
The Future of Family Law Property Settlement in Australia: A 50:50 Split or a Community of Property Regime? Some Issues for Women

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Introduction

On 30 March 1999 the Attorney-General released a discussion paper entitled 'Family Law and Property – Options for Reform'.² It proposed two options for significantly changing matrimonial property law – a starting point for dividing the property 50:50 based on the assumption that the parties have contributed equally to the property, and a

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¹ The Women's Legal Service (WLS) is a community legal centre developed and operated by women for women. Our work is grounded in and informed by women's experiences of the legal system and recognises the extent to which violence impacts on women's lives, at all levels of the legal system. We endeavour to use our clients experiences and the trends identified from our own internal research and analyses to effect structural change by ensuring women's experiences, especially of violence, inform legislative and policy reform and development. This paper is grounded in the experiences of our clients. WLS has been operating since 1984 and we are involved in a range of networks at a local, State and national level. We offer free legal advice, information and referral to women in Queensland both by telephone and through face to face interviews. We employ a domestic violence worker who provides support and counselling to women who have experienced domestic violence. A 1800 facility and a designated rural worker ensure that we have contact with women throughout the State. In 1998/99 we provided assistance to over 6000 women. The Service employs staff with a variety of expertise, including solicitors, social workers and community workers. We have an even broader range of expertise in our volunteer base, including legal and social science academics, government policy officers, students, solicitors in private practice and community legal centres and community workers. Our management committee similarly reflects a diversity of skills and comprises women from different cultural backgrounds, including two Indigenous women. This paper was developed in consultation with a sub-committee of volunteer solicitors (three of whom work in private practice and are 'accredited family law specialists' and one solicitor from an Indigenous women's community legal centre), management committee members and staff. Although WLS provides assistance to women on a range of legal matters, approximately 75% of our client contacts relate to family law and domestic violence.

² *Discussion Paper – Property and Family Law: Options for Change* Commonwealth Government, 30 March 1999 (the discussion paper) available at <http://law.gov.au/aghome/commaff/lafs/Familylaw>.

'community of property' system where on the breakdown of a marriage each party gets 50% of the communal property.

The discussion paper shows that, in developing these reforms, the policy makers do not appear to have learnt from recent experience in relation to the *Family Law Reform Act 1995* (Cth).³ That is, they have ignored the expertise of women's groups, their ideas, issues and concerns. As a result the proposed 'reforms' amount to unjust and inappropriate changes to the law. And they have not developed a clear 'rationale' for the 'reforms'. As the Chief Justice of the Family Court has put it, they have not made it clear "... what it is that needs to be reformed and why such reform is necessary."⁴

If either of the suggested amendments were implemented, they would have a disastrous impact on the economic and social position of women and children in Australia. We have no doubt they would lead to an increase in women and children living in poverty in Australia; an increase in women's reliance on social security and government support, and for longer periods; an increase in litigation (especially at the appellate level); and increased reliance on solicitors.

Fortunately, it would appear that at this stage the government is holding back on developing either option fully. In a speech by the Hon Daryl Williams AM QC MP delivered on Wednesday 27 October 1999 to the National Press Club he said that: "... neither option in the discussion paper received significant support. The submissions overwhelmingly supported the retention of the status quo, with some minor modifications, rather than complete replacement of the existing regime."⁵

The Women's Legal Service, Brisbane (WLS) is of the opinion that reform to the property sections of the Family Law Act is probably justified. However, reform must be careful and considered and not reactionary. When the government does decide to

