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

Submission to the Attorney-General's Department

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The questions below reflect the questions contained in the Consultation Paper, and are provided for ease of reference. The Consultation Paper is available on the Attorney-General's Department webpage for further context on each of the questions below. You are not required to provide a response to every question, the answer space may be left blank or marked with 'no comment'. There is no word limit for responses to any question.

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A revised framework

Question 1: Do you agree that there would be benefit in more clearly articulating the decision-making steps to be followed in determining family law property matters? What is your view on the approach outlined in this paper? What risks and issues should be considered as part of this reform process?

Yes.

Relationships Australia has, in its submissions to the Australian Law Reform Commission (ALRC) and the Joint Select Committee inquiry into the family law system, advocated:

- simplification of the *Family Law Act 1975* (Cth) (the Act) in its entirety, and
- redrafting the Act to more clearly set out the analytical steps in determining a property settlement.

During and after separation, many families look for affordable mechanisms for settling property and financial disputes.[1] However, the cost of access to legal services and the family courts is prohibitively high, and often entirely disproportionate to families' income, assets and debts.[2] Many Relationships Australia clients are financially stressed, but have just sufficient assets to be excluded from legal aid. They struggle to afford basic legal advice, let alone representation in court, even though early and inexpensive legal advice can be invaluable in enabling clients to resolve disputes without going to court.

It is extremely difficult for separating couples and their legal advisors to make reliable predictions of how judges might apply the Act in particular cases, even in commonly-arising circumstances (see ALRC Report 135, paragraph 6.18). This is because:

- the Act confers on judges very wide discretions, requiring judges to take into account numerous and complex factors in reaching their decisions, and
- reported judgments, of both first instance and appellate decisions, do not always expose how judges have determined it to be 'just and equitable' to make an order, or how they have quantified contributions and needs.[3]

[1] ALRC Discussion Paper 86, paragraph 5.18. See also submission 53 to the ALRC from Family and Relationship Services Australia, pp 34ff, and submission 137 from Marrickville Legal Centre. Relationships Australia concurs with the observations put forward by Dr Bruce Smyth and Family Relationship Services Australia in their submissions responding to ALRC Issues Paper 48. See Submission 104, 5, referencing submission 13 to the House of Representatives Standing Committee on Social and Legal Affairs, *Parliamentary Inquiry into the Child Support Program*, authored by Dr Smyth and Bryan Rodgers; FRSA submission 53, 38-39, describing various approaches taken by FRSA member organisations. See also Women's Legal Services Victoria, *Small Claims Large Battles*, 2018, available at https://womenslegal.org.au/files/file/WLSV%20Small%20Claims,%20Large%20Battles%20Research%20Report%202018.pdf .

[2] Qu, L., *et al* (2014), *Post-Separating Parenting, Property and Relationship Dynamics After Five Years*, 98.

[3] See, for example, Parkinson, P., 'Why are decisions on family property so inconsistent?' (2016) 90 *ALJ* 498.

In particular, it is not always apparent that judges have taken into account the factors listed in the Act and how they have been weighted, or whether judges have taken into account other factors (as well as, or instead of, those described in the Act), and what weight these have been given.[4] We also note that the lengthy lists in statutes contribute to what has been called 'factor overload',[5] producing a list of matters to be considered that is so long that it is, in practice, impossible to consistently produce outcomes that meet the objective of 'just and equitable' (or other similar phrase) and provide coherent guidance for separating couples and their advisors. We further note that the Government, in its response to the ALRC report, has rejected approaches that rely on the use of statutory presumptions or other, prescriptive approaches.

Accordingly, Relationships Australia suggests an alternative approach which is described in our response to Q 2.

[4] See, eg, Rhoades, H., 'Equality, Needs and Bad Behaviour: The "Other" Decision-Making Approaches in Australian Matrimonial Property Cases' (2005) 19 *International Journal of Law, Policy and the Family* 194; Fehlberg, B. & Sarmas, L, 'Australian family property law: 'Just and equitable' outcomes?' (2018) 32 *Australian Journal of Family Law*, 81, p 96.

[5] See Fehlberg & Sarmas, 2018, pp 103-104, referring to Levy, I., 'Lightening the overload of CPR Rule 3.9' (2013) 32 *Civil Justice Quarterly* 139. This issue is also apparent, of course, in Part VII of the Act.

Question 2: What alternative approaches (if any) to specifying and simplifying the decision-making steps should be considered?

Relationships Australia proposes that the Act be amended to:

- provide for 'anchor' requirements to enliven the court's jurisdiction, consistent with the High Court's approach in *Stanford v Stanford*;[6] the anchor requirements we propose differ according to whether or not there are dependent children (see below)
- articulate relevant considerations in a succinct list to avoid 'factor overload'
- require the court take family violence into account in considering both contributions and future needs, and
- require the court to consider whether additional orders need to be made to protect children and adults from family violence that may arise in giving effect to orders made pursuant to Part VIII and Part VIIIAB.

Anchoring Part VIII/Part VIIIAB relief in children's best interests or justice and equity

We suggest that subsections 79(2) and 90SM(3) should be amended to state that the court's jurisdiction to make an adjustment in legal and equitable title to property is enlivened only:

- where there are dependent children[7] - if the best interests of the children require it, with 'best interests' to be determined in accordance with section 60CC of the Act (acknowledging that this will require the inclusion of children's voices in property matters, in accordance with the principles of child-inclusive practice and Australia's obligations under Article 12 of the Convention of the Rights of the Child); it is now well-established that children and young people should be supported to express their views, where they wish to do so, in family court proceedings and FDR,[8] and
- where there are no dependent children – if it is just and equitable to do so.

Such an approach is consistent with the High Court's position in *Stanford v Stanford;*[9] ie that the jurisdiction to grant relief by altering property interests is not 'at large'. While it is novel to accord paramountcy to children's best interests for the purposes of sections 79 and 90SM, our proposed approach nevertheless retains conceptual 'anchors' – children's best interests or, if there are no dependent children, justice and equity - that reflects the High Court's approach.

[6] *Stanford v Stanford* [2012] HCA 52.

[7] For the purposes of this submission, 'dependent children' means children of the separating couple who are under the age of 18, who are completing their education, or who have a disability: see section 66L of the Act.

