to regulation 28 of the *Family Law (Family Dispute Regulations) 2008* an obligation for FDR practitioners to provide the statutory guidance document to parties before family dispute resolution.
* Adding to the National Mediator Accreditation System – Practice Standards a requirement for Nationally Accredited Mediators to provide the information to parties.

1. Achieving consistency requires substantial and ongoing education to (at the minimum) the suggested following stakeholders:

The recommendations therefore are:

|  |
| --- |
| *Recommendation 12* *That the Commission recommend insertion into the Act and the Rules provisions enabling a property settlement guidance document, then mandating the use of that guidance in consent and contested property applications.* |

|  |
| --- |
| *Recommendation 13* *That the Commission recommend widespread, and continuing, education (to all of the identified stakeholders) on the use of the statutory property settlement guidance document.* |

## VI Reform Proposal #2: Radical Change

1. This section sets out the following:

* Evidence continues to point to the financial disadvantage to Mothers with primary care of children.
* The New Zealand model has been the subject of some criticism, even with the compensation regime.
* If the Commission is contemplating radical change, then there is one property settlement model that:
  + Takes away the style of the relationship as a sole pre-condition,
  + Includes the values appropriate to contemporary property settlements explained in answer to **Question 2**.
  + Provides a scheme for equal sharing of property, but
  + Also includes a mechanism for adjustment, like the compensation regime in New Zealand, but with less onerous requirements.

1. Over the long term, primary carers of children remain substantially worse off financially. Several scholarly studies on litigated and consent outcomes support this position. [[232]](#endnote-232) Potential inferences arise from the research. However, there is insufficient evidence to conclude that the financial consequences of separation directly reflect, or result from, the impact of the law.
2. Because we do not know the family law system’s outcomes in property settlement cases (consent or otherwise), we cannot definitively conclude that the family law system is the problem. Put another way; the causes *could* be as follows:
3. Even without causation evidence of the effect of the family law system, the Commission should consider New Zealand’s model, which remains under review. The New Zealand Law Commission’s issues paper is comprehensive, but a few issues stand out as directly relevant. They are:
   1. The minimum period of duration of the relationship for equal sharing,[[233]](#endnote-233)
   2. Different rules of the division for relationships shorter than three years,[[234]](#endnote-234)
   3. What should happen if equal sharing does not lead to equality?[[235]](#endnote-235)
4. There is some scholarly criticism of the compensation model. These include that compensation blurs the distinction between capital and income, is highly speculative, operated dependent on the amount of property available, and does not achieve the goal of overcoming economic disparity. [[236]](#endnote-236) If there is to be a new Australian family property settlement law, then it should try to avoid the stated problems from New Zealand.

*A Unique Australian Model*

1. This submission offers a partial solution. It provides for sharing of property but avoids the New Zealand problems of examining relationships and providing adequate adjustment for economic disparity.
2. The concept rests on the meeting of three preconditions:

* The existence of a marriage or de-facto relationship (subject to the existing length of time requirements), and
* A child of that marriage or de-facto relationship, and
* The absence of a financial agreement covering some, or all, of the parties’ financial matters.

1. The third precondition reflects the observation of the plurality in *Stanford v Stanford*; if two spouses expressly consider, but elect not to contract out of the *Act*,[[237]](#endnote-237) then there is an acceptance that the law will intervene in the financial matters of these spouses in the event of relationship breakdown.
2. The start point is a new division in Part VIII of the *Act*, which would only apply on an affirmative finding of each of the pre-conditions. The existing provisions of section 79 of the *Act* remain as a fall back for other types of families.
3. In this proposed reform model, defining property is essential. Achieving this is by way of a simple statement that property has the same meaning as in section 4 of the *Act*, being ‘property of the parties to the marriage or either of them.’[[238]](#endnote-238) Avoiding any doubt requires a statement that property includes any property owned by the parents jointly, or separately, acquired before, during or after the marriage, at its value at the date of hearing.[[239]](#endnote-239) Deduction of liabilities then occurs unless they are uncertain or unreasonable.[[240]](#endnote-240) As is the present case, excluded property is that covered by a financial agreement.[[241]](#endnote-241)
4. Creation of a rule of equal division of property comes from only slight word changes to the equivalent New Zealand provision, such that division of property under this division (and subject to the rest of the division) each spouse shares equally in the value all property.[[242]](#endnote-242) Like New Zealand’s provision, this mandates an equal division. Unlike New Zealand, it applies to all property not just relationship property.
5. Next is a provision for dividing property unequally. If a person applies to the court for an equal property division, a court may make an order distributing the property of the parties unequally. The purpose of an unequal property order is to adjust, to the most significant extent possible, the financial circumstances of a separated family, including disparity of economic conditions resulting from separation.
6. Two subsets of factors apply:

* Where there are dependent children, the court shall give the most weight to maximising the accommodation, health, education, social, sporting and family connection opportunities of those children so that they are approximately equal in each parent’s household. Relevant evidence includes the actual costs incurred for the children (irrespective of child support) in each home.
* Where there are no longer dependent children; the court shall give the highest weight to ensuring an approximately equal standard of living for each parent, to ensure that each retires with similar dignity.

1. All in cases, the court shall also give weight to the disparity of property (if one party is retaining property under a financial agreement), financial resources, health, and respective earning capacities of the parents at the date of hearing.
2. However, an equal division of all property, together with an unequal discretion, still leaves three areas of uncertainty and unpredictability. They are:

* the amount of the unequal division;
* construction of the order, and
* judicial process for determining applications.

1. If there are no confines around the unequal division, then the model law is no more specific than the existing section 79 of the *Act*, save that the range is 50% to 100%. However, unlike section 79 of the *Act*, a spouse (in this model law) already has an equal share in the property.[[243]](#endnote-243)
2. One option to manage the quantum of judicial discretion comes from New Zealand. Henaghan wrote of a limitation on judicial discretion with a maximum of 15 % deviation from an equal division: that is a 65 % /35 % result.[[244]](#endnote-244) He argued that this provided a means for parties to plan and understand defined expectations’.[[245]](#endnote-245) However, a concern is that the cap of a 65% assumes that this result will be sufficient to compensate for economic disparity, when it may not (if there is only modest property).
3. A way of addressing the issue is a staggered cap to the adjustment. For example:
   1. the maximum adjustment is 30% (80/20 division) when the value of the property is at or less 150% of the applicable social security test.
   2. For disadvantaged families, the award is up to 50% (100/0 division) when the net property is at or below the appropriate social security test. As at 29 June 2017, this (full pension) asset test was for a couple (combined) is $575,000.[[246]](#endnote-246) On this basis, the cap of an 80/20 division would presently only apply to cases where the net property exceeds $862 500.
4. If the social security test is an inappropriate measure, then a comparator might be average couple wealth using Australian Bureau of Statistics data.
5. Separating the relevant factors for the quantum of the order from composition improves transparency. If spouses seek an equal division but remain in dispute about what property each is to retain, then the disagreement is narrower.
6. Existing factors from cases under section 79 of the *Act* readily lend themselves to inclusion in a statutory discretion. Factors include:

* The nature of the property (for example, superannuation or business interest),
* a party’s desire to retain specific property,
* the intrinsic value of keeping a home because of the proximity to favoured schools[[247]](#endnote-247) and,
* the emotional effect on a person of having to sell their home.[[248]](#endnote-248)

