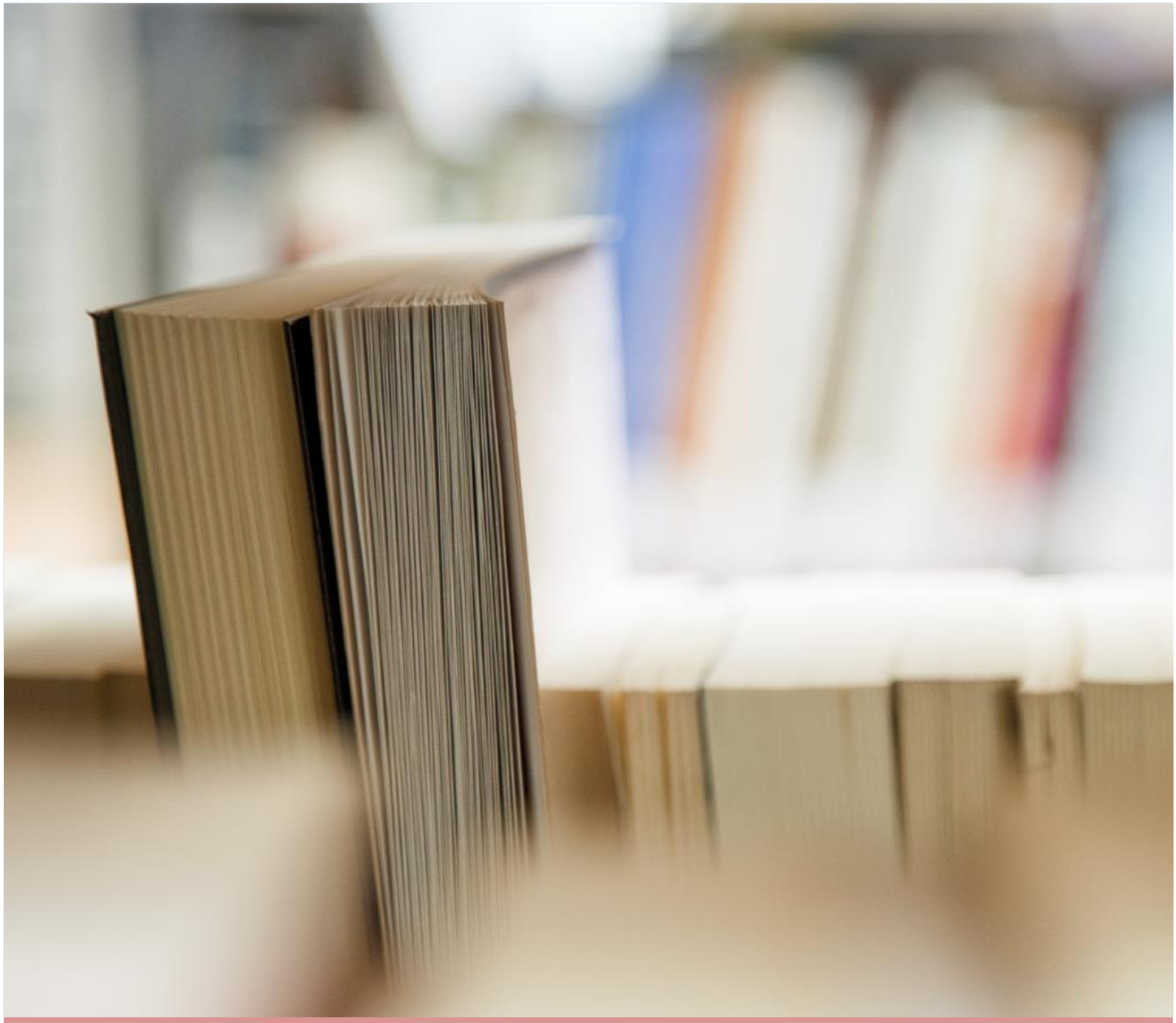


Submission and Comment in Response to Australian Law Reform Commission Discussion Paper DP86

Review of the Family Law System

Dr Christopher Turnbull, PhD

November 12, 2018

Public Submission

Submission and Comment

Australian Law Reform Commission Inquiry

Review of the Family Law System

Discussion Paper 86 (DP 86)

Dr Christopher Turnbull PhD (QUT)

12 November 2018

Introduction: Limited Scope

I write in a personal capacity. This document is a response and comments on specific matters in the Review of the Family Law System Discussion Paper 86 (DP 86) released October 2018 ('the Discussion Paper').

I thank the Commission for the careful consideration of my submission to the Issues Paper, ('my first submission')[1], particularly at pages 58 to 60 of the discussion paper,[2] together with the research contained within my doctoral thesis,[3] and reference in the Discussion Paper to those materials.[4]

This response again draws upon, in a truncated summary form, different information from the thesis from that in my first submission. The thesis is available online via https://eprints.qut.edu.au/113831/. This response and comment remain within the content bounds of my first submission (with one exception).

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

In this response and comment, I caution against two proposed changes to the property provisions of the *Act* without better evidence. I first re-visit the real lack of information about property settlement outcomes. I also bring together different elements of my first submission on education and information. I identify the relevant agreed and supported proposals first.

This document discusses only the following matters:

- **Proposals 2-1 to 2-8 Inclusive – Education, Awareness and Information**
- **Proposal 3-10: Amendment to the *Act* concerning the process for property division.**
- **Proposals 5-6 and 5-7: Proposal to include consequences for non-disclosure into the *Act.***
- **Comment: Public Health Approach and Principles generally for the division of property.**
- **Comment: Family Violence Training.**
- **Brief Analysis: New Zealand Law Review Issues Paper Issued 1 November 2018**

The compressed time frame for preparation of this response and comment document may have resulted in a few errors and inconsistencies (especially in light of the New Zealand preferred options paper). Such errors and omissions are my own.

Declaration

I am an Australian Public Service (APS) employee, bound by legislation governing my conduct.[5] 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 document, I consulted with the Family Court of Australia and the Federal Circuit Court of Australia about the process for this submission. I provided to the Co-ordinating Registrar of the Brisbane Registry a preliminary draft (with authorisation to forward the document on to whomever he saw fit) to ensure compliance with the APS code of conduct.

In making this submission, the intention is to do so in compliance with my obligations under 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 opinion 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 proper management officer representing each Court.
- This document contains further reporting on the results of quantitative research into property settlements decisions (particularly reasoning processes). All the cases used for this research came from public sources. Completion of the study (and analysis) occurred before my appointment as a Registrar.

Executive Summary

Proposal	Response and Comment
Proposals 2-1 to 2-8 Inclusive	*Response and Comment 1: It is recommended that the Commission should specify in its final report the particulars of the information to be provided in a property settlement information package, and should also make recommendations about the consequences or penalties for failure to consider, or make a genuine effort at, using the information package, including those for legal practitioners.* *Response and Comment 2: The Commission should recommend in its final report that even without the benefit of the families' hubs, production of a property settlement information package of the type set out in my first submission, and dissemination as soon as possible.*
Proposal 3-10	*Response and Comment 3: It is recommended that the Commission abandon Proposal 3-10 and instead continue with proposal 2-6, with a family law system information package including as much information as practicable on the legal framework for resolving property matters.* *Response and Comment 4: The Commission could recommend amendments to include a short statement explaining the nature of the existing judicial discretion in sections 79/90SM to provide some guidance, to the effect of (for example in a new section 79(3)), that the discretion is one, where no one consideration, and no combination of considerations, is necessarily determinative of the result.*

Proposals 5-6 and 5-7: *Response and Comment 5: I support proposal 5-6 in Full. I support proposals 5-7 and 5-8 are, except where it is proposed to include in the Act that a Court can 'take a parties' non-disclosure into account when determining how the financial pool is divided' on non-disclosure.*

Response and Comment 6: It is recommended that the Commission consider abandoning the element of proposals 5-7 and 5-8 insofar as those proposals suggest incorporating into the Act that a Court can 'take a parties' non-disclosure into account when determining how the financial pool is divided', and instead include it in the information package suggested at Proposal 2-6.