[8] Recent years have seen mounting research and commentary favouring the participation of children and young people, and noting the increasingly-articulated desire of children and young people to have a voice in decision making that affects them. The ALRC commented that 'This tension between protection and participation is sometimes framed as a contest between competing principles or rights…..The Committee on the Rights of the Child has suggested that there is no tension between children's welfare or best interests (art 3) and their right to participation (Article 12). Instead, they are complementary…'. [at para 7.18] See also the Australian Human Rights Commission, Children's Rights Report, 2015; Carson, R., Dunstan, E., Dunstan, J., & Roopani, D. (2018). *Children and young people in separated families: Family law system experiences and needs*. Melbourne: Australian Institute of Family Studies.

[9] *Stanford v Stanford* [2012] HCA 52.

Prioritising best interests of the child - parenting and property disputes are intertwined

Where dependent children are involved, family law litigation has particular characteristics:

- there is an imperative - enshrined in law and reflecting contemporary expectations around the roles of separated parents - to support children's ongoing relationships with parents and other people with whom they have a meaningful relationship; as a consequence, parents and caregivers (for example) will often need to co-operate over several years in co-parenting or enabling children to enjoy those relationships, and
- the fundamental issues are *not* the relative rights of the parties who are in front of the judge, but about the rights of children who are *not* parties and may not have anyone, even an over-stretched ICL, speaking exclusively for their interests.

It is the practice experience of Relationships Australia that, where there are dependent children, the statutory distinction between parenting and property matters is a harmful legal artifice. It further entrenches combative win/loss dynamics between parents, prolongs conflict, drains resources, and undermines established shared care arrangements.[10]

It is also our experience that the loss of financial resources, including through the necessary expenses of establishing two separate households, can have serious socio-economic impacts on all children, not only those in the poorest or most disadvantaged families. For example, parental separation can:

- require children to move away from known and familiar suburbs (perhaps into two new suburbs for shared care)
- require children to leave private schooling due to disputes about fees
- require children to leave known schools, perhaps with the consequence of losing contact with friendship groups
- require children to withdraw from costly or inconvenient extra-curricular activities
- lead to the loss of, or reduced coverage by, private health care, and
- mean that one or both parents may need to work more hours, leading to a loss of physical and emotional availability to their children at an already fraught time.

[10] As Relationships Australia has argued in detail in the following submissions: to the Attorney-General's Department concerning the direct cross-examination ban, to the Senate Standing Committee on proposals to reform the family law courts, to the Joint Select Committee on Australia's Family Law System, to the House of Representatives inquiry on family, domestic and sexual violence, and to the Australian Law Reform Commission's inquiry into the family law system. These submissions are available at https://www.relationships.org.au/about%20us/submissions-and-policy-statements .

The failure of Parts VIII and VIIIAB to accord paramount importance to the best interests of children, moreover, means that orders can and are made that ignore the strong associations between family separation and poverty, between single parent caregiving for children and poverty, and between poverty and adverse developmental and other outcomes for children. These outcomes are likely to be amplified later in life, echoing through their adult lives, relationships and engagement in community life.[11]

We therefore concur with the observation of the Bar Association of Queensland that

> Most of all, whether the proceedings are property or parenting – it hurts the children.[12]

The best interests of the children, therefore, should be treated as paramount not only in Part VII, but also and explicitly in Parts VIII and VIIIAB. This is consistent with Australia's obligations under the Convention on the Rights of the Child. By way of necessary corollary, if there is tension between the wellbeing of children and achieving justice and equity between two adults, the wellbeing of children must take precedence.

Prioritising safety

Relationships Australia also urges that applications made pursuant to amended Parts VIII/VIIIAB should be dealt with in a way that identifies and addresses family violence through a safety first and trauma-informed lens, to ensure that such disputes are not being used to perpetuate violence, and that the resolution of disputes does not occur in such a way as to exacerbate safety risks. Such an approach is consistent with the views expressed by the House of Representatives Social Policy and Legal Affairs Committee in its 2017 report, *A better family law system to support and protect those affected by family violence* (see, eg, Recommendation 18 of that Report, to which the Government agreed in part), and is similar to the approach in England and Wales under the *Matrimonial Causes Act 1973* (England and Wales).

[11] The 2016 Australian census noted that female single parents comprise 82% of single parent households: Australian Bureau of Statistics*, 2024.0 – Census of Population and Housing: Australia Revealed*, published 27 June 2017, accessed 4 July 2021. https://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0 See also de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2007). *The consequences of divorce for financial living standards in later life* (Research Paper No. 38). Melbourne: Australian Institute of Family Studies; de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2015). *The economic consequences of divorce in six OECD countries* (Research Report No. 31). Melbourne: Australian Institute of Family Studies; Easteal, P., Young, L., & Carline, A. (2018). Domestic violence, property and family law in Australia. *International Journal of Law, Policy and The Family*, 32, 204–229. doi:10.1093/lawfam/eby005; Fehlberg, B. & Millward, C. (2014). Family violence and financial outcomes after parental separation. In Hayes, A. & Higgins, D. (Eds.) *Families, policy and the law: Selected essays on contemporary issues for Australia* (1 ed., pp. 235-243) Australian Institute of Family Studies; Fehlberg & Sarmas, 2018, pp 89-90; Gray, M., de Vaus, D., Qu, L., & Stanton, D. (2010). *Divorce and the wellbeing of older Australians* (Research Paper No. 46). Melbourne: Australian Institute of Family Studies; Kelly, J.B., 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research', 39 *J. A M. Acad.Child & Adolescent Psychiatry* 963 (2000); Smyth, B., & Weston, R. (2000). *Financial living standards after divorce: A recent snapshot* (Research Paper No. 23). Melbourne: Australian Institute of Family Studies; Stock, Corlyon et al, *Personal Relationships and Poverty: An Evidence and Policy Review*, a report prepared for the Joseph Rowntree Foundation by the Tavistock Institute of Human Relations, 2014; Warren, D, *Low Income and Poverty Dynamics - Implications for Child Outcomes.* Social Policy Research Paper Number 47 (2017). Available at https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policy-research-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes.

[12] See submission 80 to the ALRC inquiry, p 21. See also submission 55 to the ALRC inquiry, by the Australian Psychological Society, p 36.

Question 3: In this paper, the term 'just and equitable' has been used in step 1 and also step 6. Do you consider this terminology should be retained? Would other terminology such as 'fair' or 'reasonable' be preferable?

Yes; Relationships Australia considers that 'just and equitable' should be retained, albeit for the more limited anchoring role in respect of adjustments as between parties where there are no dependent children (see our response to Q 2).

We note that the consultation paper cautions that 'the benefits of any proposed amendments would need to outweigh the risks associated with impacts on the jurisprudence developed to date' (p 7).