³ Professor Reg Graycar also makes this point in 'If It Ain't Broke, Don't Fix It: Matrimonial Property Law Reform and the Forgotten Majority' an Address to a NSW Bar Association Public Forum, 20 May 1999 available at <<http://www.familycourt.gov.au/papers>> at 1. The last major change to the *Family Law Act 1975* (Cth) took place on 11 June 1996, after the introduction of the *Family Law Reform Act 1995* (Cth), which significantly amended Part VII, the childrens sections. Although the new provisions were heralded as a 'new age' in family law, the three Women's Legal Services in existence at the time (Brisbane, Sydney and Melbourne) and the National Women's Justice Coalition lobbied strongly against a number of aspects of the *Reform Act*. The criticisms of, and the predictions made by women's groups in relation to the reforms have, unfortunately, largely proved correct. See the research of H Rhoades, R Graycar and M Harrison *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* Interim Report April 1999 at <<http://www.familycourt.gov.au/papers>>, and J Dewar and S Parker *Parenting, planning and partnership: The impact of the new Part VII of the Family Law Act 1975* (Griffith University, March 1999). See also comments by the Chief Justice of the Family Court, Alastair Nicholson AO RFD, in A Nicholson 'Proposed Changes to Property Matters Under the Family Law Act' an address to the Bar Association of NSW, 20 May 1999, Sydney at <<http://www.familycourt.gov.au/papers>> at 4.

⁴ Nicholson *supra* n 3 at 3.

⁵ The Attorney-General also said that "one of the difficulties in this area is the lack of comprehensive statistics about the outcome of property settlements. We have some information but we need much more to understand the matrimonial property laws under which we operate." He said he would be speaking to the Australian Law Reform Commission and the Australian Institute of Family Studies about further research. The amendments that he will proceed with will be (1) clarifying the factors which courts can take into account in spousal maintenance and property settlements, (2) resolving the conflict between family law and bankruptcy law, and (3) giving the court power to bind third parties in order to give effect to a property settlement.

amend the property provisions in the *Family Law Act 1975* (Cth) it is important they 'get it right'. Getting it wrong again through ill-informed legislative reform processes, as demonstrated by the *Reform Act* experience, will be at a great cost to the Australian community both socially and economically.

This article considers issues for women arising out of the recently proposed property reforms as a contribution to informing the ongoing debate about Australia's matrimonial property laws. First, it discusses the ill-considered rationale for the reforms, and secondly, it considers the two options and how they would impact on women. Finally, it proposes some important avenues of research which need to be followed before any reforms are seriously developed.

Part 1: An Ill-Considered Rationale For Reform

The discussion paper is a disappointing document. It contains only limited information and makes no reference to empirical research. It does not present as a document that is truly intended to elicit community response, ideas and debate about the issue of matrimonial property division in Australia. Instead it examines only a small aspect of the property settlement regime (namely, the substantive law). It makes almost no reference to legal processes and procedures which affect the equitability of property division outcomes as much as substantive legal issues do.⁶ The emphasis throughout the discussion paper is on finding ways to ensure that the party who made the greatest financial contribution does not feel 'cheated' after their property settlement.

The discussion paper is, in short, predominantly aimed at the concerns of men.⁷ This rationale is not based on clear evidence,⁸ but rather on doubtful and inappropriate assumptions concerning first, changes in the family unit and its social context;⁹

⁶ See on this point the recent report sponsored by the Women's Legal Services Network and the National Association of Community Legal Centres: N Seaman *Fair Shares? Barriers to equitable property settlements for women* (Women's Legal Services Network/National Association of Community Legal Centres, Canberra, 1999).

⁷ Professor John Dewar has also commented that the discussion paper is "... playing to the gallery of the men's groups.": *Making Family Law New? Property and Superannuation Reform in Australia* (forthcoming 2000). The Attorney-General, Daryl Williams, was recently quoted as saying of these groups: "I think the men's groups have changed quite significantly. Some of them are a bit over the top, but there are some who are doing quite a reasonable job." M Cosic 'Uncivil War' *The Australian Magazine* August 21-22 1999 15 at 20. For a brief discussion of the claims of men's rights groups in this context see M Kaye and J Tolmie 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 19 at 59-60.

⁸ The Chief Justice also makes this comment: "... what is lacking from this paper is any empirical research to support the need for change. Such research that is referred to is usually many years out of date. Otherwise reference is made to several Parliamentary Inquiries and to dissatisfaction that was expressed by certain groups and individuals to those inquiries. This is a classic example of the application of the "Squeaky Wheel" principle and should not take the place of proper research.": *supra* n 3 at 4.