Response and Comment 7: If the Commission decides to proceed with the proposal of taking 'a parties' non-disclosure into account when determining how the financial pool is divided' then the phrasing of that recommendation be tightened to reflect the current law. The proposal should read such that a Court can find (a) that if the truth has not come about, and (b) that a Court could readily conclude that the asset pool is more than disclosed, then an adjustment may be available toward the innocent party.

Public Health Principles and Philosophical Approaches

It is recommended that, in addition to the present proposal for future research, the Commission call for consideration by the Attorney-General's department of the various models for property division (including that proposed by the writer) such that:

(a) The initial research is directed to the results and reasoning processes of both contested and agreed property outcomes, but,

(b) *The study also compares the cases considered against one (or a number) of proposed models to see what the different results might be.*

Response and Comment 9: That, in its final report, the Commission set out the principles which, in the Commission's view, should inform redevelopment of the law for the alteration of property interests between separated spouses, whether it be a public health approach or otherwise.

Family Violence Teaching

Comment 10: It is recommended that the Commission should take into account, in framing teaching for legal practitioners, that education of family violence is already a core component of some family law courses at an undergraduate level.

New Zealand Law Review Preferred Approach Paper

Comment 11: Comment 11: It is recommended that, in its final report, in light of the New Zealand Preferred Approach Paper, the Commission revisit its position in answer to Question 17. In addition to a recommendation of further research, it is recommended that the Commission express a theory or theories that in the Commission's view should underpin property settlements to promote fairer outcomes. This theory or theories could inform the direction for further research.

Comment 12: It is recommended, that, in its final report, the thoery or theories in the Commission's final report include the priority to the interests of children as future economic and social citizens; and the sharing of economic benefits of the family relationship (either as a consequence of the family as a joint venture or the absence of discrimination between spouses).

Comment 13: It is recommended that, in its final report the Commission should express, in answer to Question 17, a preferred statutory model or models for alteration of property interests. Such a model or models (in whatever form) should promote fairer outcomes. These models could either form the basis for further review or a direct proposal for amendment of the Act.

List of Abbreviations

Full Description	Abbreviation
Australian Law Reform Commission	The Commission
Australian Bureau of Statistics	ABS
Australian Institute of Family Studies	AIFS
Discussion Paper 'Review of the Family Law System' DP 86 October 2018	Discussion Paper
Dr C Turnbull, Public Submission Australian Law Reform Commission Inquiry Review of the Family Law System (submission number 48 to the Issues Paper)	In text reference 'My first submission') Citation: Dr C Turnbull, Submission 48 to Issues Paper IP48.
Family Law Act 1975 (Cth) (as amended)	The *Act*
Family Court of Australia	Family Court
Federal Circuit Court of Australia	Federal Circuit Court
Federal Magistrates Court of Australia	Federal Magistrates Court
Full Court of the Family Court of Australia	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

Supported Proposals

Consistent with my first submission, I support the following proposals, noting the similar discussion points in my first submission:

Discussion Paper Proposals	**Recommendations from Submission 48**
2-1 Education and Awareness Campaign	Recommendation 13 – Widespread and continuing education to stakeholders (albeit in respect of a guidance document)
2-6: Information Package Including Framework for property matters	Recommendation 12 – Development of a guidance document with information about property matters
3-12 Commissioning of Further Research on property matters after separation	Recommendations 7 and 8 – That before making substantive changes there be further external research on both agreed and contested property settlement outcomes.

Proposals 2-1 to 2-8: Family Law System Information Package

I The Proposals and Response

1. I support proposals 2-1 to 2-4 inclusive, for the provision of information, and proposals 2-7 to 2-8 inclusive which proposes delivery via electronic means and development of information package.
2. This part responds to proposal 2-6 (and in Part to proposal 2-5). Proposal 2-6 reads:

   The family law system information package should be tailored to take into account jurisdictional differences and should include information about:

   - *the legal framework for resolving parenting and property matters;*
   - *the range of legal and support services available to help separating families and their children and how to access these services; and*
   - *the different forums and processes for resolving disputes.*

3. The proposals full expression is in paragraph 2.25 on page 29 of the Discussion Paper, which sets out:

   A family law system information package should provide people experiencing separation with a practical guide to the family law system. It should provide information to guide people wishing to resolve their post-separating parenting and property matters themselves, including clear information on the legal frameworks governing these matters.

4. This part:
   a. Expresses concern that the actual information to be provided to parties is not articulated in the Discussion Paper, and,
   b. Re-draws the Commission's attention to elements of my first submission that provide much of the information necessary for a property settlement information package.
   c. Asks questions about the structural relationship between the information packages and Court proceedings.

II Information about Property Division without Committee Consultation

5. I support the component of proposal 2-5 that establishes a standing committee to ensure that the information package is of the highest standard. I recommend the creation of an information package about the legal framework for resolving property matters. However, I make the following comments:

a. I provided the Commission in my first submission a summary of the type of information available for an information package, which is a distillation of some years of academic research into section 79 of the *Act*. Accordingly, a committee is not required to start with a 'blank slate' into the nature of the judicial discretion.
b. An information package about property settlement matters can, and should be produced as soon as possible, well before the proposed integration of services, to assist parties.
c. The Discussion Paper does not specify the level of information sufficient for an information package. This may be a matter for the final report.
d. The Discussion Paper does not, as far as I can see, propose a framework for consequences for parties (or lawyers) for a failure to avail themselves of the information package.

III Property Settlements Information Package: Components and Consequences

6. I reiterate paragraphs 128 to 132 inclusive of my first submission.[6] In those paragraphs, I set out over four pages a carefully distilled summary, a review of the legal framework for resolving property matters. What I describe as a 'guidance document' in my first submission is readily transferable to (and consistent with) an information package.
7. That summary (from my first submission) requires some brief modification in light of recent cases (which I speak to later in this document) in particular:
    a. That there is no binding requirement to consider section 79(4) of the *Act*;
    b. There are facts and circumstances in which a Court could take into account to dismiss a property settlement application.
    c. There is no requirement that a Court considers section 79(4) factors in any particular order.
    d. The consequences for a failure to make full and frank disclosure promptly.
8. My first submission does not include a full list of the relevant section 75(2) factors in the information for parties and would need to do so.
9. I recommended, if it is not already planned, that the Commissions' final report contain precisely what should be in the information package in property settlements. Unlike

in other areas, the Commission is not proposing a re-write of the statute. A useful summary of the current law is readily available.

10. At pages 30-31 of the Discussion Paper, the Commission broadly discusses the range of (excellent) information services already available. Presently there are no legislative or rule-based consequences or penalties for failure to utilise those information services. I submit that, in property settlement cases, there ought to be real and enforceable consequences for persons not availing themselves of the information package.
11. In my first submission, I concluded at paragraph 38 that, subject to some qualifications, about 95% of property cases resolve in the Family Court and Federal Circuit Court without final judicial determination.[7]
12. It follows that there is an (unknown) portion of those cases that should never have entered the Court system in the first place.
13. The challenge for the Commission then is to bring in to the families' hubs (and encourage - strongly- persons to read and consider the information package) those families which have not already self-selected that information. Put another way, those who want to resolve their matters out of Court are – probably – already using the existing services.
14. Integrating those services is supported, but the Discussion Paper does not propose a means to compel those seeking litigation to work through the information package.
15. The Commission is therefore urged to consider the linkages between the information package and commencement of litigation. Options include:
    a. Costs penalties
    b. Stay of proceedings
    c. Undefended hearings
    d. A refusal to hear the application (e.g. in similar terms to section 60I of the *Act*)
    e. Mandatory orders for the defaulting party to work through (in person or electronically) the information package with evidence of completion.
    f. Certification in all Court documents of consideration of the information package – of at least an equivalent to the current certification in the 'Application for Consent Orders' document of consideration of relevant legislation.

g. Mandatory filing of draft 'smart forms' (or an electronically produced summary) drawn from the information package as part of any initiating application or response.

h. Mandatory consideration of the information package before the issue of an equivalent to the section 60I certificate (assuming a final recommendation of compulsory dispute resolution in financial cases.)