The phrase 'just and equitable' may underlie the apparent disparity of men's and women's perceptions as to how they fare in property settlement matters.[13] As with the notion of 'shared care', the phrase 'just and equitable' may contribute to a view that the underlying principle is (or ought to be) equality – assuming a 50/50 split as a norm.

However, it is unclear that an alternative formulation, such as 'fair and reasonable', would offer greater simplicity and clarity while not inviting a wave of litigation over what is meant by 'fair and reasonable' and how that differs from 'just and equitable'. Notions of 'fairness' and 'reasonableness', in the view of Relationships Australia, are as prone to subjectivity, misunderstanding and manipulation, as 'just and equitable'.

Question 4: If clearer articulation of the decision-making steps is pursued, what is the appropriate order of the steps? For example, should consideration about whether it is appropriate to adjust the property interests at all be the preliminary step? Should contributions be considered by the court before it considers the future needs of the parties?

Relationships Australia considers that the decision-making steps should be in the following order:

1. establish the existence of the relevant anchor (as specified in response to Q2)
2. identify existing legal and equitable interests in, and right or title to, property
3. consider the current and future needs of any dependent children (ie elevating consideration of children's needs above an indirect factor to be considered through the lenses of the adult parties)
4. consider each party's contributions, as suggested in the consultation paper
5. consider each party's current and future needs as described at:
    - paragraph 4(a) of the consultation paper - to the extent not already taken into account under step 4 of this proposal (ie with reference to capacity to work and the need to take time out of the paid workforce to care for the children)
    - paragraphs 4(b)-(e) of the consultation paper
6. consider the safety of any dependent child or adult party, and whether ancillary orders should be made to promote their safety in giving effect to Part VIII/Part VIIIAB orders
7. to the extent not already provided for - consider the matters described at paragraphs 5 and 6 of the consultation paper.

[13] Fehlberg & Sarmas, 2018, pp 92-95.

Question 5: Are there any contributions or needs factors that have not been canvassed in this paper that should be expressly provided for in the FLA? Are there any contributions or needs factors that have been canvassed that should not be expressly specified?

See response to Q 24 (comments on ALRC recommendation 19).

Question 6: Should any of the contribution or needs factors be weighted above others? In other words, should there be a hierarchy of needs and/or contributions in the FLA? In what other ways could the FLA be amended to provide greater guidance as to how a 'future needs' adjustment should be made?

See responses to Qs 2-5.

Question 7: Should the FLA provide more clarity on quantifying the 'homemaker contribution' as set out at step 3(c)? If so, how?

Nil response.

Spousal maintenance

Question 8: If the spousal maintenance provisions are de-linked from the property division framework, should the existing spousal maintenance provisions (i.e. the future needs factors in existing s 75(4)) be amended or retained in their current form?

Relationships Australia supports locating property division matters and spousal maintenance matters in discrete parts of the Act, and considers that the cross-references in paragraphs 79(4)(e) and 90SM(4)(e) should be removed to improve clarity. The future needs factors should be amended in the simplified form suggested in the consultation paper, subject to inclusion of the paramountcy of children's best interests as proposed in our response to Q 4. By way of background, Relationships Australia notes that we supported Proposal 3-18 made by the ALRC in its Discussion Paper,[14] and agreed with the Law Council of Australia that it would be desirable to merge provisions for married and de facto spousal maintenance. Relationships Australia also agreed with the suggestion from the Law Council of Australia that there should be provision made to allow urgent interim spousal maintenance claims.

Question 9: Should the same future needs factors apply to both the property division and the spousal maintenance provisions?

Relationships Australia agrees, in principle, that the same factors should apply in both sets of provisions.

[14] That is, that considerations applicable to spousal maintenance (presently located in s75 of the Act) should be located in a discrete part of the Act.

Question 10: What, in your view, explains the currently (anecdotally) low number of applications for spousal maintenance orders?

Relationships Australia suggests that cost, complexity and the absence of culturally safe services across the family law system compound barriers to access to justice more broadly for people who experience vulnerabilities and co-morbidities which, while hindering access to justice, render them more in need of it. These factors are compounded by imbalances of power which deter some prospective applicants for spousal maintenance orders (such as those on a provisional partner visa).

Relationships Australia encourages the Government to commission research to explore whether (and, if so, to what extent) applications are not being made when they could be and what factors or circumstances deter applications.

Question 11: To what extent would additional guidance material be helpful to self-represented litigants and lawyers in making applications for spousal maintenance orders?

Relationships Australia supports Government commissioning and promoting guidance material that:

- clearly explains the nature of spousal maintenance orders and the process by which to seek them (including relevant criteria and exclusions)
- identifies where prospective applicants can go to receive help in applying for orders, as well as for other kinds of support such as housing services, counselling, financial assistance, financial counselling, and family dispute resolution, and
- is available in multiple languages and meets accessibility standards.

Child support

Question 12: Should the FLA retain child support as an express contribution and/or needs factors in the proposed codified decision-making steps?

Yes.

Question 13: Should the FLA be amended to require the court to specify the specific amount of child support it has taken into account (if any) when making the property adjustment order?

Yes.

If the court takes child support into account in making a property adjustment order, then Relationships Australia considers that a requirement of this kind would serve natural justice and promote transparency of judicial decision-making, while also enabling separating couples to be better informed in planning for their respective financial futures.

Question 14: Do you have any other comments about the consideration of child support in the property division process?

No.

Debt

Question 15: What are your views on the option of referencing debt as a separate contributions factor?

Relationships Australia supports referencing debt as a separate contributions factor. This is consistent with our response to the ALRC Discussion Paper, in which we suggested that the property division frameworks should take into account contributions of debt as well as those of assets when calculating the asset pool and deciding on a distribution of any remaining assets. This would be of particular importance in situations of financial abuse where one party may have caused a significant deterioration of assets, including by generation of debt, and the other party has not contributed to the deterioration.

In this context, Relationships Australia notes the strong and well-documented associations between family separation and poverty, between single parent caregiving for children and poverty, and between poverty and adverse developmental and other outcomes for children. These outcomes are likely to be amplified later in life, echoing through their adult lives, relationships and engagement in community life.[15] (See also our response to Q 2).

Question 16: What are your views on moving consideration of the effect of an order on creditors into a separate 'effect of orders' step (that is, proposed step 5)?

Relationships Australia considers that such an approach, which could readily be incorporated into the framework proposed in our response to Q 4, may enhance the clarity of the legislation and transparency of decision-making (including, where applicable, transparency for creditors).