⁹ The executive summary of the paper contains the following statement: "Since 1976, the family unit and its social context have changed significantly. Most notably there has been: a growing recognition, and acceptance, that both parties to a marriage contribute equally to the acquisition, maintenance and improvement of the assets of the marriage either as income earner or as homemaker and/or child carer; an emerging tendency for couples to live together before marrying and to marry and have children at a later age; and increased workforce participation by women before and during marriage, meaning that marriage is becoming increasingly recognised as an economic partnership as well as a social relationship." Chapter 4 elaborates on these assumptions.

secondly, the operation of the Child Support scheme;¹⁰ and thirdly, community dissatisfaction and perceptions of bias with regard to the operation of the current property provisions.¹¹

1.1 The Change in the Family Unit and its Social Context¹²

The paper identifies as problematic the fact that the social environment has changed significantly since the current matrimonial property laws were developed. It argues that reform of the current laws is justified on the basis, for example, that there is now societal acceptance that both parties contribute equally to the marital assets either as income earner or child carer and/or homemaker, and on the basis that there has been an increase in paid employment by women. The paper has the audacity to conclude that women are now making an economic as well as nurturing contribution to marriage.

The discussion paper continues under an assumption that the economic position of men and women is now “pretty much equal”, and advocates that the law should reflect this “social reality”. The paper fails, however, to identify (let alone discuss) important issues that clearly show the reality for women is certainly far from the equal ideal.

For example, a social and economic profile of Queensland women in 1999 indicated that 55.2% of women are employed full-time and 44.8% part-time, compared with 87.3% and 12.7% respectively for males. Further, women comprise 60.3% of all unpaid helpers in family businesses in Queensland, women are estimated to contribute 65% of the value of unpaid work in Australia, and average earnings for women are lower than those for men in all occupational groupings.¹³ In addition, the NSW Pay Equity Inquiry Report discusses in some detail the fact that women earn less than men, even when the work they are doing is the same work as men.¹⁴ Further, it is known that women still do most of the work in the home including child rearing work,¹⁵ and Beggs and Chapman have identified that women forego significant earnings as a result of taking time away from the paid workforce to care for their children.¹⁶

¹⁰ The executive summary of the paper states: “Also, the introduction, in 1988, of the Child Support Scheme means that there is no-longer a need for the day-to-day support of children to be taken into consideration in property and spousal maintenance proceedings.”

¹¹ The executive summary refers to reviews of the family law carried out in the 1980s and early 1990s and to “... concerns about the unpredictability of the outcome of cases and the perception that decision-making by the court in property proceedings is arbitrary. These concerns have caused many to believe that decisions about property reallocation are biased towards one of the parties.” The reviews referred to and discussed in Chapter 2 of the paper are: *Family Law in Australia*, Report of the Joint Select Committee on the Family Law Act (Cth) (AGPS, July 1980); *Matrimonial Property (the Hambly Report)*, (ALRC, 1987); *The Family Law Act 1975: Aspects of its Operation and Interpretation* Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975* (Cth) (AGPS, November, 1992).

¹² See also Graycar *supra* n 3 at 2 - 4.

¹³ *A Social and Economic Profile of Women in Queensland in 1999* Office of Women’s Policy, Department of Equity and Fair Trading (Queensland Government, 1999). See also B Pocock ‘All Change, Still Gendered: The Australian Labour Market in the 1990s’ (1998) 40(4) *The Journal of Industrial Relations* 580.

¹⁴ NSW Pay Equity Enquiry Report, December 1998 available at <http://www.dir.nsw.gov.au/pubs/equity/index.htm>.

¹⁵ Graycar, *supra* n 3 at 4 and see the references at n 37 of her paper.

¹⁶ J Beggs and B Chapman *The Foregone Earnings from Child-Rearing in Australia – Discussion Paper No.190*, ANU Centre for Economic Policy Research (Canberra, June 1988).