16. The Commission should guard against mere token compliance or 'box-ticking' and that the information package is designed to ensure that real effort is required to complete the material, and evidence of completion (produced electronically or otherwise) arises only upon demonstration of a genuine attempt.

17. In summary, a robust approach is needed to ensure the net result of the Commission's recommendations is not only more (and better information is available), but also that those who commence litigation (when it is not needed) are not doing so in ignorance and disregard of the information and services available.

Response and Comment 1: It is recommended that the Commission should specify in its final report the particulars of the information to be provided in a property settlement information package, and should also make recommendations about the consequences or penalties for failure to consider, or make a genuine effort at, using the information package, including those for legal practitioners.

Response and Comment 2: The Commission should recommend in its final report that even without the benefit of the families' hubs, production of a property settlement information package of the type set out in my first submission and dissemination as soon as possible.

Proposal 3-10: Statutory Articulation of Property Settlement Process

I The Proposal

18. This part responds to proposal 3-10, which reads:

    The provisions for property division in the Family Law Act 1975 (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.

19. The fuller proposal appears in paragraph 3.109 on page 61 of the Discussion Paper, which sets out:

    In line with proposals for legislative simplification elsewhere in this Discussion Paper, the ALRC considers that redrafting the core provisions of Pt VIII to more clearly set out the analytical steps in determining a property settlement would improve the usability of the legislation.

20. At page 61 of the Discussion Paper the Commission first (at paragraph 3.106) (consistent with my earlier submission) identifies that substantial changes to the law should not occur without further research.

21. The Commission describes the current discretionary process in section 79 of the *Act* in paragraph 3.92 on page 57 of the discussion paper, as follows:

    a. *identify the existing legal and equitable interests of the parties in the property;*
    b. *consider whether it would be just and equitable to make an order altering those interests; and*
    c. *if it is just and equitable to do so, consider what orders should be made, taking into account the factors listed in s 79(4), which incorporate the 'future needs' factors set out in s 75(2).*

II Response: Process and Relevance Changes but not Weight

22. My submissions concerning both statutory codification of process and insertion of disclosure obligations into section 79(4) are:

    a. That the presently suggested clarifications of the law, as they, will change the circumstances relevant to, and the process of, the exercise of discretion, and
    b. Such clarifications are unlikely to achieve discernible changes in the ultimate results.

23. This part argues:

a. There are no settled process steps in determining a property settlement.
b. Re-drafting Part VIII (in particular section 79 of the *Act*) to codify a process for altering property (whether a four-step process or other processes) changes the fundamental nature of judicial discretion conferred by the *Act*.
c. Substantive change should not occur without further research.
d. Other proposals by the Commission to provide information about the present law are just effective at achieving education, awareness, and access to justice.

24. My arguments about the structure of judicial discretion and codification of disclosure obligations are mostly the same. My position is this:
    a. Statutory codification of the four-step process changes the manner of judicial determination, but
        i. Changing the reasoning structure does nothing to guide litigants or a Court about weight to individual factors or directs the ultimate result, which means,
        ii. The net (practical) effect may only be more appeals concerning the failure to follow the statutory process.
    b. Statutory codification of non-disclosure *in the manner proposed by the Commission*:
        i. Changes the method in which non-disclosure becomes relevant to the substance of judicial discretion in property settlement cases, but
        ii. Does nothing to guide litigants or a Court about weight to the non-disclosure as a factor or directs the ultimate result, which means,
        iii. The net (practical) effect may only be more appeals on the failure to adequately consider non-disclosure.

III Section 79: A 'Classic' Judicial Discretion

25. At page 61 of the Discussion Paper, the Commission first discusses codification of a process for judicial discretion, citing some submissions, including those suggesting that codification of a 'four-step' process would be beneficial to litigants and practitioners.[8] Those learned submissions are worthy of citation. A complete understanding of why codification of process changes the law begins with a deeper analysis of the nature of section 79's judicial discretion.

26. In more recent times, the discussion commences with the comment of the plurality of the High Court in *Stanford v Stanford*, who wrote that the just and equitable requirement is 'qualitative description of a conclusion reaches after examination of a range of competing considerations.'[9] It does not 'admit of exhaustive definition'.[10]
27. The Full Court (Bryant CJ, Finn and Thackray JJ) in *Bevan & Bevan* (2014)[11] picked up the above comment from the High Court and wrote:

> Their Honours there are describing the classic judicial discretion, where no one consideration, and no combination of considerations, is necessarily determinative of the result. Instead, the decision maker is allowed latitude as to the choice of decision to be made.[12]

28. In so doing, the Full Court cited the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[13]*.* In that decision, the plurality (Gleeson CJ, Gaudron, and Hayne JJ) wrote:

> "Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.[14]

29. Belinda Fehlberg and Lisa Sarmas in their recent article pointed out, 'The physical structure of the legislation thus *encourages* (but does not *require*) contributions to property to be considered first' [original emphasis].[15] Assuming these learned authors are correct (and in my respectful submission they are) then a sequential or structured approach, as a rule, is contrary to the basic construction of section 79 of the *Act*.
30. The starting point then is that the nature of the 'just and equitable' discretion conferred by section 79(2) of the *Act* is one where no single consideration, or one combination of factors, necessarily determines the result.

IV No Obligation to Consider Section 79(4) Factors

31. As I recently argued in the *Australian Journal of Family Law* that in *every case* (whether or not the ultimate result was to dismiss an application for alteration of property interests), a Court was still obligated to consider, and make findings about, the relevant section 79(4) factors. I wrote:

> Four matters that lead to the conclusion that consideration of s 79(4) of the *Act* is mandatory in any application for alteration of property interests. First is the plain text of s 79(4) that a court 'shall' consider and take into account. Second is the various comments from the High Court expressing consideration of s 79(4) in obligatory terms. The third is the comments of Bryant CJ and Thackray J in *Bevan v Bevan*, in which those justices of the Full Court express the view that ignoring s 79(4) would be contrary to its plain wording. Fourth is that considering s 79(4) is obligatory in making an order, but not so in dismissing an application, creates a dual standard. This amounts to a compulsory consideration of s 79(4) in making an order, but not so when declining to make an order. This position is unsupported by any evidence of parliamentary intent.[16]

32. My argument for consideration of section 79(4) factors in every property settlement application appears lost. In *Whent & Marbrand,*[17] the Full Court (Strickland, Ainslie-Wallace & Foster JJ) affirmed multiple earlier decisions, each dismissing property settlement applications, without necessarily considering section 79(4) of the *Act*.[18] In *Whent & Marbrand* the trial judge examined a long list of factors, of which several stand out as being outside the text of section 79(4) of the *Act*: the characterisation of the parties' relationship by financial autonomy and independence, the loans between the parties, and the lack of provision for each other in their respective wills.[19] Those factors influenced the trial judge not to make an order altering the property of the parties.

33. The present situation appears to be that a trial Judge is (at least in dismissing an application) is therefore encouraged, but not required to consider any of the matters in section 79(4) of the *Act*.

V Reasoning Process – Appellate History

34. In my thesis, I set out the history of the Full Court jurisprudence covering the structural approach to the discretion conferred by section 79(2) of the Act.[20] That review runs

for five pages. I attempt, in the following paragraphs, to compress that history into short form.