Relationships Australia supports measures to encourage credit providers to ensure that vulnerable individuals, particularly those affected by family violence, do not unfairly shoulder debt burdens from separating relationships.[16] We strongly support Government in working with the financial sector along these lines.

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[15] The 2016 Australian census noted that female single parents comprise 82% of single parent households: Australian Bureau of Statistics, *2024.0 – Census of Population and Housing: Australia Revealed*, published 27 June 2017, accessed 4 July 2021. https://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0 See also de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2007). *The consequences of divorce for financial living standards in later life* (Research Paper No. 38). Melbourne: Australian Institute of Family Studies; de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2015). *The economic consequences of divorce in six OECD countries* (Research Report No. 31). Melbourne: Australian Institute of Family Studies; Easteal, P., Young, L., & Carline, A. (2018). Domestic violence, property and family law in Australia. *International Journal of Law, Policy and The Family*, 32, 204–229. doi:10.1093/lawfam/eby005; Fehlberg, B. & Millward, C. (2014). Family violence and financial outcomes after parental separation. In Hayes, A. & Higgins, D. (Eds.) *Families, policy and the law: Selected essays on contemporary issues for Australia* (1 ed., pp. 235-243) Australian Institute of Family Studies; Fehlberg & Sarmas, 2018, pp 89-90; Gray, M., de Vaus, D., Qu, L., & Stanton, D. (2010). *Divorce and the wellbeing of older Australians* (Research Paper No. 46). Melbourne: Australian Institute of Family Studies; Kelly, J.B., 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research', 39 *J. A M. Acad.Child & Adolescent Psychiatry* 963 (2000); Smyth, B., & Weston, R. (2000). *Financial living standards after divorce: A recent snapshot* (Research Paper No. 23). Melbourne: Australian Institute of Family Studies; Stock, Corlyon et al, *Personal Relationships and Poverty: An Evidence and Policy Review*, a report prepared for the Joseph Rowntree Foundation by the Tavistock Institute of Human Relations, 2014; Warren, D, *Low Income and Poverty Dynamics - Implications for Child Outcomes.* Social Policy Research Paper Number 47 (2017). Available at https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policy-research-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes .

[16] For example, in our response to Proposal 3-14 of the ALRC Discussion Paper.

Question 17: Do you have any other comments about how debt should be provided for in an amended decision-making framework?

Yes.

The practice experience of Relationships Australia supports the observation made to the ALRC by the Bar Association of Queensland that

> …family violence permeates numerous other aspects of family law proceedings, beyond just parenting proceedings.[17]

Accordingly, Relationships Australia supports measures ensuring that survivors of family violence are not unfairly burdened by debts, including (but not limited to) debts arising in the course of financial abuse or in the context of coercive controlling behaviour. We would support the inclusion of statutory provisions recognising coercive controlling behaviour, and how it may manifest through property and financial matters during and after the relationship.

Gifts/windfalls/inheritances/dowry

Question 18: Should common law principles governing the treatment of gifts, windfalls and inheritances be codified in the FLA, noting the varying approaches taken by the courts? If so, what approach to legislative reform should be undertaken?

Yes.

Relationships Australia considers that codification could enhance the transparency of decision-making about property in the family law courts and promote predictability – both factors which may give separating couples greater confidence when bargaining 'in the shadow of the law' (with or without external support and advice) and in making decisions about whether to seek judicial resolution.

We note the Department's comment that parties wishing to quarantine an asset from judicial consideration in the event of separation may 'execute a financial agreement to oust the court's jurisdiction in respect of that property.' This seems to be done only rarely, a circumstance which may be at least partly attributable to the circumspection with which lawyers (and their insurance providers) view them. Accordingly, we cannot at this point be confident that BFAs offer a realistic option in respect of gifts, windfalls and inheritances (although an optimist might suggest that passage of legislation substantively simplifying and clarifying the Act may lead to greater take up of BFAs).

If the Government is minded to codify the treatment of gifts, windfalls, inheritances and dowries, it could perhaps also make that codification subject to the existence of a valid BFA.

[17] Submission 80 to the ALRC inquiry, paragraph 2.1.1, p 5.

Question 19: How should payments of dowry be dealt with during property proceedings under section 79 of the FLA? Would specific legislative provisions assist to address the 'inconsistent approaches' canvassed in the Dowry Inquiry? If so, what approach to legislative reform should be undertaken?

Relationships Australia acknowledges evidence given to the Senate Standing Committee on Legal and Constitutional Affairs that the Act as it stands enables 'just and equitable' adjustments with respect to dowry payments,[18] and also confers on family law courts sufficient discretions and powers to make orders about assets located overseas.[19]

We are, however, persuaded that evidence given by other submitters suggests that these discretions have not enabled consistent and predictable treatment of dowries that gives practical guidance to separating couples, their advisers and judges. This inconsistency and unpredictability offers further scope to a partner engaging in coercive and controlling behaviour to leverage the payment of dowry in ways that isolate, marginalise and further disempower spouses seeking to leave marriages where dowry has been paid.[20]

Relationships Australia therefore proposes that dowry payments (whether paid or located in Australia or elsewhere) be specified as a contribution to the marriage, to be taken into account in making an order under section 79 or 90SM. This would be consistent with Recommendation 3 of the Senate Standing Committee on Legal and Constitutional Affairs in the Dowry Inquiry. We consider that this should apply regardless of whether a dowry payment has been made to the husband only, or to the husband's family, and as complementary to (not instead of) other provisions enabling family violence (if applicable) to be taken into account in determining contributions and future needs.

Relationships Australia also supports Recommendation 1 made by the Committee in its report - that subsection 4AB(2) of the Act set out an inclusive list of examples of economic abuse, including dowry abuse.

Family violence

Question 20: Would requiring courts to consider the impact of family violence as one of the contribution factors be an appropriate way to take account of the impact of family violence on a party? What would be the risks, benefits or issues associated with such an approach?

Please see response to Q 22.

Question 21: Should the impact of family violence instead be considered as a future needs factor? What would be the risks, benefits or issues associated with such an approach?

Please see response to Q 22.

[18] See, for example, submission 15 from Monash Family Violence Prevention Centre, the Monash Migration and Inclusion Centre and Monash Gender, Peace and Security.

[19] Evidence of Ms Ashleigh Saint, Attorney-General's Department, Committee Hansard, 3 December 2018, p 7; https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/3f895c27-8187-4274-bb0c-7797b3d9a98d/toc_pdf/Legal%20and%20Constitutional%20Affairs%20References%20Committee_2018_12_03_6835_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/3f895c27-8187-4274-bb0c-7797b3d9a98d/0000%22

[20] See the report of the Dowry Inquiry, pp 37-38.