1.2 The Introduction of the Child Support Scheme Means That There is No Longer a Need for the Day to Day Support of Children to be Taken into Consideration in Property and Spousal Maintenance Proceedings

We absolutely reject the assumption that there is no longer a requirement to consider the day to day needs of children in property settlements on the basis that the Child Support scheme adequately provides for children. This assumption flies in the face of the experience of our clients and no research is cited in support of it.¹⁷

The paper assumes that the scheme has “equalised” any economic disparity that may have followed the marriage breakdown for the residence parent. We suspect that research currently being conducted by the AIFS¹⁸ will show that, although the scheme may have made some improvement to the economic position of women and children (compared to their position before the scheme was introduced), that improvement has not been dramatic.

Women continue to carry the bulk of the economic responsibility for rearing children after marriage breakdown and many continue to live in poverty as a result.¹⁹ In the debate that surrounds Child Support, a lot of attention is given to the amount of money paid by men. Little attention is given, however, to the “true cost” of bringing up children, the infrastructure that is required to raise children and the sacrifices of income and otherwise made by women in fulfilling their ongoing responsibilities to their children. Further, rarely if ever is reference made to the women who receive no child support or less child support than they are entitled to because of domestic violence or because the father is self-employed (and able to minimise his taxable income) or receives “cash in hand”.

All women consulted by the Women’s Legal Services Network (WLSN) in the preparation of their submission on these proposals confirmed that issues related to child support provision are integral to the cost of caring for children for the resident parent and therefore cannot be ignored in determining equitable division of property on the

¹⁷ On the contrary, the findings of the Child Support Advisory Group appointed in September 1989 to evaluate the Child Support scheme reported that the overall collection rate for stage two of the scheme was only 50%, commenting that this was “unsatisfactory and must be improved”: Child Support Advisory Group *Child Support in Australia: Final Report of the Evaluation of the Child Support Scheme, Volume 1 - Main Report* (AGPS, 1992) at 300. That Report also noted problems with enforcement of child support liabilities - id at Chapter 14. See also Parliament of the Commonwealth of Australia, *The Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme* (AGPS, Canberra, 1994). There are many social and political issues relating to non-compliance with child support obligations for both women and their children. In terms of issues concerning the interests of children, Ross Hyams argues that the lack of adequate enforcement under the scheme is arguably a breach of article 27(4) of the United Nation Convention on the Rights of the Child: R Hyams ‘The Child Support Scheme - Failures of the First Decade’ (1997) 22(1) *Children Australia* 6 at 9.

¹⁸ The Australian Institute of Family Studies is soon to publish a Report from the Australian Divorce Transitions Project which will update the earlier Settling Up and Settling Down projects researching the economic consequences of marriage breakdown.

¹⁹ The Women’s Legal Services Network (WLSN) puts it this way: “The facts are that child support does not cover the full costs of caring for a child, many liable parents do not pay what they are supposed to pay and others try to avoid paying.” Women’s Legal Services Network *Submission in Response to Property and Family Law – Options for Change* Attorney-General’s Department (Canberra, 1999) at 9. Graycar has also said that “... many children still receive no child support, either because their non-custodial parents cannot pay or will not pay.” Graycar *supra* n 3 at 2.

breakdown of a marriage. To prevent consideration of these issues "... will create a system which ignores the economic disadvantage which flows from being the primary care-giver".²⁰

It should also be noted that women's groups have predicted that the changes to the Child Support scheme, which have just come into effect, are likely to seriously disadvantage women.²¹ The new formulae tend to reduce the likely child support assessment which a woman with dependent children will receive. Further, the increased privatisation of collection may result in an increased failure to pay by the non-residence parent.

It is inappropriate therefore that the government should consider changes to the *Family Law Act* which depend on assumptions about an effective Child Support scheme which are highly questionable.

1.3 Perceptions of Uncertainty and Bias

The discussion paper argues that change from the present system is further justified by community concerns about "unpredictability of outcome" and a "perception of bias towards one of the parties".²²

Who holds the asserted perceptions of bias? Most of the complaints about bias in financial matters in the family law system are from men.²³ Men's groups want to emphasize financial contributions and downplay the importance of the non-financial contributions made by women. They generally favour the introduction of a system of formal equality and a 50:50 outcome. Dealing with this perception of bias is not, however, a matter for legislative amendment to the substantive law. Rather it requires a public education campaign about the value of women's work.