35. Early decisions emphasised a requirement to work through a dual exercise; that is, firstly looking at the assets and considering the contributions to them; and, secondly, considering the relevant section 75(2) factors,[21] one a retrospective element and the other prospective.[22] Subsequent decisions identified a non-prescriptive three-step process of identifying the property, considering contributions, and then considering 75(2) factors.[23] A fourth step then appeared, which was ensuring the result was just and equitable.[24]
36. 2003 saw the delivery of the decision of *Hickey & Hickey*.[25] There are two critical differences between the statement of the four-step process in *Hickey & Hickey* and the previous process descriptors. The first is that description of the whole approach is 'preferred'.[26] The second is a requirement of expression of findings of contributions as a percentage of the net value of the property of the parties.[27]
37. Following *Hickey*, the 'two-pool' process emerged from *Coghlan & Coghlan*.[28] While not expressed as a rule, the language of the majority in *Coghlan* was very strong, suggesting the use of a two-pool process was 'necessary where a splitting order is sought, or extremely prudent where no such splitting order is sought.'[29]
38. In the first *Bevan & Bevan* decision, the Full Court described the four-step process as no more than a means to illuminate the path to the ultimate result.
39. Moreover, the Full Court cautioned against arid discussions about stages in the process.[30] In 2014, the decision of *Bevan & Bevan* the Full Court described the four-step process as a 'proper, transparent, certain, and structured process, which remained a convenient way to present and determine applications under section 79 of the *Act*.'[31]
40. In my submission, there is nothing permanent or unique about any structured process. There are no binding rules. There is little, I submit, from the Full Court jurisprudence that elevates any single process to the level entitling it to statutory codification. My submission is that the appellate decisions demonstrate a gradual drift towards a structured process, more so then a move away from the importance of structure.
41. I add that if a statutory requirement to follow a particular process was binding upon trial judges, my view is that a rich vein of grounds of appeal is likely to emerge about

the adequacy or extent of compliance with the reasoning process provisions, even if such an error did not impact on the ultimate result.

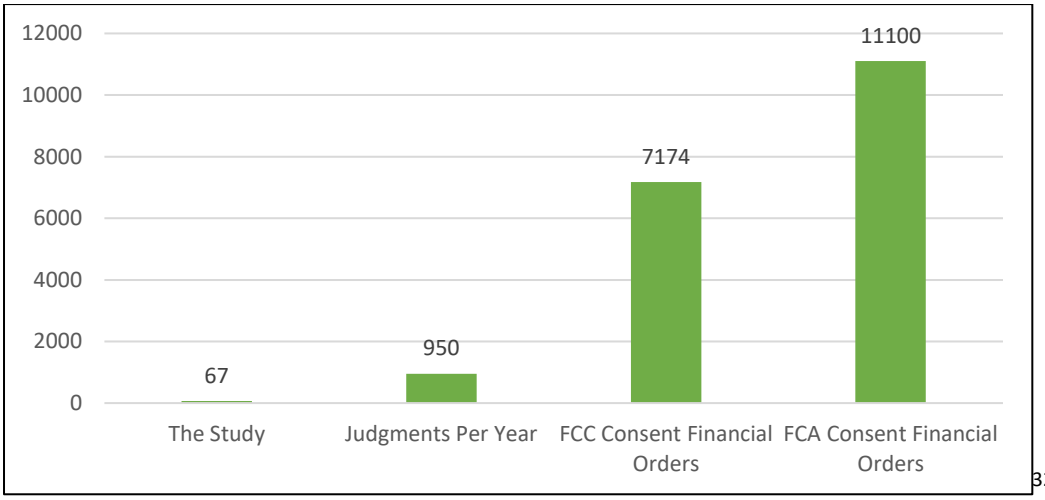
42. Statutory codification of the four-step (or two-pools) processes assumes use by trial judges in all or almost all cases. Other parts of my PhD research (not included in my first submission) examined the use of judicial reasoning processes at first instance. These results showed a common- but far from universal – application of the four-step process.

VI Reasoning Process – First Instance Judgments Findings (Thesis study)

43. This section reports on the part of my thesis' quantitative analysis not included in my first submission.

44. First, a reminder of how my PhD quantitative study of 200 Judgments fits within the estimated potential population of decisions available, (and consequently just how we know about the process and outcome of judicial decision-making):

Figure: The PhD Study Compared to Other Populations (Orders *Per Year*) (Family Court of Australia and the Federal Circuit Court of Australia)



[32]

45. Add to my figure the additional unknowns:

    a. The number of financial consent orders made in Local or Magistrates Courts each year.

    b. The number of financial consent orders made in the Family Court of Western Australia each year.

    c. The number of financial judgments delivered in the Family Court of Western Australia each year.

    d. The number of post-separation financial agreements made each year.

e. The number of informal post-separation property agreements made each year.

46. Turning back to my thesis research, I measured in the sample (of 200 cases) the occurrence rates of when:
    a. The trial judge made a finding in percentage terms about the contributions of the parties (whether about the non-superannuation property, superannuation) or both, or
    b. Where the trial judge did not make a finding in percentage terms as to the contributions of the parties.[33]
47. The table below shows the thesis's study results, reported by each Court:

Cases by Variables of Contribution-based Entitlements Sample (n=200)

Court	**(Separate findings of Contributions / 75(2) in Percentage Terms)**	**(No separate findings about Contributions / 75(2) in Percentage Terms**
Federal Circuit Court	138	29
Family Court	28	5
Total	**166**	**34**
% (rounded)	**83 %**	**17 %**

[34]

48. Accordingly, 17% of the study's cases did not strictly follow the basic *Hickey & Hickey* approach.
49. The next variable measured was the occurrence of a one-pool or two-pool approach, as follows:
    a. A court made different findings of the contributions of the parties to their superannuation compared to their non-superannuation, or the parties agreed on their division of superannuation, or
    b. A court made the same findings of contributions to superannuation (as was made to non-superannuation) or made one finding of contributions overall.
50. A summary of the results by Court, by percentage against the total cohort for each court, and overall total, are in the following table:

Variable Approaches: Contributions to Superannuation and Non-Superannuation Property (n=200) (Sample)

Court	Different Findings on Contributions to Super and Non-Super	Same Findings on Contributions or one Finding on Contributions	Total Court Cohort
Federal Circuit Court	23 (14 %)	144 (86 %)	167
Family Court	4 (12 %)	29 (88 %)	33
Total	**27 (13 %)**	**173 (87 %)**	**200**

51. The table shows that, despite the Full Court's comments in *Coghlan & Coghlan* that a two-pool approach was all but necessary, and bearing in mind that a significant proportion of these cases pre-date *Bevan & Bevan*, a two-pools approach appeared in 13% of cases. These results suggest, at a first-instance level, there is a considerable variety of judicial reasoning approaches. All of these approaches are, in my view, having regard to the text of section 79 of the *Act*, permissible. Therefore, picking any one process will alter the way (albeit subject to the limitations on the study) Judges determine property settlement cases.
52. Of course, one of the critical exceptions in *Coghlan & Coghlan* to use of a two-pools process was the consent of the parties. The explanation for the limited use of the two-pool method might be the presentation of cases and the approach of the parties. Without going behind the reasons for Judgment, it is impossible to know.

VII Articulation of any reasoning process still changes the law

53. In summary, this part set out that there are five key elements of the exercise of discretion to alter property interests:
    a. No one factor, or series of factors, determines the result;
    b. A Court is encouraged, but not obliged, to consider the factors in section 79(4);
    c. If considering the factors in section 79(4) a Court is encouraged, but not obliged, to consider contributions first;
    d. There is no binding rule setting out the structure for the reasoning process,
    e. Review of some first instance judgments reveals a significant majority, but not all, decisions include the four-step process.

54. Therefore, if any structure is imposed upon the judicial reasoning process by statute, then:
    a. Creates an obligation to consider factors;
    b. Creates a sequence in which to consider various factors
    c. Grouping elements affect the weight, or the limitations of the importance, to those factors,
    d. A structure may, dependent on its structure, direct a Judge to a particular result;
    e. The structural order of factors affects their weight;
    f. The opportunity is lost to do justice by adopting a different reasoning structure.
    g. The structure may appear as if it were elements of a cause of action, each which need satisfying, and
    h. Therefore, for all of the reasons set out above, would change the nature of the existing judicial discretion.
    i. However, it remains the case that there will still be no guidance in the legislation concerning weight or the ultimate result.
55. On that basis, I submit against including a reasoning structure into the existing discretion in section 79 of the *Act*.
56. Consequently, I urge the Commission to **abandon Proposal 3-10** and, as I previously support in this submission, **continue with proposal 2-6**, with a family law system information package including information about the legal framework for resolving property matters.
57. There is one alternative. While, as I have indicated earlier in this document, I am not convinced about information services / legislative amendments without compulsion, an option is to take the summary I have just provided about the discretion, and include it in plain English at the commencement of sections 79. Such a statement of the nature of the judicial discretion, provides some, albeit limited, assistance in understanding the existing law.