Question 22: Would it be appropriate for the impact of family violence to be considered as both a contribution factor and a future needs factor? What would be the risks, benefits or issues associated with such an approach?

Yes.

Subject to more detailed consultation, Relationships Australia suggests that, in exercising jurisdiction under sections 79(4) and 90SM(4), the court should be required to consider family violence as a (negative) contribution factor in respect of parties who use violence, and as a needs factor in respect of parties who experience violence. This would enhance transparency and predictability and is consistent with Proposal 3-11 in the ALRC Discussion Paper.

More detailed consultation would assist in the development of legislative amendments that:

- prioritise children's best interests
- promote safety
- are trauma-informed and pro-therapeutic, and
- lay a robust and principled foundation for quantification of the (negative) contributions and needs attributable to family violence in particular cases.

Relationships Australia would welcome involvement in further consultation about the treatment of family violence in applications for property division and spousal maintenance.

Question 23: Should family violence be accounted for in spousal maintenance applications? If so, how?

Yes.

See responses to Qs 8, 22 and 24.

Question 24: Are there other approaches for recognising the impact of family violence in property settlement that should be considered? Please provide details.

ALRC Recommendation 19 – introduction of statutory tort - concerns

Relationships Australia acknowledges that, in its response to the ALRC report, the Government has noted Recommendation 19 - the introduction of a statutory tort of family violence as a way to account for the effects, during and after the relationship, of family violence, including by way of providing compensatory damages awards.

We share the concerns, briefly described at p 13 of the consultation paper, that the introduction of such a tort would exacerbate conflict and violence, add to existing costs of family law litigation, and protract hearings. We are further concerned that a statutory tort of family violence would have serious adverse consequences for the safety and well-being of those against whom family violence has been used, including by:

- exacerbating the win/loss dynamics between parents enmeshed in the family law system, inevitably harming children and making ongoing successful co-parenting even less likely[21]
- undermining the integration of trauma-informed practice into family law systems and processes
- imposing on people already suffering from severe asymmetries of power an additional burden that must be met to hold perpetrators to account
- encouraging perpetrators of family violence to raise and seek to prove defences such as consent or voluntary assumption of risk (also undermining the integration of trauma-informed practice); while legislation could attempt to exclude the raising of such defences, it is difficult to be confident that such statutory exclusion could survive challenge, but it is easy to be confident that it would encourage protracted, traumatic and costly litigation while the point was being settled
- encouraging the invidious involvement of private investigators, endemic to Australian family law before the current Act, to surveille victim/survivors to prove, for instance, that they are not as badly affected as they make out (as currently happens in personal injury matters). This would
    - create an actual disincentive for victims to engage in help-seeking behaviour that might enable them to participate fully and freely in family and community life, education and employment
    - add further to the costs of bringing a matter before the court
- detaining victim/survivors in an innately anti-therapeutic state of trauma and harm for protracted periods while harms are crystallised and quantified
- encouraging futile but costly (emotionally and financially for parties and their children) collateral action on matters such as, for example, limitation periods and questions of causation, and
- increasing the likelihood of multiple interlocutory applications to deal with evidentiary issues, burdening scarce court resources while oppressing and harassing victim/survivors and prolonging opportunities to exert coercive control.

Relationships Australia considers that Recommendation 19 sits incongruously among diverse measures and initiatives taken by Government over the past decade that have responded to a robust evidence base describing the dynamics and harms of family violence.

Implementation would radically contradict Australia's recognition of family violence as not simply a private matter, but a matter of public importance – as expressed by the Government itself, for example, in its Explanatory Memorandum accompanying the Bill to create federal family violence orders.

Relationships Australia acknowledges that the proposal set out in our response to Q 22 may be thought to give rise to similar concerns as the creation of a statutory tort. However, we consider that these would be mitigated by treating family violence within the known and existing conceptual frameworks of contributions and needs (subject to the clarifications canvassed in this submission), rather than by creating a novel cause of action falling with its origins in rubric of civil wrongs, and importing concepts alien to the objects and purposes of the Family Law Act.

Recommendation 19 took Relationships Australia by considerable surprise, not having been canvassed in any of the consultation processes leading up to publication of the report. It is difficult to discern from the ALRC report how this recommendation emerged and won the support of the ALRC. If Government is minded to take this recommendation further, we would strongly urge a discrete and thorough consultation to elicit robust and evidence-informed views as to the consequences of implementation.

[21] See, *inter alia*, Crockenberg, S., & Langrock, A. (2001). The role of emotion and emotional regulation in children's responses to interparental conflict. In J. H. Grych & F. D. Fincham (Eds.), *Interparental conflict and child development: Theory, research, and applications* (pp. 129–156). Cambridge University Press. https://doi.org/10.1017/CBO9780511527838.007; Morris, M., Halford, W.K., Petch, J. & Hardwick, D, 'Predictors of Engagement in Family Mediation and Outcomes for Families that Fail to Engage,'(2018) 57(1) Family Process, 131, https://doi.org/10.1111/famp.1227 ; ALRC report 84, Seen and heard: priority for children in the legal process, paragraph 4.25. See also Marrickville Legal Centre, submission 137 to the ALRC inquiry, p 3; South Australia Commissioner for Children and Young People, *What Children and Young People Think Should Happen When Families Separate* (Office of the Commissioner for Children and Young People, 2018) 15.

Other

Question 25: Do you have any other general comments or suggestions about how the property decision-making framework should be reformed to better support Australian families?

In response to this question, we recommend that the Government:

1. mandate pre-filing FDR for property and spousal maintenance matters (and make suggestions about qualifications of FDRPs who wish to undertake this work)
2. reinstate funding for legally assisted dispute resolution to be made available through Family Relationships Centres, expanded as envisaged by the ALRC and potentially acting as Family Wellbeing Hubs (as described in our submissions to the ALRC)
3. continue to explore options for culturally appropriate FDR
4. strengthen obligations to disclose, imposed on parties and their advisors
5. further progress initiatives to facilitate superannuation splitting (Relationships Australia recently welcomed the opportunity to comment on an exposure draft of a Bill to facilitate exchange of superannuation asset information between the family law courts and the Australian Taxation Office),[22] and
6. consider how the relevant legislative frameworks (including family law, social security law, taxation law and superannuation law) should be 'future proofed' to enable accessible dispute resolution mechanisms to respond to multi-generational property disputes.