1. The difference between this recommended provision and the existing law is a limitation of use of these factors to work out the form of the order and not for changing the value each party receives.
2. The final matter is the reasoning process. While Part VII of the *Act* (parenting) sets out steps in the exercise of discretion, it does not specify their order. Avoiding lengthy appellate discussion of the appropriate discretionary process comes from defining the sequence of decision-making.
3. In this proposal, the statutory sequence is:
4. Determining in dollar terms the net property amount as a single table (including superannuation) (‘the net property amount’), then
5. Dividing the net property amount in half (‘the equal entitlement’) and expressing that result in dollar terms to each party.
6. If there is an application for an unequal division, then determining the entitlement of each party, expressed in percentage and dollar terms, (‘the unequal entitlement’) and, finally, only after deciding the equal entitlement or the unequal entitlement, then,
7. Deciding the composition of the order.
8. This concept of division of property for separated families does the following:

* It provides for a separate cause of action to divide the property of spouses in separated families when their relationship ends, treating these cases differently from other families.
* It contains specific objects and principles, including a statement of non-discrimination between parents, a continuation of equality, and consistency of decision-making.
* It is more predictable then section 79 of the *Act.*  It achieves this setting out a process of sequential steps for determining applications and providing a cap to unequal divisions of property.
* It implements a principle of non-discrimination between spouses in separated families by identifying their net property (including superannuation) and dividing it equally, irrespective of the circumstances of acquisition, maintenance, or improvement of that property.
* It directs a court to give weight to the financial consequences of separation, recognising financial disadvantage as between spouses in separated families.
* It recognises financial disadvantage to more impoverished families by increasing the unequal division of property when there is less property to divide.
* It provides a specific mechanism to implement priority to the financial interests of children, rather than just a statement of principle.
* It is more transparent. It separates the discretion for the composition of the order from the amount each spouse receives.

1. This model does not address all family types (e.g. families without children, families with children from previous relationships only). It adds another layer of complexity to an already lengthy *Act*. It is not a complete solution. Conversely, having a different cause of action for these types of families recognises their difference, where a one-size-fits-all statutory scheme cannot sufficiently provide negotiation guidance.
2. On implementation of this cause of action, consistency of use is achievable by a very similar model proposed for the existing law, which is;
   1. Coupling with the amendments a specific statutory guidance document, and
   2. Incorporating the guidance material into the *Act* and *rule*s, and
   3. Widespread education.
3. Accordingly, my recommendations are:

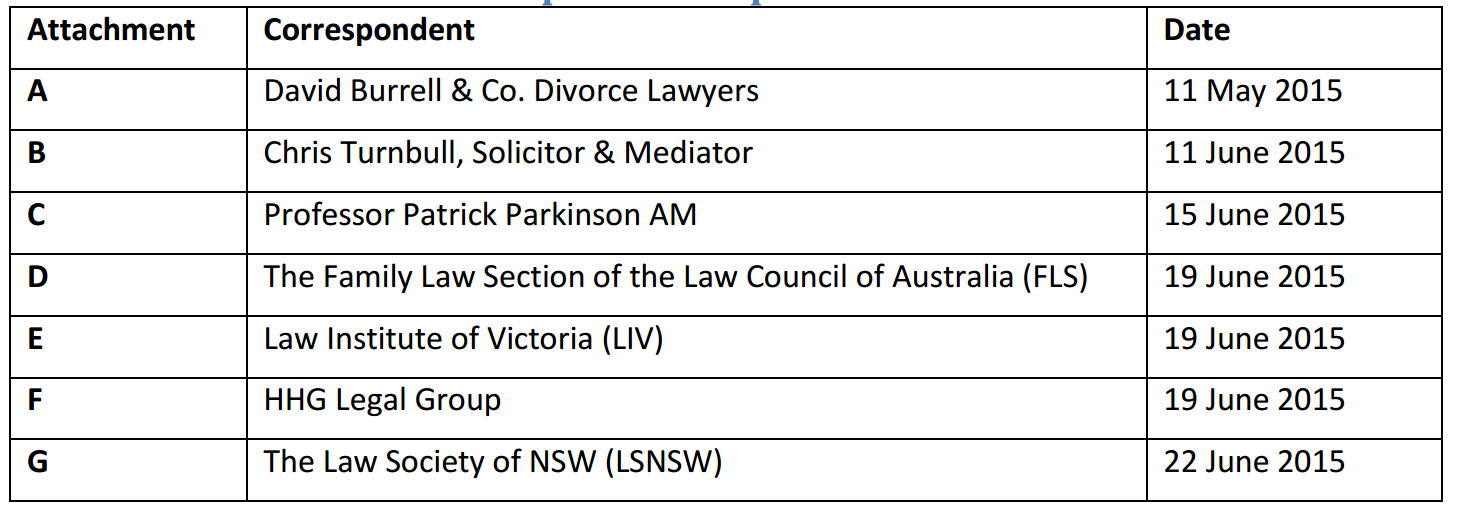
|  |
| --- |
| *Recommendation 14* *That if the Commission is satisfied that the family law system produces unfair property settlement outcomes, then the Commission consider a new cause of action for alteration of property interests in Part VII of the Act (and the equivalent) containing the following elements:*   * *A separate cause of action applying to families where:* * *The spouses are in a marriage or de-facto relationship (using the existing requirements), and* * *There is a child of the relationship, and* * *The parties have not otherwise sought to regulate their arrangements through a financial agreement covering some or all their property, then,* * *Property is all property acquired before during or after the marriage or de-facto relationship.* * *Property is divided equally as a rule.* * *Only if a person applies for an unequal division does a Court have discretion and then the discretion is governed by:* * *Objects and Principles, including redressing economic disadvantage, and giving weight to the economic interests of dependent children.* * *The actual costs of dependent children in each household.* * *The disparity in income and earning capacity of the spouses.* * *The health of the spouses.* * *Financial resources of the spouses.* * *The ability to live with dignity in retirement.* * *Capping the percentage division at 80%/20% for wealthier families, but* * *For less affluent families the percentage division extends to 100%/0%.* * *The Court retains a discretion concerning the composition of an award (within the scope of the % entitlement), using the following:* * *The Nature of Property.* * *The desire to retain specific property.* * *Proximity (of real property) to children’s schools and family members.* * *The emotional impact of selling real property.* * *In conjunction with this additional cause of action a statutory guidance document (as recommended for the existing regime) issue, with procedural amendments to put it into effect, and extensive education take place (as suggested earlier), and* * *The current provisions of section 79 of the Act (and equivalents) remain as a fall-back provision for other types of families.* |

# **Question 19: What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?**

## I New Question - Similar Issues

1. In 2015 and 2016, the Commonwealth engaged in an extensive consultation exercise for the *Civil Law and Justice Legislation Amendment Bill 2015*. This involved the Attorney-General’s department and then the Senate. The stated intention of the bill was to ‘improve the operation of the financial agreements regime.’[[249]](#endnote-249) While the Issues Paper notes the evidence of the inquiry,[[250]](#endnote-250) there is a great deal of material submitted to that inquiry that covers this question.
2. That material includes:

* Binding Financial Agreements Amendments – Civil Law and Justice Legislation Amendment Bill 2015 (Cth) (“The Consultation Draft”)
* Commonwealth of Australia, Legal and Constitutional Affairs Legislation Committee Report*, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, February 2016
* The 20 public submissions made to the inquiry concerning financial agreements many of them substantial.
* The public submissions made to the Attorney-General’s department in response to the exposure draft, being:



1. Because I made a substantial submission in response to that exposure draft, I do not propose to repeat it. I make the following recommendations:

|  |
| --- |
| *Recommendation 15* *That the Commission considers the Commonwealth of Australia, Legal and Constitutional Affairs Legislation Committee Report, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, February 2016, and the public submissions available.* |

|  |
| --- |
| *Recommendation 16* *That the Commission calls upon the Department of Justice and Attorney-General to Produce:*   * *Binding Financial Agreements Amendments – Civil Law and Justice Legislation Amendment Bill 2015 (Cth) (“The Consultation Draft”), and* * *The public submissions made in response to the exposure draft.* |