Response and Comment 3: It is recommended that the Commission abandon Proposal 3-10 and instead continue with proposal 2-6, with a family law system information package including as much information as practicable on the legal framework for resolving property matters.

Response and Comment 4: The Commission could recommend amendments to include a short statement explaining the nature of judicial discretion in sections 79/90SM to provide some guidance on the current nature of judicial discretion, to the effect of (for example in section 79(3)):

(3) The discretion conferred by this section:

- *(a) Is on the basis that no singular factor, or series of factors, necessarily determines the result;*
- *(b) Does not oblige, as a rule, a Court to consider any one factor or group of factors in any particular order, or oblige a Court to follow a specific reasoning process.*
- *(c) Encourages, but does not oblige, a Court to consider all or any of the matters contained in section 79(4) (and by extension section 75(2));*
- *(d) Encourages, but does not oblige, a Court when considering the matters in section 79(4) to consider the matters in sections 79(4)(a),(b) and (c) first.*

Proposals 5-6 and 5-7: Codification of Disclosure Obligations

I The Proposal and Response

58. This part responds to proposals 5-6, 5-7, and 5-8. Those proposals will not be set out in full. They are all *supported* except for the last dot point in Proposal 5-7 and sub-paragraph (d) of proposal 5-8, which are:

> ***Proposal 5-7*** *The provisions in the Family Law Act 1975 (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may*
>
> - *[…..] take the party's non-disclosure into account when determining how the financial pool is to be divided.*

> ***Proposal 5-8*** *The Family Law Act 1975 (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that: […]*
>
> *(d) [Courts have the power to] take the party's non-disclosure into account when determining how the financial pool is to be divided.*

59. These proposals are more fully discussed in paragraphs 5.40- 5.43 on page 111 of the Discussion Paper, which relevantly sets out:

> *5.40 Presently the duty of disclosure is contained in court rules.*[35]
>
> *5.42. Existing mechanisms to support disclosure include the courts' power to impose punishment for contempt of court, or to take the non-disclosure into account in considering costs. The proposed provision in relation to taking non-disclosure into account in apportioning the property pool reflects current case law.* [36]

60. At page 61 of the discussion paper the Commission first (at paragraph 3.106) correctly, in my submission, identifies that substantial changes to the law should not occur without further research.

61. This part argues:

    b. The duty to make full and frank disclosure derives from case law and is reflected in the rules of each Court, but is not a creation of either of them.
    c. Adding the element of non-disclosure, in the way that is proposed by the Commission, does not reflect the present law and would result in a change to the factors to be considered.
    d. Change should not occur without further research.
    e. Other proposals by the Commission to provide information about the present law are just effective at achieving education, awareness, and access to justice.
    f. Including non-disclosure into the effect still does nothing to solve the problem of weight to individual factors.

II Appellate consideration of the 'Full and Frank Disclosure' requirement

62. My submission supports the inclusion of the duty of disclosure in the Act as it reflects the long-settled law.
63. The discussion begins with *Howard & Howard* (1982) FLC ¶91-279 where the Full Court (Evatt C.J, Asche S.J, and Strauss J) wrote, in respect of the Husband's acceptance of an offer of sale by a third party, wrote:

> However, whilst it can be said that the husband was not under a duty to make full disclosure, he was not entitled to attempt to mislead the wife or the Court or to take steps to conceal matters which then appeared to be relevant, or to give instructions to counsel which led counsel to make statements in which the true position was not stated accurately or which were misleading.[37]

64. Emery, Fogarty and Murray JJ adopted an entirely different approach in *Oriolo & Oriolo* (1985) FLC ¶91-653, when writing, 'We consider that there is a clear obligation on a party to proceedings in this Court to make a full and frank disclosure of all relevant financial circumstances.'[38]
65. *Oriolo & Oriolo* adopted the comments of Smithers J in *Briese & Briese* (1986) FLC ¶91-713, who wrote:

> In my view it is fundamental to the whole operation of the *Family Law Act* in financial cases that there is an obligation of the nature to which I have referred. *Livesey v. Jenkins* makes it clear that mere compliance with rules of court or practice directions does not alter the basic principle of the need for full and frank disclosure by the

> parties. The fact that in the present case it is not a question of ultimate non-disclosure of a matter relevant to the orders made, but is of a different nature being relevant to delay and expense, does not in my view prevent the principle being applicable here as to the matter of costs. There is an obligation on each party to act so as to provide a basis upon which the two of them are in a position to resolve the case by agreement, or proceed to a hearing, as expeditiously as may reasonably be done. [39]

66. Accordingly, the duty to make full and frank disclosure has not come expressly from the *Act*. It is a creature emanating from various cases' analysis of the nature of the proceedings.
67. Full and frank disclosure (as it appears in the present rules) has its antecedents in various provisions of the *Family Law Rules 1984.* However, the requirements for full and frank disclosure did not appear in these rules at the outset.
68. Order 20 of the *Family Law Rules 1984* (at least as at 1993) had provisions in it for discovery, including on request,[40] or for a court to make an order for formal discovery.[41]
69. The earliest reference I can readily locate to full and frank disclosure (using the current phraseology) in the *Family Law Rules 1984* appear in amendments in force by June 1997, in which Order 17 then provided:

> A person who is required by these Rules to file a financial statement in accordance with rule 2 must make in the financial statement a full and frank disclosure of the person's financial circumstances including details of [details then followed].[42]

70. On the face of it, the amendments to the *Family Law Rules*, sometime in the mid-1990's, removed the anomaly between the disclosure requirements from the case law and the more traditional discovery process in previous incarnations of the rules.
71. Accordingly, the rules of both the Family Court and Federal Circuit Court as they are, presently reflect the long-standing law, together with all of the existing evidential and substantive powers of a Court, such as:
    a. A refusal to admit the some or all evidence.
    b. Costs.
    c. Contempt.
    d. Stay or dismissal of proceedings.

72. Incorporation of the above into Part VIII therefore merely repeats the powers which already exist, so there is no reason not to support such amendments. For contemporary parties to who are likely to avail themselves of the *Act* online, this is a helpful step.

73. However, there is, in my submission, a difficulty with phrasing a change to section 79(4) of the *Act* in the way the Commission proposes. The Commission's proposal is adding a phrase that a Court can 'take the party's non-disclosure into account when determining how the financial pool is to be divided.' Understanding this potential problem requires an in-depth analysis of the Full Court authorities.

III The *Weir* principle

74. At page 111 of the Discussion Paper, the Commission rightly points to the decision of *Weir & Weir*,[43] in which Nicholson CJ, Strauss and Nygh JJ wrote:

> It seems to us that once it has been established that there has been a deliberate non-disclosure, which follows from His Honour's findings in this case, then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature.[44]

75. A more contemporary analysis comes from *Gould v Gould* (2007) FLC ¶93-333. Bryant CJ, Finn and Boland JJ, after considering *Weir* and several other relevant decisions wrote:

> Whether the non-disclosure is wilful or accidental, is a result of misfeasance, or malfeasance or nonfeasance, is beside the point. The duty to disclose is absolute. Where the Court is satisfied the whole truth has not come out it might readily conclude the asset pool is greater than demonstrated. In those circumstances it may be appropriate to err on the side of generosity to the party who might be otherwise be seen to be disadvantaged by the lack of complete candour. This is the course the trial Judge adopted. It was a course clearly open to him and one that does not merit appellate interference.[45]

76. Their Honours examined the decision of *Monte & Monte* (1986) FLC ¶91-757 and rejected the proposition that it was necessary for a Court to make an affirmative finding of the 'existence and value' of undisclosed property.[46]

77. *Gould,* therefore, appears to be authority for the proposition that, to adjust the substantive outcome because of non-disclosure, a Court should find:

a. that the truth has not come out, *and*
b. that a Court could readily conclude that the asset pool is more significant than disclosed and,
c. On the making of both those findings, then an adjustment is available toward the innocent party whether couched within section 75(2)(o) or authorised by section 79(2) of the *Act*.