Mandatory pre-filing FDR for property and spousal maintenance matters

Relationships Australia recommends that the Act be amended to:

- require pre-filing FDR in property/financial matters (including spousal maintenance matters) as in parenting matters; in many instances, property and parenting matters run in tandem and it can be difficult for parents to separate the two discussions, and
- provide for exemptions from engaging in pre-filing FDR that apply across all family law matters (following review of the value of current exemptions in section 60I of the Act).[23]

Relationships Australia supports further development and funding of FDR as a proven means of diverting people from court. While the 2006 reforms saw filings in parental matters drop by 25%, filings in property disputes increased following the *de facto* reforms. Relationships Australia regularly sees successful parenting plans undermined by later, combatively conducted, property disputes.

[22] Available at https://www.relationships.org.au/pdfs/TreasurySuperannuationdisclosureEDsub.110621FINAL.pdf

[23] Relationships Australia supported Proposal 5-5 in the ALRC Discussion Paper that FDRPs provide a certificate where property issues in dispute have not been resolved in pre-filing FDR.

We have elsewhere recommended that the section 60I process currently in use for parenting matters be reviewed to improve its utility for parenting matters and to enable the process to be safe and effective in property and finance matters.[24] More detailed discussion of the issues with the existing section 60I process can be found in our response to Question 5-3 posed in the ALRC Discussion Paper.[25]

Requiring pre-filing FDR for property matters:

- is consistent with the recommendations made in the *Access to Justice* report by the Productivity Commission in 2014[26]
- would divert many more families from going to court, or from settling only 'on the steps of the court' after enduring lengthy, combative and expensive legal proceedings to that point, and
- would significantly reduce court workloads, as has been the case for parenting matters.

For well over a decade now, pre-filing FDR requirements have successfully diverted people from the courts in disputes about arrangements for children. The ALRC acknowledged that

> In both parenting and property matters, AIFS research indicates that FDR operates in a way that is more consistent with families' needs than either lawyer-led negotiation or court proceedings.[27]

The large Longitudinal Study of Separated Families conducted by AIFS pointed to limited use of FDR for property matters, but also showed that participants were more likely to consider their property division 'fair' if they had used mediation than if they had used a lawyer or been to court.[28] Australian commentators consistently identify a 'strong need' for affordable assistance in financial matters, especially property disputes, and particularly low value property disputes.[29] Accordingly, Relationships Australia has welcomed the PPP500 initiative and the LAC trial referred to at p 3 of the consultation paper.

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[24] Pre-filing FDR was supported by a range of submitters to the ALRC's inquiry; see, for example, submission 83 from the Mediator Standards Board, p 4; Central Australian Women's Legal Service, submission 24; submission 137 from Marrickville Legal Centre, 18. The Law Council of Australia would appear to disagree (see paragraphs 222ff of submission 43), on the basis that FDR can be used as a vehicle for burning off a party that is financially or emotionally weaker and to take unfair advantage of such a party. It is the experience of Relationships Australia, however, that such issues arise also in parenting matters, in which FDR has been effective. Relationships Australia Victoria has recommended that Government evaluate the effectiveness of the section 60I system to ensure that appropriate cases are not bypassing FDR services, and are being referred into FDR at an early enough stage. Such an evaluation could also examine whether some services are exempting clients who might benefit from FDR and whether courts are appropriately monitoring and enforcing mandatory FDR. Relationships Australia Western Australia suggests that certificates should avoid subjective language such as 'genuine' or 'non-genuine', and use objective statements such as 'attended FDR with [practitioner] and no agreement was reached'.

[25] At https://www.relationships.org.au/about%20us/submissions-and-policy-statements/australian-law-reform-commission-review-of-the-family-law-system , p 57.

[26] Productivity Commission, *Access to Justice Arrangements*, (2014), Report No. 72, https://www.pc.gov.au/inquiries/completed/access-justice/report .

[27] ALRC Report 135, paragraph 8-11.

[28] Qu et al., 2014.

[29] Fehlberg, B., Millward, C. & Campo, M. (2010). 'Post-separation parenting arrangements, child support and property settlement: Exploring the connections.' *Australian Journal of Family Law*, 24 (2), pp.214; Productivity Commission, 2014; submission 137 from Marrickville Legal Centre.

Relationships Australia has offered mediation in property, as well as parenting, matters since 1984. Nationally, Relationships Australia handles between 2000-3000 cases each year involving property, of which around 600 are property-only. With the 2006 reforms, the focus shifted to parenting matters and funding constraints have limited the offerings in property and finance mediation. These reforms precluded FRCs from offering property mediation in isolation from a parenting dispute. Accordingly, FRCs operated by Relationships Australia do not offer property mediation at all. Elsewhere, property mediations are offered by Relationships Australia as a fee-paying service under separate FDR funding. Clients pay a sliding hourly rate based on income and are advised to seek legal advice.

Relationships Australia Tasmania

Most clients who use Relationships Australia Tasmania's property mediation service are seeking to divide a small and uncomplicated asset pool; sometimes, the issue is more about division of debts than division of assets. The latter can sometimes be as a result of financial abuse, or other issues such as gambling addiction. Participants are encouraged to seek legal advice or legal information; this is especially important when financial abuse or family violence is an issue. Relationships Australia Tasmania suggests that where one of these circumstances exist, it is appropriate to ensure that the vulnerable participant has a legally qualified advisor.

Relationships Australia Western Australia snapshot

Relationships Australia Western Australia reports that FDR can be beneficial for families with large and complex asset pools. Typically, property mediations conducted by Relationships Australia Western Australia in such matters include:

- assets held within Australia
- assets held overseas
- vehicles
- multiple bank accounts, including offshore accounts
- shares
- superannuation funds, including self-managed funds or defence force superfunds
- family trusts
- credit card debt, and
- personal loans with third parties, often linked to one of the properties

The success of the FCC 'blitz', in which cases on the Court's list were referred to mediation, demonstrated that many property matters that had been filed for judicial resolution are, in fact, amenable to resolution through mediation instead. Relationships Australia would support diversion of participants involved in property disputes into mediation services, subject to those services being staffed with trained mediators who are skilled in family violence assessment and are properly accredited (preferably in FDR).