It is true that some uncertainty in matrimonial property law arises out of the broad judicial discretion allowed in the determination of disputes.²⁴ The principle behind this judicial discretion is to provide for case-by-case justice by allowing a flexibility of

²⁰ WLSN *supra* n 19 at 9. On the point of women's economic disadvantage after separation see references in n 39 below.

²¹ For a discussion of the amendments see M Harrison 'Recent Issues and Initiatives' (1999) 52 *Family Matters* 61. Graycar's comment on the amendments is that they "... entrench poverty traps for residence parents, most of whom are women on low incomes." Graycar *supra* n 3 at 2.

²² Again these concerns are not referenced, although in Chapter 2 it is clear they have arisen from the Joint Select Committee Report on Certain Aspects of the Operation and Interpretation of the *Family Law Act* 1992. Information contained in Chapter 2 advises that the "bulk of the submissions critical of the discretionary approach were from *individuals*". Of the individuals listed as having provided submissions to the Inquiry, most are men. See Graycar *supra* n 3 at 2.

²³ Kaye and Tolmie have commented: "Some fathers' rights groups have submitted that women are getting the better matrimonial property deal on divorce, although their claims are not generally supported by the research in this area.": *supra* n 7 at 59.

²⁴ *Family Law Act* 1975 (Cth) s 79(4)(e) provides that the matters referred to in s 75(2) as far as they are relevant shall be taken into account in considering what property orders should be made. Section 75(2)(o) provides that amongst the matters the court can consider is "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account."

approach and response.²⁵ Some possible disadvantages arise for women from such a system. For example, the judge's subjective assessment of individual cases is based on his or her own personal values which may not, for example, value women's unpaid work in the home;²⁶ discretionary rules tend to disadvantage a more risk averse negotiator;²⁷ and "... uncertainty about outcome in court probably increases transaction costs" because "[a] lawyer may be necessary simply for a person to learn what his (sic) bargaining chips are."²⁸ The financial position of women post separation means they are far less able to bear the burden of legal costs than their former partners.

The court cannot, however, exercise its broad judicial discretion to make unjustified or arbitrary decisions, as reasons for judgment are always required.²⁹ Even the discussion paper concedes that, notwithstanding the broad judicial discretion, it is possible to discern from decisions a "going rate" at a particular time in relation to property distribution. Also, Bordow and Harrison's research (which is not referred to in the discussion paper) concludes that there is quite a consistency in court decision-making. Further, in a research report into women and property settlements commissioned by the Women's Legal Services Network and the National Association of Community Legal Centres, not one solicitor favoured a move to a less discretionary system.³⁰

The alternative to a discretionary system is a rules based system such as the one proposed in option two regarding a community of property regime.³¹ It might be said

²⁵ It has been said that discretion "... gives a judge authority to respond to the full range of circumstances a case presents and thus to do justice in each individual case.": CE Schneider 'The Tension Between Rules and Discretion in Family Law: A Report and Reflection' (1993) 27 *Family Law Quarterly* 229 at 234. This individual treatment of cases requires that the standards applied by officials must not be applied mechanically, but rather with the use of judgment: see R Dworkin *Taking Rights Seriously* (Duckworth, London, 1977).

²⁶ MJ Bailey 'Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Claims' (1989) 8 *Canadian Journal of Family Law* 61 at 66. Although it has been said that "... the dangers of discretion are blunted the higher the calibre of those exercising it" (SD Sugarmann 'Family Law for the Next Century' (Background and Overview of Special Conference of the Family Law Section of the American Bar Association) (1993) 27(2) *Family Law Quarterly* 175 at 177), the appointment of judges is often based not on the calibre of their ability and experience, but on, for example, political expediency.