IV Summary: Articulation of non-disclosure changes a relevant factor

78. Because of the *Gould* requirements, the proposal as currently framed by the Commission:
    a. Does not reflect the current law concerning property adjustment because it does not set out the necessary minima for adjusting;
    b. Fails to adequately distinguish between a failure to make full and frank disclosure promptly, or produce documents quickly (a costs issue), an inability to produce available documents in support of an asserted proposition (an evidential matter) and a *Weir*-type adjustment (a substantial element of discretion), and
    c. Still offers no guidance to litigants or a Court about the weight to be applied to this factor.
79. On those bases, I recommend that the Commission abandon the proposal to amend the *Act* insofar as it includes a 'take into account' provision, or if inclusion is unavoidable, that the phraseology is much more targeted to reflect the current law and not alter it.

Response and Comment 5: Response and Comment 5: I support proposal 5-6 in Full. I support proposals 5-7 and 5-8, except where it is proposed to include in the Act that a Court can 'take a parties' non-disclosure into account when determining how the financial pool is divided' on non-disclosure.

Response and Comment 6: It is recommended that the Commission consider abandoning the element of proposals 5-7 and 5-8 insofar as those proposals suggest incorporating into the Act that a Court can 'take a parties' non-disclosure into account

when determining how the financial pool is divided', and instead include it in the information package suggested at Proposal 2-6.

Response and Comment 7: If the Commission decides to proceed with the proposal of taking 'a parties' non-disclosure into account when determining how the financial pool is divided' then the phrasing of that recommendation be tightened to reflect the current law. The proposal should read such that a Court can find (a) that if the truth has not come about, and (b) that a Court could readily conclude that the asset pool is more than disclosed, then an adjustment may be available toward the innocent party.

Comment: Public Health and Financial Disadvantage: Principles

I The Proposal and Comment

80. This part comments on the 'Public Health' approach discussed at pages 14-17 of the Discussion Paper, as an underlying principle guiding redevelopment of the family law system, addressed at paragraphs 40-68 of my first submission.[47] This part also briefly addresses my opening remarks in my first submission about the nature of the family law system.

81. This part argues:

    a. There are some common elements between the public health approach in the Discussion Paper and contemporary liberalism discussed in my first submission.

    b. That there is still an opportunity to the Commission to:

        i. Recommend inserting into the *Act* objects and principles underpinning Part VIII as it stands, without changing the current law;

        ii. Present, as part of the Commission's call for further research, some potential models for the Attorney-General's Department to research as against current outcomes,

        iii. That the elements of just results argued in my first submission are appropriate for re-formulating the principles for the redevelopment of the family law system.

82. My brief comment about my opening remarks concerns the Commission's comments on page 14 of the discussion paper. I am delighted to see at page 14 of the Discussion Paper that the Department of Human Services provided some additional data about the number of children with parents who separate each year, noting that I recommended to the Commission the obtaining of similar data.[48]

83. The Commission points out that around 70 000 new families per year register for the child support scheme. While other research quoted by the Commission suggests about 50 000 children per year have parents separating, the Department's figures of 70 000 families per year (with an average of 1.8 children) results in a figure closer to 126 000 children per year.[49]

84. At paragraphs 9 and 10 of my first submission,[50] I noted the reporting of contested parenting applications, at around 14 000 or so per year. Using the same arithmetic at 1.8 children, this is about 25,200 children. I concede the numbers are rough estimates. The data obtained by the Commission is consistent with my first submission to the extent that it seems most separated families *do not* utilise Court services, and almost none of them require a final judicial determination.

II Some Common ground

85. So far as financial matters are concerned, there are a couple of areas of common ground between the Commissions' public health approach and my first submission. They include:
    a. Not exacerbating financial disadvantage.[51]
    b. Priority to the interests of children and young people to preserve and protect their role as future members of society, and[52]
    c. The maximum assistance is possible for people to reach their agreement about the division of finances after separation.[53]
86. The Commission does, in part, reflect my recommendations for further research in financial cases. [54] However, the Commission does not go on to examine or recommend in the Discussion Paper, overarching principles for redeveloping the family law system in financial (and particularly property) cases.

III An Opportunity: Recommendations for future Principles

87. At page 59 through to 61 of the Discussion Paper, the Commission notes the absence of consensus on models for property division, then calls for further research. However, the Commission does not specify the manner or direction for that research.
88. The Commission at pages 14 to 17 of the Discussion Paper explains the basis for a public health approach to the family law system. The Commission rightly gives priority to the wellbeing of children and safety and support needs.
89. However, the Commission does not appear to answer the question of what principles should guide redevelopment of the law concerning alteration of property interests. While it may not yet be possible to pin down with precision any legislative change, the Commission should at least form a view about what those governing principles should be. If the Commission only recommends further research, the Commission should specify the direction of that research.

90. Accordingly, I submit that the Commission commit in its final report, to the greatest extent possible, principles for the redevelopment of the law concerning property division and specify the nature and direction of the research to support those principles.

Response and Comment 8: It is recommended that, in addition to the present proposal for future research, the Commission call for consideration by the Attorney-General's department of the various models for property division (including that proposed by the writer) such that:

(a) The initial research is directed to the results and reasoning processes of both contested and agreed property outcomes, but,

(b) The study also compares the cases considered against one (or a number) of proposed models to see what the different results might be.

Response and Comment 9: That, in its final report, the Commission set out the principles which, in the Commission's view, should inform redevelopment of the law for the alteration of property interests between separated spouses, whether it be a public health approach or otherwise.

Comment: Legal Practitioners and Family Violence Training (Proposal 10-6)

91. A comment concerning the training of legal practitioners at proposal 10-6. This comment comes from my experience as a sessional academic teaching family law at QUT and Griffith University. Students at Griffith University have the benefit of Zoe Rathus AM as convener of the course (I teach the financial components). No doubt the Commission is well aware of Ms Rathus' research and dedication in the field.
92. At QUT, I am responsible for some content in the Family Law subject that specifically addresses family violence. The module consists of three elements:
    a. A series of podcasts;
    b. Prescribed reading;
    c. An in-person workshop.
93. The podcasts are on YouTube. They are publicly available via this link: https://www.youtube.com/playlist?list=PLKYteNDMWB_kcDQJg1aQ7_EemjkCHUaLn They provide a basic outline of the dynamics of family violence as well as the legislative provisions, both Commonwealth and at State Level.
94. The family law provides students links to the Family Court of Australia best practice guidelines, the Queensland Law Society Family Violence Principles, as well as law reform and scholarly material on the impact of family violence, particularly children's exposure to conflict, and recent academic work on systems abuse.
95. It is likely that similar resources are available to students at law schools throughout Australia. My comment is that the Commission should be aware, in framing training for practitioners, that the teaching of family violence is already a core component of some family law courses at an undergraduate level.
96. Assuming then that undergraduates take the information from their teaching into practice, then many legal practitioners admitted in the past few years (and between the two law schools I teach at there are some 700 students who enrol in family law each year) who will have a working knowledge of the basics of the dynamics of family violence.
97. However, I support the proposal that refresher training for legal practitioners remains of great benefit.

Comment 10: ***It is recommended that the Commission should take into account, in framing teaching for legal practitioners, that education of family violence is already a core component of some family law courses at an undergraduate level.***

98. On 1st November 2018 the New Zealand Law Commission released its paper 'IP 44: Review of the Property (Relationships) Act 1976: Preferred Approach - Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai'[55] (the 'Preferred Approach Paper').
99. Given the time frame between the release of the Preferred Approach paper and the due date for comments and response for the Commission, my analysis is by nature somewhat superficial and rushed, and therefore may contain the occasional error.
100. The New Zealand Law Commission was kind enough to briefly mention my PhD research (footnote 302 on page 102), in the context of my literature review of post-separation financial circumstances. The Preferred Approach Paper does not (as far as I am aware) specifically address my comments concerning underlying principles or my suggested model. I am to explain the areas of common ground.