## II No Substantive Changes: A Summary

1. This part sets out, in summary, the bases (drawn from my 2015 submission) on which I recommend that there is no change to the existing statutory regime.
2. The chronological sequence that ultimately led to the 2015 exposure draft was as follows:

* The amendments to the *Act* which came into effect in the year 2000 provided, for the first time (post-1975), the liberty to persons intending to be married, who were married, or who were divorced, to enter into binding agreements without the approval of a court.[[251]](#endnote-251)
* In the early years following the introduction of financial agreements, their use was limited, mainly as the requirements to make them binding were perceived to be too stringent.[[252]](#endnote-252)
* Amendments were made to the Act to ease the compliance requirements, directly addressing concerns raised by the legal profession.[[253]](#endnote-253)
* The effect of the decision of the Full Court of the Family Court of Australia in *Black v Black[[254]](#endnote-254)* was that financial agreements were seen to be highly vulnerable to attack arising from technical and drafting errors.
* Further amendments, commencing into effect in 2010, intended to deal with the problem of financial agreements not being strictly compliant.[[255]](#endnote-255)
* Those amendments resulted in more litigation, and financial agreements were still set aside.[[256]](#endnote-256)

1. Sections 90B, 90C, 90D, 90G, 90K and 90KA of the Act operate together in Part VIIIA.[[257]](#endnote-257) A summary of the structural relationship of the sections comes from the Full Court decision of *Senior & Anderson*[[258]](#endnote-258)*,* where Strickland J wrote:

The Act in effect draws a distinction between agreements which are financial agreements (s 4, s 90B, s 90C, s 90D) and those financial agreements which are binding (s 90G). Financial agreements can, like any other agreement, govern the actions of the parties to them and bind the parties to obligations, but do not oust the jurisdiction of the court. Parties to an agreement that satisfies the definition of “financial agreement” are bound by its terms (or not bound as the case may be), just as they would be bound (or not bound) by any other agreement (s 90KA) (see generally *Australian Securities and Investment Corporation and Rich & Anor*).[[259]](#endnote-259)

1. This decision demonstrates that in determining the validity of a financial agreement, a sequence of steps must be undertaken.[[260]](#endnote-260) The first step is to examine an agreement to see whether it deals with how the property of the parties is to be dealt with in the event of a breakdown of the marriage and that the agreement *is expressed to be made* under the relevant section.[[261]](#endnote-261)
2. The second step is to examine the financial agreement like any other contract, to determine whether it is valid and enforceable in law and equity. Within this process, a court may also consider using any powers or remedies available in contract and equity.[[262]](#endnote-262)
3. Only after a court has completed *all* the above steps can a court then consider the requirements of section 90G of the *Act*. Within this third and final step there are two components: determining whether the financial agreement meets the strict requirements of section 90G (1) of the Act; [[263]](#endnote-263) and in the event of failure to meet those requirements, a court has the discretion to declare that the agreement is binding.[[264]](#endnote-264)
4. Therefore, it is essential to recognise that the operation of section 90G of the Act is subject to pre-conditions contained in the rest of Part VIIIA of the Act. If an agreement is void, voidable or unenforceable because of a matter in sections 90B, 90C, 90D, 90K or 90KA of the Act, it cannot be perfected afterwards or made binding by the operation of section 90G or its sub-sections.
5. Any further amendments to the *Act* will have to be prospective. Amendments to an already complex regime (irrespective of the good intention and merit of those changes) make a difficult situation worse. Consider how confusing the three existing compliance regimes are, using the following table:

**Table: Existing Compliance Regimes s 90G**



1. My recommendation therefore is:

|  |
| --- |
| *Recommendation 17* *That there be no change to the legislative provisions governing financial agreements.* |

# Other Publications

Portions of this submission have previously been published (or are to be published) as follows:

* Turnbull, Christopher J. (2017) *Family law property settlements: Principled law reform for separated families.* PhD thesis, Queensland University of Technology (21 November 2017) <https://eprints.qut.edu.au/113831/>
* Christopher Turnbull, ‘Evaluating Judicial Discretion in Family Property Settlements: Developing a Quantitative Analysis Methodology’ (Paper Presented at Australian Institute of Family Studies Conference, Melbourne, 8 July 2016).
* Christopher Turnbull, ‘A Quantitative Report on Judicial Discretion in Family Property Settlements: Results and Implications for Practitioners’ (Paper Presented at Northern Territory Law Society ‘Start at the Top’ Family Law Conference 2017, Darwin, 19 January 2017).
* Christopher Turnbull, 'Family Law Property Settlements: An Exploratory Quantitative Analysis' (2018) 7(3) *Family Law Review* 215.
* ***[Forthcoming]*** Christopher Turnbull, 'In metes and bounds:  Revisiting the just and equitable requirement in family law property settlements' (2018) 31 *Australian Journal of Family Law.*