Notwithstanding its acceptance of evidence about the efficacy of mandated FDR in diverting people from litigation, the ALRC recommended a 'genuine steps' requirement, accompanied by greater court scrutiny of compliance with that requirement.[30] The rationale for this appears to have its roots in a perception that mandating FDR for property matters was 'too prescriptive' and inflexible. The ALRC stated that '…for others, lawyer-led and court pathways may be more appropriate for a range of reasons, including personal dynamics, such as family violence, and legal and forensic complexity.'[31] Relationships Australia notes that these considerations are currently managed in parenting matters; they are not, in our view, valid reasons to refrain from mandating pre-filing FDR in property or finance disputes.[32]

Qualifications to conduct property mediation

As stated in our response to Joint Select Committee inquiry, Relationships Australia does not consider legal qualifications to be a prerequisite to undertake mediation in relation to property or finance matters. The ALRC agreed with this view.[33] This is because a mediator is not a decision-maker and agreements reached through mediation are not, of their own force, legally binding. However, where family violence is present, and/or there are imbalances in knowledge and power, for example, it is preferable to employ legally-assisted dispute resolution.

There is currently highly-developed training and a registration process for FDRPs which offers a direct pathway for registration as an FDRP through the Attorney-General's Department. The course also includes competencies in financial and property dispute resolution.

FDRPs aspiring to offer services in finance and property matters should undergo basic training to understand, for example:

- contemporary legislation and jurisprudence, and
- the balance between presenting practical options for property division and not providing advice as to the adequacy of the proposed property division (the FDRP is neither a legal adviser nor a financial adviser).

Current training for FDRPs may not be sufficient to deal with the array of matters that would come to them if pre-filing FDR were mandated for property matters, and time and money will be necessary to 'skill up' significant numbers of FDRPs. Government could also consider initially limiting FDR in finance and property matters to matters that would fall within the parameters of 500PPP.

[30] See ALRC Report 135, Recommendation 21.

[31] Citing the Law Council of Australia, submission 285.

[32] See submission 119 to the ALRC inquiry, from Relationships Australia Victoria, pp4 ff.

[33] The ALRC agreed that legal qualifications should not be required to undertake FDR of property/finance matters: Report 135, paragraphs 13.110-13.111.

Relationships Australia South Australia currently offers training in property mediation to FDRPs, through the Australian Institute of Social Relations. Relationships Australia Western Australia has provided FDR for property and financial matters for more than 20 years; its FDRPs do not all hold legal qualifications. As with any qualification, ongoing professional development increases knowledge and skills to be applied within a mediation framework and in accordance with the Family Law Act. It is recommended that FDRPs need to demonstrate that they undertake ongoing professional development specific to property and financial matters to maintain their accredited status. Relationships Australia New South Wales suggests that training be required to ensure that FDRPs who work with property and finance matters understand, among other things:

- the concepts of full disclosure, 'just and equitable' (if retained), 'clean break'
- the provisions applying to de facto couples
- valuations, and
- other matters emerging from reform of Parts VIII and VIIIAB.

Relationships Australia study of FDR outcomes

Relationships Australia has undertaken a national study aimed at measuring the outcomes of its FDR services in both parenting and property matters. That survey, of more than 1700 participants, completed a survey at intake appointments for FDR between May and November 2017, and again three months later. These surveys included questions about their dispute and measures of individual wellbeing, conflict (including violence) between separating parties, and children's wellbeing. A twelve-month follow-up survey was also undertaken and we conducted interviews with a subsample of participants.

Although the vast majority of participants in this study (70%) were doing FDR for parenting matters, 23% said at intake that they had a combination of parenting and property/finance issues they wished to resolve. This represented over a quarter of participating FDR clients (28%). More specifically, 377 respondents (22%) reported wanting a property settlement. Three quarters of these 'property clients' were also hoping for a parenting agreement. Conversely, about a quarter (24%) of those reporting parenting issues also wanted to resolve property/finance matters. Excluding those who reported having no shared property to divide, this proportion jumps to 49%. There is considerable overlap of parenting and property clientele, despite the distinction that is reinforced by compulsory attendance for parenting matters only.

Value of shared property

The asset pools of property clients in the sample were greater than those of parenting clients, which is an expected selection effect when property clients (a) have some property to divide, and (b) have had to attend a fee-paying service. Nevertheless, the pools are far from high:

- a quarter (25%) are under $200,000 (including 8% where the pool is comprised of debt)
- more than half (53%) are under $500,000, and
- more than ¾ (81%) are under $1 million.

These values must be considered alongside the cost of going to court. One 2014 estimate was that a more straightforward family law case will cost parties $20,000-$40,000, while a complex case can cost in excess of $200,000 to litigate.[34] For many of the clients in our sample, costs in this range would represent a prohibitive proportion of the total value of the shared assets. For some, the cost of going to court would be greater than the value of the shared property.

Satisfaction

Facilitator: And how would you say that mediation has affected your relationship with your [ex-partner]? **Participant:** Probably made it a lot better to be honest, because we hadn't sat down and spoke about anything for you know, four or five months until we sat down in mediation.

Facilitator: Would you say that that the mediation that you did attend has affected your relationship with your ex-partner in any way? Has it changed some things for you? **Participant:** I think if we hadn't gone there would've been maybe suspicion about why do we need to have this sort of agreement in place…Whereas having been through the mediation process we could see this was just about formalising it for clarity as opposed to using it as you know some way of getting back at each other or something like that. So I think that the process that we went through actually helped to de-escalate emotion that might have been linked to that process if that makes sense.[35]

Among those who had participated in FDR at the 3-month follow-up:

- 80% agreed that 'Overall, I am satisfied with the way my mediation was carried out'
- 63% agreed that 'Overall, I am satisfied with the outcome of my mediation'

Analysis shows that **outcome** satisfaction is related to whether or not an agreement was reached, as might be expected. However, clients' satisfaction with the **process** is independent of whether or not an agreement was reached, with clients expressing appreciation of the professionalism and quality of mediation services.

Support to reinstate LADR in Family Relationships Centres, including low cost culturally appropriate FDR

Relationships Australia urges Government to reinstate funding for legally-assisted dispute resolution in FRCs, and to continue to work with the sector to develop, pilot and implement a range of accessible and appealing options for culturally appropriate FDR, while strengthening FRCs (as envisaged by Recommendations 59 and 60 of the ALRC report).[36]

Until recently, funding was available for FDR clients at Family Relationship Centres to have one hour of free legal advice, which was an effective way of delivering much-needed services in a way which was accessible and affordable, and which could enable families to avoid lengthy proceedings over what is often a modest property pool (or debts). Unfortunately, this funding has been withdrawn and clients are struggling as a consequence. In our experience, obtaining legal advice early in FDR can benefit clients by providing 'reality testing' of their expectations, and can be key to setting the scene for successful mediation.