I My Previous Submission – Theory and a Potential Model

101. I refer the Commission back to my earlier submission in two respects:
    i. My discussion concerning Question 2 (paragraphs 40-68 of my earlier submission) (principles guiding redevelopment of the family law system); and
    ii. My discussion concerning Question 17 (specifically paragraphs 134-161 of my earlier submission) (an alternative – described as radical) change model for alteration of property interests.
102. In summary, I argued relevantly (and I repeat that contained in the executive summary at page 5 to my first submission) concerning values:
    a. There is no need to have a single set of principles guiding the whole of the development of the family law system.
    b. 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:
        i. The rule of law,
        ii. Non-discrimination between spouses,

iii. Adequate recognition of financial disadvantage,
iv. Priority to dependent children as future economic and social members of society**.**

103. When considering the various alternative models (and repeating elements from page 8 of my first submission), I wrote:

i. 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.
ii. The discretion in section 79 of the Act would remain for families not falling within this cause of action.

II Relevant Proposals from the Preferred Approach Paper

104. The Preferred Approach Paper is extensive, but the proposals that appear to impact on the issues I raise directly are:

a. Proposal 11: The PRA should continue to provide that each partner is entitled to share equally in all relationship property, subject to limited exceptions.
b. Proposal 18: Section 15 of the *PRA* and maintenance under Part 6 of the Family Proceedings Act 1980 should be repealed and replaced with a new, limited entitlement to share future family income through a Family Income Sharing Arrangement or FISA,
c. Proposal 19: A partner (Partner A) should be entitled to a FISA in the following circumstances:
    i. the partners have a child together; or
    ii. the relationship was ten years or longer; or
    iii. during the relationship:
        a. Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or

other career advancement opportunity, to make contributions to the relationship; or

b. Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.

III Common Ground

Part One: Different Principles for Different Situations

105. In my first submission, I presented a model for sharing that operated on the existence of pre-conditions, in particular, that there was a child of the marriage or the de-facto relationship.

106. Having considered the Preferred Options Paper, there may be an alternative model that falls in between the New Zealand proposal and my initial proposed model, consistent with the Commission's Public Health approach.

107. First, however, is that the Preferred Approach Paper demonstrates that, provided the regimes are not too complicated, different principles governing property division are available, that are not dependent on the status of the relationship itself. Proposals 14 to 19, at least at their first reading, set up three regimes:

    a. Regime 1: Where the parties are in a de-facto relationship of less than three years there is no claim unless there is a child of that relationship and a court considers it just to make an order.

    b. Regime 2: The 'ordinary' sharing of relationship property (see Proposals 5-11 which seem to extend to reach of relationship property.

    c. Regime 3: The sharing of future family income subject to pre-conditions (being a child, or 10 years or longer, or other conditions).

108. In principle, then, the Preferred Approach paper is consistent with my earlier submission that, dependent on the consequences of the relationship (rather than the structure or labelling of the relationship) different approaches.

Part Two: Sharing as Fundamental to the treatment of Financial Matters

109. In my first submission I set out, in the briefest of summary form, an underlying policy approach for the division of property that comprised the following principles:

    a. The rule of law.

b. Non-discrimination between spouses.
c. Recognition of a significant economic disparity between spouses, and the differences between wealthier families and less affluent families.
d. 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.

110. The Preferred Approach Paper, on page 21 onwards (from paragraph 1.45) explores a theory – and simplifying it – of the approach of the *PRA*, in particular:

> During the relationship, partners contribute to the family joint venture with the expectation that they will continue to share in the fruits of that joint venture – the product of their combined contributions – into the future. If that family joint venture breaks down, the *PRA* governs the just division of property deriving from the family joint venture.
>
> 1.46 We consider that an entitlement to share the fruits of the family joint venture should be the central underpinning theory of the *PRA*. We also consider that the theory of compensation should no longer play a role in explaining what property should be shared when relationships end. This is because our proposals in Chapter 5: Section 15 move[s] away from requiring one partner to compensate the other when the division of functions during the relationship result in economic disparity on separation. Instead, we propose that partners should share future income in some situations, in order to ensure the economic advantages and disadvantages arising from a relationship or its end are shared.
>
> 1.47 The theory of need may continue to play a role in the *PRA* in relation to children's interests, given our proposals in Chapter 7: Children's interests to make the best interests of children a primary consideration, and to continue to enable a court to settle relationship property on a child.[56]

111. In light of the Preferred Approach Paper, there are, in my submission, two matters for the Commission to reconsider.

112. The first is that, even without the benefit of further research, it is possible for the Commission in its final report to express values that should inform property settlements. Expression of values is in common with my argument for some clear policy rationale for property settlements. The second is that those values should include some notion of the equal status of spouses – something is consistent both with the Preferred Approach Paper's 'joint venture' and my submission of 'non-discrimination'.

Part Three: Priority to the Economic Interests of Children

113. In my first submission in paragraph 146 (pages 61-62), I set out the practicality of priority to the economic interests of children. In explaining my proposed model, I suggested using the actual costs of children (in particular accommodation, health, education and the like) in each household.

114. The Preferred Approach Paper (at paragraph 7.8 – page 153) points out:

> Parental separation can have significant and wide-ranging impacts on children. Children may experience new care arrangements. They might be dealing with inter-parental conflict. The family home may be sold as one household splits into two, and children might have to move to a new house, neighbourhood or region. They may lose important connections to family, whānau and friends as well as peer and community support networks, especially if a change of school is required. A geographic move following parental separation may also impact on a child's ongoing relationship with their nonprimary caregiver parent.

115. In my first submission, I kept the theoretical discussion relatively brief. However, in my thesis, I drew upon contemporary liberal theory and discussed that the economic interests of children were not (just) about an individual family, but was in the economic and social benefits of society as a whole by enabling children to reach their maximum potential.[57]

116. The Preferred Approach Paper makes a broader proposal than my first submission. Proposal 34 (see page 7 of the Preferred Approach Paper) is:

Children's best interests should be a primary consideration under the PRA. This should be given effect through:

a. a statutory principle, to guide the achievement of the purpose of the PRA;

b. an overarching obligation on the courts to have regard to the best interests of any minor or dependent children of the relationship (replacing the existing obligation in section 26); and

c. Procedural rules, to ensure a court is provided with the information it needs in order to effectively perform its obligation at (b) above, and to promote to parents, practitioners and the court the importance of considering children's best interests and the tools available for meeting children's needs.

117. In this submission, I have already argued that the Commission's suggested clarifications of the law, will change the circumstances relevant to, and the process of, the exercise of discretion without achieving any discernible change in result.

118. I agree with the need for further research. These positions are reconcilable. It is open to the Commission to express in its final report the principles to be incorporated into the *Act* to promote fair outcomes. Accordingly, I make further comments:

Comment 11: It is recommended that, in its final report, in light of the New Zealand Preferred Approach Paper, the Commission revisit its position in answer to Question 17. In addition to a recommendation of further research, it is recommended that the Commission express a theory or theories that in the Commission's view should underpin property settlements to promote fairer outcomes. This theory or theories could inform the direction for further research.

Comment 12: It is recommended, that, in its final report, the thoery or theories in the Commission's final report include the priority to the interests of children as future economic and social citizens; and the sharing of economic benefits of the family relationship (either as a consequence of the family as a joint venture or the absence of discrimination between spouses).

IV The PISA concept and my Previous submission: A Combined Model

119. Time prohibits a substantial critique of Proposals 18 to 26 inclusive of the Preferred Approach Paper. However, there are some elements of the proposal that have immediate appeal. In my earlier submission (in particular recommendation 14) I set out a separate cause of action for the division of property subject to certain pre-conditions. In my proposal, provided the parties had a child of the marriage or the de-facto relationship (subject to the threshold requirements for de-facto couples) sharing of property was equal as a rule, then subject to guided judicial discretion.

120. The proposal was, transparently, an attempt to achieve a hybrid model between rules and discretion, and avoid a basis to entitlement on gender or the type of relationship between the adults.

121. Having considered the submissions for the Commissions' discussion paper, and the Preferred Approach Paper, I submit that there is a combined model available that:

    a. Avoids the rules v discretion argument; and
    b. Puts beyond doubt a threshold for equal sharing as a fundamental principle, and;
    c. Retains elements for judicial discretion, and
    d. Is clear in its application (facilitating negotiation), and
    e. Promotes fairer outcomes.

122. At recommendation 14 of my first submission I promoted a model where all property, howsoever acquired, was divided equally as a rule, and, in the event of an application by a party, a Court had the discretion to change an equal division with children's economic interests as a priority.