# Endnotes

1. Turnbull, Christopher J. (2017) *Family law property settlements: Principled law reform for separated families.* PhD thesis, Queensland University of Technology (21 November 2017) <https://eprints.qut.edu.au/113831/> . [↑](#endnote-ref-1)
2. *Public Service Act 1999* (Cth) s13. [↑](#endnote-ref-2)
3. Issues Paper Page 15. [↑](#endnote-ref-3)
4. Issues Paper Page 17. [↑](#endnote-ref-4)
5. Department of Human Services, Australian Government, *Annual Report 2012-2013,* 74. [↑](#endnote-ref-5)
6. Ibid 41. [↑](#endnote-ref-6)
7. Australian Bureau of Statistics. (2015). Family Characteristics and Transitions Australia, Data Cube - Table 5: All Children, Family type by age of child 2012-2013, 2009-2010, 2006-2007 (4442.0) Retrieved from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4442.02012-13?OpenDocument> [↑](#endnote-ref-7)
8. Ibid. [↑](#endnote-ref-8)
9. Federal Circuit Court of Australia, *Annual Report 2012-2013* (2013) 40. [↑](#endnote-ref-9)
10. Ibid, 42. [↑](#endnote-ref-10)
11. Family Court of Australia, *Annual Report 2012-2013* (2013) 42. [↑](#endnote-ref-11)
12. Ibid . [↑](#endnote-ref-12)
13. Rae Kaspiew, Lawrie Moloney, Jessie Dunstan and John de Maio, ‘Family Law Court filings 2004-05 to 2012-13’ (Research Report No 30, Australian Institute of Family Studies, 2015). [↑](#endnote-ref-13)
14. Ibid 16. [↑](#endnote-ref-14)
15. Australian Bureau of Statistics. (2016). 2016 Census Quickstats (22 February 2018) .<http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036> . [↑](#endnote-ref-15)
16. Lixia Qu & Ruth Weston, *Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms* (2010) Australian Institute of Family Studies, 40 <https://www.ag.gov.au/Publications/Pages/FamiliesProject-SeparatedParentsFinalReports.aspx> . [↑](#endnote-ref-16)
17. Child Support Agency *Facts and Figures 2000-2001* (2001) Australian Government, 16; Child Support Agency *Facts and Figures 2001-2002* (2002) Australian Government, 16; Child Support Agency *Facts and Figures 2002-2003* (2003) Australian Government, 16; Child Support Agency *Facts and Figures 2003-2004* (2004) Australian Government, 17; Child Support Agency *Facts and Figures 2004-2005* (2005) Australian Government, 22; Child Support Agency *Facts and Figures 2005-2006* (2006) Australian Government, 21; Child Support Agency *Facts and Figures 2006-2007* (2007) Australian Government, 21; Child Support Agency *Facts and Figures 2007-2008* (2008) Australian Government, 25; Child Support Agency *Facts and Figures 2008-2009* (2009) Australian Government, 22. [↑](#endnote-ref-17)
18. Ibid. [↑](#endnote-ref-18)
19. See generally *Child Support Legislation Amendment (Reform of the Child Support Scheme – Initial Measures) Act 2006* (Cth); *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006* (Cth). [↑](#endnote-ref-19)
20. Child Support Agency, Department of Human Services, Australian Government, Decision on Freedom of Information Application No. LEX 8570, 17 June 2014 [12] (copy available on request). [↑](#endnote-ref-20)
21. Ibid [13]. [↑](#endnote-ref-21)
22. Australian Government, Department of Human Services, *Statistical Information and Data* Department of Human Services (11 December 2017) <https://www.humanservices.gov.au/organisations/about-us/statistical-information-and-data#request> [↑](#endnote-ref-22)
23. *Child Support (Assessment) Act 1989* (Cth) s 55C. [↑](#endnote-ref-23)
24. Australia Government, *Child Support Guide Version 4.30 – Care Costs & Child Support Percentages*, Department of Social Security (21 March 2016) <http://guides.dss.gov.au/child-support-guide/2/4/5> . [↑](#endnote-ref-24)
25. Family Court of Australia*, Annual Report 2016-2017* (2017) 29. [↑](#endnote-ref-25)
26. Federal Circuit Court of Australia, *Protocol for the Division of Work between the Family Court of Australia and the Federal Circuit Court*, Federal Circuit Court of Australia (12 April 2013) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/corporate-information/protocol-for-division-of-work-fcoa-fcc> . [↑](#endnote-ref-26)
27. Family Court of Australia, *Annual Report 2012-2013* (2013) 44. [↑](#endnote-ref-27)
28. Family Court of Australia, *Annual Report 2013-2014* (2014) 61. [↑](#endnote-ref-28)
29. Family Court of Australia, *Annual Report 2014-2015* (2015) 55. [↑](#endnote-ref-29)
30. Federal Circuit Court of Australia, *Annual Report 2012-2013* (2013) 55. [↑](#endnote-ref-30)
31. Federal Circuit Court of Australia, *Annual Report 2013-2014* (2014) 61. [↑](#endnote-ref-31)
32. Federal Circuit Court of Australia, *Annual Report 2014-2015* (2015) 68. [↑](#endnote-ref-32)
33. Federal Circuit Court of Australia, *Annual Report 2015-2016* (2016) 71-72. [↑](#endnote-ref-33)
34. Family Court of Australia, *Annual Report 2015-2016* (2016) 46. [↑](#endnote-ref-34)
35. Federal Circuit Court of Australia, *Annual Report 2016-2017* (2017) 79. [↑](#endnote-ref-35)
36. Family Court of Australia, *Annual Report 2016-2017* (2017) 30. [↑](#endnote-ref-36)
37. Federal Circuit Court of Australia, *Annual Report 2015-2016* (2016) 54. [↑](#endnote-ref-37)
38. Family Court of Australia, *Annual Report 2015-2016* (2016) 44. [↑](#endnote-ref-38)
39. Family Court of Australia, *Annual Report 2015-2016* (2016) 43. [↑](#endnote-ref-39)
40. Family Court of Australia, *Annual Report 2015-2016* (2016) 43-44. [↑](#endnote-ref-40)
41. Federal Circuit Court of Australia, *Annual Report 2015-2016* (2016) 53-54. [↑](#endnote-ref-41)
42. Ibid. [↑](#endnote-ref-42)
43. Family Court of Australia, *Annual Report 2015-2016* (2016) 43-44. [↑](#endnote-ref-43)
44. See generally *Family Law Act 1975* (Cth) ss 60H,60HA, 60HB. [↑](#endnote-ref-44)
45. *Family Law Act 1975* (Cth) s 60B(1)(a). [↑](#endnote-ref-45)
46. Marygold Melli, ‘Whatever Happened to Divorce?’ (2000) *Wisconsin Law Review* 637, 638; see also Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge, 2011) 277. [↑](#endnote-ref-46)
47. *Child Support (Assessment) Act* *1989* (Cth) s 12(1)(c). [↑](#endnote-ref-47)
48. *Family Law Act 1975* (Cth) s 66L. [↑](#endnote-ref-48)
49. See, eg, Law Reform Commission, *Matrimonial* *Property,* Report No 39 (1987) [350]. [↑](#endnote-ref-49)
50. *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). [↑](#endnote-ref-50)
51. Australian Bureau of Statistics. (2012). Australian Social Trends, Data Cube - Family and Community: Table 1 - Family and community, National Summary 1998–2012 (4102.0). Retrieved from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4102.0Dec%202012?OpenDocument#Data>. [↑](#endnote-ref-51)
52. Australian Institute of Family Studies, *Births in Australia Source Data* (2016) Australian Institute of Family Studies <https://aifs.gov.au/facts-and-figures/births-australia/births-australia-source-data#exnuptial> . [↑](#endnote-ref-52)