²⁷ Risk-aversion is a significant factor for women in the outcome of pre-trial negotiations and 'door of the court' settlements. That is, as women have been identified as being potentially more risk-averse than men, they are perhaps more easily encouraged to settle prematurely, and possibly against their interests, on the basis that a litigated outcome is too uncertain. See discussion, for example, in JH Wade 'In Search of New Conflict Management Processes: Part II' (1995) 10(3) *Australian Family Lawyer* 16 at 19, PE Bryan 'Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation' (1994) 28 *Family Law Quarterly* 177 at 197, and R Field 'Participation in Pre-Trial Legal Negotiations of Family Law Disputes: Some Issues for Women' (1998) 12 *Australian Journal of Family Law* 240.

²⁸ RH Mnookin and L Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950 at 979.

²⁹ The Chief Justice confirms in his paper that "... in the early stages of the Court's history the Full Court made it clear in a number of cases including *Horsley and Horsley*, *Merryman and Merryman*, and *Davut and Raif* that a failure by a judge to give full and adequate reasons is an error of law that will lead to the judgment being set aside": *supra* n 3 at 4.

³⁰ Seaman *supra* n 6. Further, in a survey of Queensland solicitors conducted in 1995 regarding the discretionary nature of childrens matters, again the discretionary system was endorsed: R Field, 'The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: A Survey of Queensland Family Law Solicitors' (1996) 7(1) *Australian Dispute Resolution Journal* 5 at 8-9.

³¹ For a discussion of rules in the context of family law see Schneider *supra* n 25 at 236 - 241.

that rules allow for rational planning,³² and "... make even-handedness easier to demonstrate and perceive".³³ But it should also be remembered that rule interpretation is "adjudication's home ground".³⁴ And certainty is by no means assured in an adjudicatory system where the exception to the rule may win the day.

So why is there emphasis on the apparent arbitrariness of the present system and finding an alternative regime? The emphasis is a reflection that it is the voice of men's groups that has been heard and responded to in forming the bases for the two proposed reform options. 'Perceptions and feelings' about bias and arbitrary decision-making are not however a basis on which substantial changes to the *Family Law Act 1975* (Cth) can be justified. As women's advocates it is particularly frustrating to observe the system's apparent willingness to accommodate the concerns of men about bias, even though no empirical data has been presented, while for example single women with dependent children continue to represent one of the poorest groups in Australia. In part 3 below we advocate that any changes to matrimonial property law should be based on empirical research, and not on 'perceptions' and 'feelings'.

Part 2: The Options for Change

The two options outlined in the discussion paper are considered below from the perspective of their impact on women. We consider matters of concern that are common to both options and then issues arising from each option individually.

The discussion paper summarises the first option as follows:

The first option is a "separate property" regime, similar to that currently in existence. Under this approach parties own their own property and all property, regardless of when it was acquired, is available for reallocation by the court on marriage breakdown. The major difference between this option and the current law is that the starting point for the redistribution of the property would be equal sharing, based on the assumption that each party had contributed equally to the property. The court would retain its discretion to depart from the equal sharing."³⁵

This option is in effect a reincarnation of the *Family Law Reform Bill (No.2) 1995*. Of the two options it is the closer to the current system. The 50:50 starting point is based on the assumption that each person has contributed equally to the property. The party who believes they have made a greater contribution or have greater future needs bears the onus of proving their claim to more than 50% of the property.

The discussion paper summarises option 2 as follows:

³² 'Bargaining in the shadow of the law' is a phrase used to describe the process of negotiation whereby the law "... gives each parent claims based on what each would get if the case went to trial." Mnookin and Kornhauser *supra* n 28 at 968.

³³ Schneider *supra* n 25 at 240. First, because on the face of it rules apply across the board and parties are therefore ostensibly equal, and secondly, because rules are perceived as ensuring a consistency of approach to cases and the suppression of individual judicial opinions and biases. These perceptions are not necessarily borne out in reality however. For example, some rules only exist as an adjunct to their exceptions.

³⁴ J Effron 'Alternatives to Litigation: Factors in Choosing' (1989) 52 *Modern Law Review* 480 at 487.