123. I now submit a more conservative proposed model, either as a direction for further research and investigation, or, if the Commission so considers, amendments to the *Act*.

124. The model is one where the threshold requirements are significantly higher both than my previous submission, my PhD model, and the preferred approach paper model.

125. I suggest the following:

a. That where two parties have been in a relationship (whether a de-facto relationship or a marriage), and the totality of the relationship equals or exceeds ten years (whether comprised in part of a de-facto relationship and part marriage), *and*
b. There is a child or children of that relationship, *then*
c. The equal sharing model, together with judicial discretion, and objects and principles (as set out in detail in recommendation 14 of my first submission) apply.

126. At the outset of my first submission, I dealt with circumstances in which equality is fundamental to the terms of the association between two persons and that the benefit of the family was one of them.

127. This modified proposal, in my submission, more strongly correlates with values:
a. That the parties to the relationship intended, *both* by the duration of their relationship *and* the fact of a child or children, that they meant to share substantially in their property, and,
b. That by the absence of a financial agreement contracting out, they ought to be compelled to divide property in a way that is equal, and
c. If there are ongoing economic consequences that render an equal division unjust, then the discretion should be available to make the appropriate adjustment.

128. The modified model is consistent with the Public Health Model adopted by the Commission, because it facilitates a framework for quick negotiation, enables public education on the relevant legal principles. Narrowing the frame for alteration of property interests lessens the scope of the disputes. This reduces the complexity, length, and delay in judicial determination. It also – at least in part - address the potential for abuse of the litigation system

129. On that basis, I make one final comment.

Comment 13: It is recommended that, in its final report the Commission should express, in answer to Question 17, a preferred statutory model or models for alteration of property interests. Such a model or models (in whatever form) should promote fairer

outcomes. These models could either form the basis for further review or a direct proposal for amendment of the Act.

Other Publications

Portions of this submission have previously been 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.
- Christopher Turnbull, 'In metes and bounds: Revisiting the just and equitable requirement in family law property settlements' (2018) 31 *Australian Journal of Family Law* 159.

More generally, discussion on the nature of the just and equitable requirement can be found in Harland et al, *Family Law Principles* (2nd ed, Thomson Reuters, 2015), at Chapter 12. The writer was a contributing author to financial chapters of the second edition.[58]

Endnotes

[1] Dr C Turnbull, Public Submission, Australian Law Reform Commission Inquiry Review of the Family Law System (submission number 48 to the Issues Paper).
[2] Australian Law Reform Commission, *Review of the Family Law System – Issues Paper (IP48*) March 2018.
[3] Christopher Turnbull, *Family Law Property Settlements: Principled Law Reform for Separated Families* (PhD Thesis, Queensland University of Technology), 2017.
[4] Discussion Paper pages 58-60.
[5] *Public Service Act 1999* (Cth) s13.
[6] Pages 53-57 of my first submission.
[7] Page 28 of my first submission.
[8] Discussion Paper page 61 citing NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*, S Christie, *Submission 216,* National Legal Aid, *Submission 163*.
[9] *Stanford v Stanford* (2012) 247 CLR 108, 120.
[10] Ibid.
[11] *Bevan & Bevan* (2014) FLC 95-572.
[12] Ibid, 79-023, citing *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194.
[13] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194.
[14] Ibid, [19], citing Norbis v Norbis [1986] HCA 17; (1986) 161 CLR 513 at 518 per Mason and Deane JJ; *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 76 per Gaudron J; See *Jago v District Court* (NSW) [1989] HCA 46; (1989) 168 CLR 23 at 75-76 per Gaudron J; *Russo v Russo* [1953] VicLawRp 12; [1953] VLR 57 at 62 per Sholl J. See also Pattenden, Judicial Discretion and Criminal Litigation, 2nd ed (1990) at 5-6.
[15] Belinda Fehlberg and Lisa Sarmas 'Australian family property law: 'Just and equitable' outcomes? (2018) 32 *Australian Journal of Family Law* 81, 85.
[16] Christopher Turnbull, 'In metes and bounds: Revisiting the just and equitable requirement in family law property settlements' (2018) 31 *Australian Journal of Family Law* 159, 173.
[17] *Whent & Marbrand* [2018] FamCAFC 95 (25 May 2018).
[18] Ibid [21]; see also *Chapman & Chapman* (2014) FLC ¶93-592.
[19] *Whent & Marbrand* [2018] FamCAFC 95 (25 May 2018), [8].
[20] Christopher Turnbull, *Family Law Property Settlements: Principled Law Reform for Separated Families* (PhD Thesis, Queensland University of Technology), 2017, 124-129.
[21] *Pastrikos & Pastrikos* (1980) FLC ¶90-897, 75-654; See also *Napthali & Napthali* (1989) FLC ¶92-021; Ellen Goodman, 'Property Law Following Dissolution of Marriage: Is There a Future for Judicial Discretion?' (1982) 13 *Federal Law Review* 131.
[22] *Seiling & Seiling* (1979) FLC ¶90-627, 78-264; See also *Mallet v Mallet* (1984) 156 CLR 605, 608.
[23] *Clauson & Clauson* (1995) FLC ¶92-595, 81-907, citing *Ferraro & Ferraro* (1993) FLC ¶92-335 and *Lee Steere and Lee Steere* (1985) FLC ¶91-626; See also *Whitely & Whitely* (1996) FLC ¶92-684; *Davut & Raif* (1994) FLC ¶92-503.
[24] *JEL & DDF* (2001) FLC ¶93-075, 88-332.
[25] *Hickey & Hickey & Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC ¶93-143, 78-386.
[26] Ibid (citations omitted).
[27] Ibid.
[28] *Coghlan & Coghlan* (2005) FLC ¶93-220.
[29] Ibid 79-646.
[30] *Bevan & Bevan* (2013) FLC ¶93-545, 87-232.
[31] *Bevan & Bevan* (2014) FLC ¶93-572, [18].
[32] Christopher Turnbull, *Family Law Property Settlements: Principled Law Reform for Separated Families* (PhD Thesis, Queensland University of Technology), 2017, 164-170.
[33] Ibid page 183.
[34] Ibid.
[35] Discussion Paper page 111, citing *Family Law Rules 2004* (Cth) r. 13.01; *Federal Circuit Court Rules 2001*, r 24.03.

[36] Discussion Paper page 111, citing, *Family Law Rules 2004* (Cth) r13.01(1), *Family Law Act 1975* (Cth) s 117(2A)(c); *Family Law Rules 2004* (Cth) r 13.14; *In the Marriage Of: Suzanne Margaret Weir Appellant/Wife And: William Hilton Weir Respondent Husband* [1992] FamCA 69.
[37] *Howard & Howard* (1982) FLC ¶91-279 at p. 77,594.
[38] At page 80-256.
[39] (1986) FLC ¶91-713 (at page 75-181).
[40] *Family Law Rules 1984* 9Cth) Order 20, rule 2.
[41] *Family Law Rules 198*4 (Cth) Order 20, rule 10.
[42] *Family Law Rules 198*4 (Cth) Order 17, rule 3 (Incorporating amendments up to SR 1997 No. 155).
[43] Discussion paper page 111 citing *Weir & Weir* (1993) FLC ¶92-338; 16 Fam LR 154.
[44] At page 79-593.
[45] At page 81-715.
[46] At page 81-714.
[47] Pages 29 to 35 of my first submission.
[48] Page 5 of my first submission, recommendation 3.
[49] Page 14 discussion paper footnote 73.
[50] Page 19 of my first submission.
[51] Discussion Paper page 18; my first submission page 34.
[52] Discussion Paper page 16-17, my first submission page 47.
[53] Ibid.
[54] Discussion Paper page 59.
[55] https://lawcom.govt.nz/our-projects/review-property-relationships-act-1976.
[56] Preferred approach paper pages 21-22.
[57] Christopher Turnbull, *Family Law Property Settlements: Principled Law Reform for Separated Families* (PhD Thesis, Queensland University of Technology), 2017, 71-72.
[58] Credits for the writer's contribution are found on the book's title page and – relevantly – page x.