53. *Family Law Act 1975* (Cth) s 4AA; cf *Marriage Act 1961*(Cth) s 5 definition ‘marriage’. [↑](#endnote-ref-53)
54. Ibid s 90SB. [↑](#endnote-ref-54)
55. Genevieve Heard and Dharmalingam Arunachalam (eds), *Family Formation in 21st Century Australia* (Springer, 2015). [↑](#endnote-ref-55)
56. Belinda Hewitt and Janeen Baxter, ‘Relationship Dissolution’ in Genevieve Heard and Dharmalingam Arunachalam (eds), *Family Formation in 21st Century Australia* (Springer, 2015) 85. [↑](#endnote-ref-56)
57. Issues Paper Page 20. [↑](#endnote-ref-57)
58. *Family Law Act 1975* (Cth) s 60B(4); See also *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) sch. 1. [↑](#endnote-ref-58)
59. See, eg, Anthony Dickey, ‘The Moral Justification for Alteration of Property Interests Under the Family Law Act’ (1988) 11 *University of New South Wales Law Journal* 158, Stephen Parker and Peter Drahos, ‘Closer to a Critical Theory of Family Law’ (1990) *Australian Journal of Family Law* 159, Stephen Parker, ‘Rights and utility in Anglo-Australian Family Law’ (1992) 55 *Modern Law Review* 311, John Dewar, ‘The Normal Chaos of Family Law’’ (1998) 61(4) *Modern Law Review* 467, John Dewar, ‘Family Law and its Discontents’ (2000) 14 *International Journal of Law, Policy and the Family* 59. [↑](#endnote-ref-59)
60. Pamela Symes, ‘Indissolubility and the Clean Break’ (1985) 48 *Modern Law Review* 44, 57. [↑](#endnote-ref-60)
61. Anthony Dickey, ‘The Moral Justification for Alteration of Property Interests Under the Family Law Act’ (1988) 11 *University of New South Wales Law Journal* 158, 162. [↑](#endnote-ref-61)
62. John Dewar, ‘Reducing Discretion in Family Law’ (1997) *Australian Journal of Family Law* 309, 316. [↑](#endnote-ref-62)
63. Patrick Parkinson, ‘The Diminishing Significance of Initial Contributions to Property’ (1999) 13(1) *Australian Journal of Family Law* 52, 57; See generally Patrick Parkinson, ‘Reforming the Law of Family Property’ (1999) 13 *Australian Journal of Family Law* 117, 139; See also Patrick Parkinson, ‘Quantifying the Homemaker contribution in Family Property Law’ (2003) 31 (1) *Federal Law Review* 1; Patrick Parkinson, ‘The Yardstick of Equality: Assessing Contributions in Australia and England’ (2005) 19 *International Journal of Law Policy and the Family* 163; See also Patrick Parkinson, ‘Constitutional Law and the Limits of Discretion in Family Property Law’ (Paper Presented at 15th Australian Family Lawyers’ Conference, Noumea, June 2015). [↑](#endnote-ref-63)
64. Patrick Parkinson, ‘Family Property Law and the Three Fundamental Propositions in Stanford v Stanford’ (2013) 3 *Family Law Review* 80, 91-92. [↑](#endnote-ref-64)
65. Belinda Fehlberg, ‘With All My Worldly Goods I Thee Endow?” The Partnership Theme in Australian Matrimonial Property Law’ (2005) 19 *International Journal of Law, Policy and the Family* 176, 180. [↑](#endnote-ref-65)
66. Any reference to section 79 of the *Act* is also a reference to its equivalent section 90SM. Equally, references to section 75(2) and its sub-sections are references to the equivalent in section 90SF. [↑](#endnote-ref-66)
67. *Family Law Act 1975* (Cth) ss 90B,90C,90D,90G (and de-facto relationship equivalents). [↑](#endnote-ref-67)
68. Ibid s 90K(1)(d). [↑](#endnote-ref-68)
69. Ibid s 90K(1)(c). [↑](#endnote-ref-69)
70. *Senior & Anderson* (2011) FLC ¶93-470. [↑](#endnote-ref-70)
71. *Family Law Act 1975* (Cth) 90KA(a). [↑](#endnote-ref-71)
72. Ibid s 71A. [↑](#endnote-ref-72)
73. See generally John Stuart Mill, *On Liberty* (Harmondsworth: Penguin Classics 1974 [1859]) 71-72, Wayne Morrison, *Jurisprudence: From the Greeks to the Post-Modern* (Routledge, 2016) 201-203; Jeremy Bentham, *Principles of the Civil Code*, quoted in Paul Kelly, *Utilitarianism and Distributive Justice, Jeremy Bentham and the Civil Law* (Oxford, 1990) 87-88; Richard Craswell, ‘Contract Law, Default Rules, and the Philosophy of Promising’ (1989) 88 *Michigan Law Review* 489, 496, citing Neil MacCormack and Joseph Raz, ‘Voluntary Obligations and Normative Powers’ (1972) 46 *Proceedings of the Aristotelian Society, Supplementary Volumes* 59. Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) 369; Charles Fried, *Contract as a Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 16. [↑](#endnote-ref-73)
74. John Rawls, *A Theory of Justice* (Harvard University Press, 1971); John Rawls, *A Theory of Justice Revised Edition* (Harvard University Press 1999); John Rawls, *Political Liberalism* (Columbia University Press, 1993); John Rawls, *Political Liberalism* *(Expanded Edition)* (Columbia University Press, 2005); John Rawls, *The Law of Peoples* (Harvard University Press, 1999); John Rawls, *Collected Papers* (Harvard University Press, 1999); John Rawls, *Lectures on the History of Moral Philosophy* (Harvard University Press, 2000); John Rawls, *Justice as Fairness: A Restatement* (Belknap Press 2001); John Rawls, *Lectures on the History of Moral Philosophy* (Harvard University Press, 2007); John Rawls, ‘Justice as Fairness: Political not Metaphysical’ (1985) 14 *Philosophy and Public Affairs* 223; John Rawls, *Political Liberalism* *(Expanded Edition)* (Columbia University Press, 2011). [↑](#endnote-ref-74)
75. Peter Saunders, ‘What is a Fair Divorce Settlement?’ (1999) 53 *Family Matters* 48. [↑](#endnote-ref-75)
76. Rob George, *Ideas and Debates in Family Law* (Hart Press, 2012). [↑](#endnote-ref-76)
77. John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 6; See also John Rawls, *A Theory of Justice Revised Edition* (Harvard University Press, 1999) 79. [↑](#endnote-ref-77)
78. John Rawls, *Political Liberalism (Expanded Edition)* (Columbia University Press, 2005) 5. [↑](#endnote-ref-78)
79. John Rawls, *A Theory of Justice Revised Edition* (Harvard University Press, 1999) 72. [↑](#endnote-ref-79)
80. Murray Gleeson, ‘Individualised Justice – The Holy Grail’ (1995) 69 *Australian Law Journal* 421, 431-432. [↑](#endnote-ref-80)
81. Law Commission (New Zealand), *Review of the Property (Relationships) Act 1976* (16 October 2017) New Zealand Government <http://www.lawcom.govt.nz/our-projects/review-property-relationships-act-1976>. [↑](#endnote-ref-81)
82. Ibid. [↑](#endnote-ref-82)
83. *Harris v Caladine* (1991) 172 CLR 84. [↑](#endnote-ref-83)
84. *Family Law Rules 2004* (Cth) r 24.13(1) (d), 24.13 (2A). [↑](#endnote-ref-84)
85. These results are discussed in more detail in a recent article: Christopher Turnbull, 'Family Law Property Settlements: An Exploratory Quantitative Analysis' (2018) 7(3) *Family Law Review* 215. [↑](#endnote-ref-85)