[34] Productivity Commission 2014, volume I, 853.

[35] From interviews conducted as part of the study.

[36] Acknowledging that the Government response to these recommendations was simply to note them: https://www.ag.gov.au/families-and-marriage/publications/government-response-alrc-report-135-family-law-future-inquiry-family-law-system

Legally-assisted FDR is particularly useful in areas where there are limited options for low cost legal services. It can offer families continuity of service provision in the same location (which is highly valued by clients who don't wish to be confronted with new faces at every appointment and obliged to re-tell their stories), who will be less likely to 'fall through the cracks' in moving between services. In the experience of Relationships Australia, clients also benefit significantly from having a meeting with their lawyers before and after FDR sessions. The ALRC supported increased use of legally-assisted dispute resolution for families experiencing property and finance disputes (as in, for example, Recommendation 60).

Relationships Australia supports further work to be done to enable families, who might otherwise be screened out of FDR, to access low cost resolution mechanisms. In our experience, there are very few low cost services available to help low income families who present with multiple co-occurring needs.[37] We note the observation, made in the joint submission from Darebin Community Legal Centre and Fitzroy Legal Service to the ALRC inquiry that

> At present, lack of availability of counselling and mediation services means that for impecunious clients, going to court is often the only option.[38]

This is a perverse outcome.

Additional funding for legally-assisted FDR within the community sector would significantly benefit 'at risk' families, and could be of value in addressing asymmetries of knowledge and power.

Culturally appropriate FDR

Relationships Australia supports the provision of low cost culturally appropriate services, including for property disputes, and therefore agrees with Proposal 5-9 in the ALRC Discussion Paper.

Obligations to disclose

Relationships Australia reiterates its support for Proposals 5-6 and 5-7 in the ALRC Discussion Paper, as qualified by its response to Question 5-3, and its in principle support for Proposal 5-8. It is our experience (and we note that is the experience of various other submitters who responded to the ALRC Issues Paper) that non-disclosure, or tactical protracted non-disclosure, is associated with financial abuse and misuse of systems and processes. Relationships Australia further supports locating disclosure duties in the Act, as suggested by other submitters to the ALRC inquiry.[39]

[37] See also submission 137, Marrickville Legal Centre, 17, which describes this situation as a 'huge gap in service provision.'

[38] Submission 7, paragraph 9.

[39] Noting in particular the comments by the Law Council of Australia at paragraph 221 of submission 43, and those of the Family Law Committee of NSW Young Lawyers, submission 108, 7. That Committee noted its members' experiences that 'vulnerable parties are often forced to initiate court proceedings due to a spouse who consistently hinders settlement by refusing to provide financial disclosure' and that such behaviour rarely has consequences for the recalcitrant spouse.

The Act should prescribe the duties of *parties* involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case.[40]

The Act should set out *advisers'* obligations in providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters.[41] In particular, consideration should be given to imposing obligations on advisers to take all reasonable steps to ensure that parties comply with disclosure duties. Relationships Australia Queensland considers that there should be consequences for FDRPs and lawyers who knowingly facilitate a non-disclosure.[42] Relationships Australia agrees with the Law Council of Australia that more frequent use of costs orders should be encouraged as a suite of responses to breach of disclosure obligations.[43] We note, in this regard, the observation by the Australian Bar Association that 'Costs orders too can be a tool of case management.'[44] Relationships Australia supports the availability of costs orders against parties who have unreasonably failed to comply with the pre-filing requirements described above or (if our recommendation is not accepted and a 'genuine steps' approach preferred) failed to make a genuine effort to solve their differences.[45]

Superannuation splitting

Relationships Australia has recently provided a submission to Treasury, commenting on an exposure draft of a Bill to promote disclosure of superannuation assets.[46]

Relationships Australia reiterates its support for Proposals 3-16 and 3-17 set out in the ALRC Discussion Paper, that the Government:

- amend the Act to require trustees to develop standard splitting orders, and
- develop tools to assist separating couples to develop splitting orders to suit their circumstances.

Family law – property division – intergenerational dynamics

Relationships Australia strongly advocates that the Family Law Act be amended to acknowledge the older family members are affected by family separation, and elder abuse (as intimate partner violence and intergenerational violence) often takes place in a family setting as a continuation of poor and dysfunctional family dynamics in which violence has previously featured. We emphatically agree with the Law Council of Australia that

> With an ageing population there are likely to be more users of the family law system who lack capacity to make decisions about their finances, including the division of assets upon breakdown of relationships. These cases become even more complex where there are adult children of a former relationships of one or both parties, who have a financial interest (by way of testamentary law) in the outcome of the family law property division. The potential for increased elder abuse in the family law context is likely.[47]

Relationships Australia recommends the development of services to older people in the further development of culturally appropriate and safe models of FDR for parenting, property and financial matters. Consistent with broader initiatives relating to age discrimination, ageism and aged care, the Australian Government should take care to include, in its reforms of the Act, consideration of inter-generational conflicts. In this connection, we refer the Department also to our submission to the Joint Select Committee, and our response to paragraph (g) of its Terms of Reference.[48]

Question 26: What other issues should the department consider in developing options to implement recommendation 11 and other agreed recommendations to the property decision-making framework?

No further comment

[40] See ALRC DP86, proposal 5-6; Relationships Australia also supports proposal 5-7, which relates to consequences of intentional failure to disclose.
[41] See ALRC DP86, proposal 5-8. Relationships Australia South Australia provides, on intake, an information pack including materials produced by the Commonwealth Attorney-General's Department. That pack refers to disclosure obligations.
[42] Any framework to impose consequences would need to take into account that FDRPs have a neutral and non-investigative role, which limits their capacity to 'ensure' parties disclose.
[43] Submission 43 to the ALRC inquiry.
[44] Submission 13 to the ALRC inquiry, paragraph 17.
[45] See, for example, the Bar Association of Queensland, submission 80 to the ALRC inquiry, 4.2.3, p 11.
[46] The submission can be found at https://www.relationships.org.au/about%20us/submissions-and-policy-statements.
[47] Submission 43, paragraphs 94-95. See also submission 85 from Seniors Rights Service, noting that 'Older persons may have property interests not only between themselves as a divorcing couple, but also in relation to property interests held by their divorcing children'. (at p 6).
[48] See https://www.relationships.org.au/about%20us/submissions-and-policy-statements/joint-select-committee-on-australia2019s-family-law-system-2013-relationships-australia-national-office-submission .