86. See, eg, Rosemary Hunter, Ann Genovese, Angela Melville and April Chrzanowski, *Legal Services in Family Law* (Justice Research Centre, Law Foundation of New South Wales, 2000); Grania Sheehan and Jody Hughes, *Division of Matrimonial property in Australia: Research Paper No. 25* (Australian Institute of Family Studies, 2001); Nareeda Lewers, Helen Rhoades and Shurlee Swain, ‘Judicial and Couple approaches to Contributions and Property: The Dominance and Difficulties of a Reciprocity Model’ (2007) 21 *Australian Journal of Family Law* 123; 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* 206; Rae Kaspiew and Lixia Qu, ‘Property Division after Separation: Recent Research Evidence’ (2016) 30 *Australian Journal of Family Law* 1. [↑](#endnote-ref-86)
87. Sophy Bordow and Margaret Harrison ‘Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases’ (1994) 8 (3) *Australian Journal of Family Law* 264. [↑](#endnote-ref-87)
88. Rae Kaspiew and Lixia Qu, ‘Property Division After Separation: Recent Research Evidence’ (2016) 30 *Australian Journal of Family Law* 1, 19. [↑](#endnote-ref-88)
89. Law Reform Commission, *A Survey of Family Court Property Cases in Australia*, Research Paper No 1 (1985), 101; Law Reform Commission, *Matrimonial* *Property,* Report No 39 (1987) [118]. [↑](#endnote-ref-89)
90. Peter McDonald ‘Property Distribution: The shares of each partner and their determinants’ in Peter McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (Australian Institute of Family Studies, Prentice-Hall, 1986) 183. [↑](#endnote-ref-90)
91. Peter McDonald ‘Property Distribution: The shares of each partner and their determinants’ in Peter McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (Australian Institute of Family Studies, Prentice-Hall, 1986) 183. [↑](#endnote-ref-91)
92. Grania Sheehan and Jody Hughes, *Division of Matrimonial Property in Australia: Research Paper No. 25* (Australian Institute of Family Studies, 2001) 18. [↑](#endnote-ref-92)
93. Ibid. [↑](#endnote-ref-93)
94. Peter McDonald ‘Property Distribution: The shares of each partner and their determinants’ in Peter McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (Australian Institute of Family Studies, Prentice-Hall, 1986), 183. [↑](#endnote-ref-94)
95. Ibid. [↑](#endnote-ref-95)
96. 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* 206, 221. [↑](#endnote-ref-96)
97. Rae Kaspiew and Lixia Qu, ‘Property Division After Separation: Recent Research Evidence’ (2016) 30 *Australian Journal of Family Law* 1, 19. [↑](#endnote-ref-97)
98. McDonald, *Settling Up*,183; Sheehan, *Division of Matrimonial Property in Australia*, 14; Qu, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, 102; Kaspiew, *Property Division After Separation: Recent Research Evidence*, 20. [↑](#endnote-ref-98)
99. Law Reform Commission, Matrimonial Property, Report No 39 (1987) [243] - [293]. [↑](#endnote-ref-99)
100. Attorney-General’s Department, Commonwealth of Australia, *Property and Family Law-Options for Change* (Discussion Paper, 1999) 18-28. [↑](#endnote-ref-100)
101. Warren Mundy and Angela MacRae, ‘Access to Justice Arrangements’ (Productivity Commission Inquiry Report No. 72, Australian Government Productivity Commission, 5 September 2014) 874. [↑](#endnote-ref-101)
102. *Federal Circuit Court Act 1999* (Cth) s 3; *Family Law Act 1975* (Cth) s 97. [↑](#endnote-ref-102)
103. *Matrimonial Property Act 1976 (NZ)* (No. 166 of 1976), Long Title. *Martin v Martin* [1979] 1 NZLR 97, 108; See generally *Haldane v Haldane* [1976] 2 NZLR 715; cf Matrimonial *Property Act 1963* (NZ) ss 5(3), 6(1)*.* [↑](#endnote-ref-103)
104. *Property (Relationships) Act 1976* (NZ) s 1N(a). [↑](#endnote-ref-104)
105. Ibid s 1N(b). [↑](#endnote-ref-105)
106. Ibid s 1N(c). [↑](#endnote-ref-106)
107. Ibid s 1N(d). [↑](#endnote-ref-107)
108. *Family Law Act*, RSO 1990, c F-3, Preamble; See also *Serra v Serra* (2009) ONCA 105 [39]. [↑](#endnote-ref-108)
109. *Mazurenko v Mazurenko* (1981) ABCA 104, 15 Alta. L.R. (2d) 357 [20], citing Alberta Law Reform Institute, *Reform Report of the Institute of Law Research and Reform* (Report No. 18, August 1975). [↑](#endnote-ref-109)
110. *Matrimonial Causes Act 1973* (UK) c 18, s 25(1). [↑](#endnote-ref-110)
111. Ibid s 25A. [↑](#endnote-ref-111)
112. *White v White* [2001] 1 All ER 1, [2001] 1 AC 596. [↑](#endnote-ref-112)
113. *Matrimonial Proceedings and Property Act 1970* (UK) c 45, s 5(1). [↑](#endnote-ref-113)
114. *White v White* [2001] 1 All ER 1, [2001] 1 AC 596, [23]. [↑](#endnote-ref-114)
115. Ibid. [↑](#endnote-ref-115)
116. *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1, [2006] UKHL 24. [↑](#endnote-ref-116)
117. Ibid [11]. [↑](#endnote-ref-117)
118. Ibid [13]. [↑](#endnote-ref-118)
119. Ibid [16] - [17]. [↑](#endnote-ref-119)
120. Ibid [137]. [↑](#endnote-ref-120)
121. Ibid [138]. [↑](#endnote-ref-121)
122. Ibid [140]. [↑](#endnote-ref-122)
123. Ibid [141]. [↑](#endnote-ref-123)
124. *Stanford v Stanford* (2012)247 CLR 108, 120-121. [↑](#endnote-ref-124)
125. *Spry v Kennon; Kennon v Spry* (2008) 238 CLR 366. [↑](#endnote-ref-125)
126. *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1, [2006] UKHL 24 [21], See generally *White v White* [2001] 1 All ER 1, [2001] 1 AC 596. [↑](#endnote-ref-126)
127. *Matrimonial Property Act,* RSA 2000, c M-8, s 7(1). [↑](#endnote-ref-127)
128. *Property (Relationships) Act 1976* (NZ) s 8(1)(a). [↑](#endnote-ref-128)
129. Ibid s 8(1)(b). [↑](#endnote-ref-129)
130. Ibid s 8(1)(c). [↑](#endnote-ref-130)
131. Ibid ss 8(1)(g), 8(1)(h). [↑](#endnote-ref-131)
132. Ibid s 8(1)(i). [↑](#endnote-ref-132)
133. Ibid s 8(1)(k). [↑](#endnote-ref-133)
134. *Ward v Ward* [2010] 2 NZLR 31 [18]. [↑](#endnote-ref-134)
135. *Family Law Act*, SBC 2011, c 25, s 84. [↑](#endnote-ref-135)
136. Ibid s 85. [↑](#endnote-ref-136)
137. *Family Law Act*, RSO 1990, c F-3, s 4(1). [↑](#endnote-ref-137)
138. Ibid. [↑](#endnote-ref-138)
139. *Property (Relationships) Act 1976* (NZ) s 11(1); see also *Property (Relationships) Amendment Act 2001* (NZ). [↑](#endnote-ref-139)
140. *Family Law Act,* SBC 2011, c 25, s 81; *Family Law Act*, RSO 1990, c F.3, s 5(1). [↑](#endnote-ref-140)
141. *Family Law Act*, RSO 1990, c F.3, s 4(1) (definition ‘net family property’). [↑](#endnote-ref-141)
142. *Family Law Act,* SBC 2011, c 25, s 85(1). [↑](#endnote-ref-142)
143. *Family Law Act*, RSO 1990, c F.3, s 5(6); See generally *Czieslik v Ayuso* [2007] ONCA 305; *Brett v Brett* (1999) 44 OR (3d) 61, [1999] OJ 1384; *Kuzmanovic v Kuzmanovic* [2001] OJ 1450, 16 RFL. (5th) 300. [↑](#endnote-ref-143)
144. *White v White* [2001] 1 All ER 1, [2001] 1 AC 596, [25]. [↑](#endnote-ref-144)
145. *Charman v Charman (No 4)* [2007] EWCA Civ 503, [66], [83]-[86]; See also *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1, [2006] UKHL 24. [↑](#endnote-ref-145)
146. See, eg, *K & L* [2011] EWCA Civ 550; *Cowan v Cowan* [2001] EWCA Civ679; *Lambert v Lambert* [2002] EWCA Civ 1685; *SK v TK* [2013] EWHC 834 (Fam); *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam). [↑](#endnote-ref-146)
147. *Property (Relationships) Act 1976* (NZ) s 15(1). [↑](#endnote-ref-147)
148. *X v X [Economic Disparity]* [2009] NZFLR 985 [50]. [↑](#endnote-ref-148)
149. *Property (Relationships) Act 1976* (NZ) s 15(2). [↑](#endnote-ref-149)
150. *S & W* [2016] NZCA 356 [82]. [↑](#endnote-ref-150)
151. *X v X [Economic Disparity]* [2009] NZFLR 985 [77]; see also *M v B* [2006] 3 NZLR 660 [140]; *Nation v Nation* [2005] 3 NZLR 46 [162]. [↑](#endnote-ref-151)
152. *B v B* [2004] NZFLR 127 [53]. [↑](#endnote-ref-152)
153. *De Malmanche v De Malmanche* [2002] 2 NZLR 838 **[**151]. [↑](#endnote-ref-153)
154. *S & W* [2016] NZCA 356 [82]. [↑](#endnote-ref-154)
155. Ibid [91]; cf *C v C* [2014] NZFLR 9 [133] - [141]. [↑](#endnote-ref-155)
156. *S & W* [2016] NZCA 356 [86]. [↑](#endnote-ref-156)
157. *Family Law Act,* SBC 2011, c 25, ss 95(1), 95(2); see also *Family Law Act,* SBC 2011, c 25, s 95(3). [↑](#endnote-ref-157)
158. *Murchie v Murchie* (1984) 53 BCLR 157, 39 RFL. (2d) 385; See also *Devine v Devine* 2012 BCCA 509. [↑](#endnote-ref-158)
159. *Merklinger v. Merklinger* (1992) ONCA 642 [258], cited in *Serra v Serra* (2009) ONCA 105 [47]; See generally Malcolm Kronby, *Canadian Family Law* (Wiley, 10th ed, 2010) 136-137. [↑](#endnote-ref-159)
160. Joint Select Committee on the Family Law Act, Parliament of Australia, *Family Law in Australia* (1980) 107. [↑](#endnote-ref-160)
161. Law Reform Commission, *Matrimonial* *Property,* Report No 39 (1987) [350]. [↑](#endnote-ref-161)
162. Ibid [363]. [↑](#endnote-ref-162)
163. Ibid [364]. [↑](#endnote-ref-163)
164. Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, Parliament of Australia, *The Family Law Act 1975 – Aspects of Its Operation and Interpretation* (1992) 233. [↑](#endnote-ref-164)
165. Family Law Reform Bill (No.2) 1994 (Cth). [↑](#endnote-ref-165)
166. Ibid cl 15. [↑](#endnote-ref-166)
167. Attorney-General’s Department, Commonwealth of Australia, *Property and Family Law-Options for Change* (Discussion Paper, 1999) 36. [↑](#endnote-ref-167)
168. Ibid 40. [↑](#endnote-ref-168)
169. Ibid 39; See generally Stephen Bourke, ‘Matrimonial Property Law – A Discussion of the Reform Options’ (Discussion Paper, Attorney-General’s Department, 1 May 1999); See also Attorney-General’s Department, Commonwealth of Australia, *Superannuation, and Family Law* (Discussion Paper, 1998). [↑](#endnote-ref-169)
170. Family Law Council, *Submission on the Discussion Paper: Property and Family Law – Options for Change*, July 1999, 92. See also Peter Nygh, ‘Developments and Events: Reform of Matrimonial Property Law’ (1999) 13 *Australian Journal of Family Law* 89. [↑](#endnote-ref-170)
171. Family Law Council, *Submission on the Discussion Paper: Property and Family Law – Options for Change*, July 1999, 99. [↑](#endnote-ref-171)
172. *Property (Relationships) Act 1976* (NZ) s 18. [↑](#endnote-ref-172)
173. Ibid s 18(1)(c). [↑](#endnote-ref-173)
174. United Kingdom Family Justice Council, *Sorting out Finances on Divorce* (April 2016) Courts and Tribunals Judiciary <https://www.judiciary.gov.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf> . [↑](#endnote-ref-174)
175. Ibid 11. [↑](#endnote-ref-175)
176. Ibid. [↑](#endnote-ref-176)
177. Ibid 12. [↑](#endnote-ref-177)
178. Ibid 13. [↑](#endnote-ref-178)
179. Ibid. [↑](#endnote-ref-179)
180. The Law Society United Kingdom, Ancillary Relief Working Group, *Financial Provision on Divorce: Clarity and Fairness, Proposals for Reform* (Law Society, May 2003) 13. [↑](#endnote-ref-180)
181. United Kingdom, The Law Commission, *Matrimonial Property Needs and Agreements,* No. 343 (27 February 2014) Gov.UK Publications <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286308/HC_1089_Web_only.pdf> 45. [↑](#endnote-ref-181)
182. Ministry of Justice (United Kingdom), *Family Procedure Rules – Form* *E* (30 January 2017) <http://formfinder.hmctsformfinder.justice.gov.uk/form-e-eng-20160121.pdf> ; Ministry of Justice (United Kingdom), *Family Procedure Rules – Form* *E Notes* (30 January 2017) <https://formfinder.hmctsformfinder.justice.gov.uk/form-e-notes-eng.pdf>. [↑](#endnote-ref-182)
183. Australian Government, Attorney-General’s Department (21 October 2016) *Parenting Orders- What You Need to Know* <http://www.familyrelationships.gov.au/BrochuresandPublications/Documents/parenting_orders_hanbook_accessible_-_21_oct_2016_2.pdf> [↑](#endnote-ref-183)
184. *Family Law Act 1975* (Cth) s 79(1). [↑](#endnote-ref-184)
185. *Chancellor & McCoy* [2016] FamCAFC 256 (2 December 2016). [↑](#endnote-ref-185)
186. *Family Law Act 1975* (Cth) s 79(2). [↑](#endnote-ref-186)
187. *Norbis v Norbis* (1986) 161 CLR 513. [↑](#endnote-ref-187)
188. *Stanford v Stanford* (2012)247 CLR 108. [↑](#endnote-ref-188)
189. *Mallet v Mallet* (1984) 156 CLR 605. [↑](#endnote-ref-189)
190. *Family Law Act 1975* (Cth) s 79(4)(a). [↑](#endnote-ref-190)
191. Ibid s 79(4)(b). [↑](#endnote-ref-191)
192. Ibid s 79(4)(c). [↑](#endnote-ref-192)
193. Ibid s 79(4)(d). [↑](#endnote-ref-193)
194. Ibid s 79(4)(e). [↑](#endnote-ref-194)
195. Ibid s 79(4)(f). [↑](#endnote-ref-195)
196. Ibid s 79(4)(g). [↑](#endnote-ref-196)
197. *Bevan & Bevan* (2014) FLC ¶93-572. [↑](#endnote-ref-197)
198. *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* *(Intervener)* (2003) FLC ¶93-143; See also *JEL & DDF* (2001) FLC ¶93-075. [↑](#endnote-ref-198)
199. *Coghlan & Coghlan* (2005) FLC ¶93-220. [↑](#endnote-ref-199)
200. Ibid. [↑](#endnote-ref-200)
201. *Omanici & Omanici* (2005) FLC ¶93-218. [↑](#endnote-ref-201)
202. *Oriolo & Oriolo* (1985) FLC ¶91-653; See also *Briese & Briese* (1986) FLC ¶91-713. [↑](#endnote-ref-202)
203. *Family Law Rules 2004* (Cth) r 13.04; See also *Federal Circuit Court Rules 2001* (Cth) r. 24.03. [↑](#endnote-ref-203)
204. *Tate & Tate*(2000) FLC ¶93-047. [↑](#endnote-ref-204)
205. *Family Law Act 1975* (Cth) s 112AP. [↑](#endnote-ref-205)
206. Ibid s 79A(1)(a). [↑](#endnote-ref-206)
207. *Biltoft &* *Biltoft* (1995) FLC ¶92-614. [↑](#endnote-ref-207)
208. *Farmer & Bramley* (2000) FLC ¶93-060. [↑](#endnote-ref-208)
209. *Mallet v Mallet* (1984) 156 CLR 605. [↑](#endnote-ref-209)
210. *Farmer & Bramley* (2000) FLC ¶93-060. [↑](#endnote-ref-210)
211. *Mallet v Mallet* (1984) 156 CLR 605. [↑](#endnote-ref-211)
212. *Pierce & Pierce* (1999) FLC ¶92-844. [↑](#endnote-ref-212)
213. Ibid. [↑](#endnote-ref-213)
214. *Bonnici & Bonnici* (1992) FLC ¶92-270. [↑](#endnote-ref-214)
215. *Bishop & Bishop* (2013) FLC ¶93-553. [↑](#endnote-ref-215)
216. *Burke & Burke* (1993) FLC ¶92-356. [↑](#endnote-ref-216)
217. *Kessey & Kessey* (1994) FLC ¶92-495. [↑](#endnote-ref-217)
218. See generally *Fields & Smith* (2015) FLC ¶93-638; See also *Dickons & Dickons* [2012] FamCAFC 154, *Lovine & Connor and Anor* (2012) FLC ¶93-515; *Bolger & Headon* [2014] FamCAFC 27 (27 Februaary 2014). [↑](#endnote-ref-218)
219. *Family Law Act 1975* (Cth) s 75(2)(b). [↑](#endnote-ref-219)
220. Ibid s75(2)(a). [↑](#endnote-ref-220)
221. Ibid ss75(2) (c), 75(2)(d), 75(2)(l). [↑](#endnote-ref-221)
222. Ibid s75(2)(k). [↑](#endnote-ref-222)
223. Ibid s75(2)(g). [↑](#endnote-ref-223)
224. *Clauson & Clauson* (1995) FLC ¶92-595. [↑](#endnote-ref-224)
225. Ibid. [↑](#endnote-ref-225)
226. *Wynona & Friend* [2011] FamCAFC 6 (28 January 2011). [↑](#endnote-ref-226)
227. *Manolis & Manolis* (No. 2) [2011] FamCAFC 105 (13 May 2011). [↑](#endnote-ref-227)
228. *Phillips & Phillips* (2002) FLC ¶93-104. [↑](#endnote-ref-228)
229. *Bevan & Bevan* (2013) FLC ¶93-545. [↑](#endnote-ref-229)
230. See, eg, *M & M* (2006) FLC ¶93-281; *Doherty & Doherty* (2006) FLC ¶93-256. [↑](#endnote-ref-230)
231. *Wallis & Manning* [2017] FamCAFC 149 (10 February 2017). [↑](#endnote-ref-231)
232. See, eg, Rae Kaspiew and Lixia Qu, ‘Property Division After Separation: Recent Research Evidence’ (2016) 30 *Australian Journal of Family Law* 1; Peter McDonald (ed.) *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986); Australian Law Reform Commission*, Matrimonial Property*, Report No 39 (1987); Kathleen Funder, Margaret Harrison and Ruth Weston *Settling Down: Pathways of Parents After Divorce* (Australian Institute of Family Studies, 1993); Sophy Bordow and Margaret Harrison ‘Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases’ (1994) 8 (3) *Australian Journal of Family Law* 264; Rosemary Hunter, Ann Genovese, Angela Melville and April Chrzanowski, *Legal Services in Family Law* (Justice Research Centre, Law Foundation of New South Wales, 2000).; Grania Sheehan and Jody Hughes, *Division of Matrimonial property in Australia: Research Paper No. 25* (Australian Institute of Family Studies, 2001); Nareeda Lewers, Helen Rhoades and Shurlee Swain, ‘Judicial and Couple approaches to Contributions and Property: The Dominance and Difficulties of a Reciprocity Model’ (2007) 21 *Australian Journal of Family Law* 123; 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* 206. [↑](#endnote-ref-232)
233. Law Commission (New Zealand), *Review of the Property (Relationships) Act 1976* *Issues Paper 41 Dividing relationship property – time for change?* (16 October 2017) New Zealand Government, 47 <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/PRA%20Issues%20Paper%20FINAL_0.pdf> [↑](#endnote-ref-233)
234. Ibid. [↑](#endnote-ref-234)
235. Ibid 77. [↑](#endnote-ref-235)
236. Bill Atkin, ‘Economic disparity – How did we end up with it? Has it been worth it?’ (2007) 5 *New Zealand Family Law Journal* 299, 302; See generally Nicola Peart, ‘The Property (Relationships) Amendment Act 2001: A Conceptual Change’ (2008) 39(4) *Victoria University of Wellington Law Review* 813, Margaret Briggs and Nicola Peart, ‘Sharing the Increase in Value of Separate Property under the Property (Relationships) Act 1976: A Conceptual Conundrum’ (2010) 24(1) *New Zealand Universities Law Review*, 1, 18. [↑](#endnote-ref-236)
237. *Stanford v Stanford* (2012) 247 CLR 108,122. [↑](#endnote-ref-237)
238. *Family Law Act 1975* (Cth) s 4 (definition of ‘Matrimonial Cause’). [↑](#endnote-ref-238)
239. *Omanici & Omanici* (2005) FLC ¶93-218. [↑](#endnote-ref-239)
240. *Biltoft &* *Biltoft* (1995) FLC ¶92-614. [↑](#endnote-ref-240)
241. *Family Law Act 1975* (Cth)s 71A. [↑](#endnote-ref-241)
242. See generally *Property (Relationships) Act 1976* (NZ) s11(1). [↑](#endnote-ref-242)
243. Murray Gleeson, ‘Individualised Justice – The Holy Grail’ (1995) 69 *Australian Law Journal* 421, 431. [↑](#endnote-ref-243)
244. Mark Henaghan, ‘Dealing to Disparity’ (2008) 6 *New Zealand Family Law Journal* 51, 52. [↑](#endnote-ref-244)
245. Ibid. [↑](#endnote-ref-245)
246. Australian Government, Department of Human Services, *Assets* (29 June 2017), [https://www.humanservices.gov.au/customer/enablers/assets](https://www.humanservices.gov.au/customer/enablers/assets#assetstestlimits). [↑](#endnote-ref-246)
247. See, eg, *Phillips & Phillips* (2002) FLC ¶93-104, 88-986; *Myerthall & Myerthall* (1977) FLC ¶90-273. [↑](#endnote-ref-247)
248. *Stanford & Stanford* (2011) FLC ¶93-483; 85-990. [↑](#endnote-ref-248)
249. Commonwealth of Australia, Legal and Constitutional Affairs Legislation Committee Report*, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, February 2016. [↑](#endnote-ref-249)
250. Issues Paper Page 51. [↑](#endnote-ref-250)
251. *Family Law Amendment Act 2000* (Cth); cf *Family Law Act 1975* (Cth), ss 86, 87. [↑](#endnote-ref-251)
252. See generally: Belinda Felhberg and Bruce Smyth ‘Pre-Nuptial Agreements in the first year’ *International Journal of Law, Policy and the Family* (2002) 16. [↑](#endnote-ref-252)
253. *Family Law Amendment Act 2003* (Cth), sch 5, Item 2. See also Explanatory Memorandum, Family Law Amendment Bill 2003 (Cth), 2-3. [↑](#endnote-ref-253)
254. (2008) FLC ¶93-357. [↑](#endnote-ref-254)
255. *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth). [↑](#endnote-ref-255)
256. See *Parker & Parker* (2012) FLC ¶93-499; *Hoult & Hoult* (2013) FLC ¶93-546. [↑](#endnote-ref-256)
257. In this submission, reference to a provision in Part VIIIA *Family Law Act 1975*(Cth) should be read as including the equivalent provision relating to the breakdown of a de-facto relationship contained in Part VIIIAB *Family Law Act 1975* (Cth). [↑](#endnote-ref-257)
258. *Senior & Anderson* (2011) FLC ¶93-470. [↑](#endnote-ref-258)
259. Ibid, 85-719 (citations omitted). [↑](#endnote-ref-259)
260. In this submission the term ‘financial agreement’ is used throughout. While the term ‘binding financial agreement’ is a term in ordinary use (and appropriate for a public consultation process), sections 90B, 90C, 90D, 90K, 90KA, and 90G of the Act refer only to the term ‘financial agreement’. Part VIIIAB uses the term ‘Part VIIIAB Financial Agreement.’ [↑](#endnote-ref-260)
261. *Family Law Act 1975*(Cth), ss 90B(1)(b); 90C(1)(b); 90D(1)(b). [↑](#endnote-ref-261)
262. Ibid ss 90K, 90KA. [↑](#endnote-ref-262)
263. *Black & Black* (2008) FLC ¶93-357. [↑](#endnote-ref-263)
264. *Family Law Act 1975*(Cth), ss 90G(1A)-(1C). [↑](#endnote-ref-264)