³⁵ Discussion paper *supra* n 2 executive summary at 2.

The second option is a “community of property” regime under which communal assets will be defined to be: those assets acquired during the period of cohabitation/marriage by each of the parties, whether in separate or joint names; and the net increase in value, over the period of cohabitation/marriage, of all earlier acquired property. On marriage breakdown, each party would get 50% of the communal assets and there would be no need to look at contribution. There would be an ability to depart from the 50/50 sharing in certain circumstances.³⁶

This option is significantly different from the current system. The bases on which a departure from the 50:50 split could be argued are those of future needs or the economic consequences of the marriage and its breakdown.

Concerns For Women Relating to Both Options

Both options are said to be based on a notion of equality. The rhetoric of equality is politically persuasive but it does not necessarily lead to equity, particularly on issues of property division.³⁷ This is simply because the financial circumstances of women after the breakdown of a marriage are not the same as those of men.³⁸

A decrease in value of non-financial contributions

Our first concern relates to what will amount to a decrease in value in 'real terms' of non-financial contributions under both options. Many women contribute to a marriage in a non-financial way by, for example, providing domestic services and caring for the children.

The options are deceptive in their appearance. The rhetoric is that the value of non-financial contributions will be protected because the proposals value them equally to financial contributions. However, the proposal to allow the use of pre-nuptial and post-nuptial financial agreements to exclude assets from the matrimonial pool means that an avenue for the protection of financial contributions exists which will not apply to non-financial contributions. In practical terms, it does not matter if the law provides that financial and non-financial contributions are considered equal if, in real terms many of the financial assets are 'locked out' of the process by financial agreements.

We envisage particular problems for young women who marry older, asset rich men but who agree to sign a pre-nuptial agreement. For example, we often see women who have immigrated to Australia to commence marriages with older men. They are usually financially dependant on their husband and often are without friends or family for support. Under the proposed changes these women would be extremely vulnerable, and

³⁶ *Ibid* at paras 11 and 12.

³⁷ On this point see the work of M Fineman. For example M Fineman *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (University of Chicago Press: Chicago, 1991).

³⁸ See P McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice Hall of Australia, Melbourne, 1996) and K Funder et al *Settling Down: Pathways of Parents After Divorce* (AIFS, Melbourne, 1993). See also for US and international perspectives on this issue: LJ Weitzman *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, New York, 1985) and LJ Weitzman and M Maclean (eds) *Economic Consequences of Divorce: The International Perspective* (Clarendon Press, Oxford, 1992).

may even be left without assets of sufficient value to establish themselves in reasonable circumstances in Australia.

A Focus on Men's Issues

The two options are put forward as a way of addressing the 'perceived bias' in the Court towards women in property settlements – a catch cry of the men's rights groups. However, neither option acknowledges the disparities in living circumstances of men and women after separation and there is no empirical evidence provided to support the claim that men's assets are unjustly exposed to attack in the Family Court.

On the contrary, the issue of the 'feminisation of poverty' and the detrimental impact the roles a woman takes in marriage have on her capacity to provide for herself and/or her children after separation are now widely acknowledged.³⁹ Both proposals do nothing to address or alleviate the "feminisation of poverty", rather they will successfully entrench it further in Australian society. Also, Bordow and Harrison's research into property decisions in 1994 confirmed that the shorter the marriage the more likely it is that parties will return to the pre-marriage status quo. This means in effect that the present system already provides sufficient protection for any assets a man might bring to a brief marriage.

Further, the 'Fair Shares Report' published in 1999⁴⁰ clearly identifies a number of barriers to equitable property settlements for women, none of which is addressed by either option for reform. The most significant barriers include: the lack of availability (in practical terms) of legal aid for property settlements; the push towards informal dispute resolution processes, such as mediation processes, which lead to inequitable results for women; the failure of the Family Law Act to deal effectively with debt; the problem of obtaining a just result in relation to a small property pool; ineffective and expensive court discovery processes which occur too late in the proceedings; and of course the impact of violence.

Interestingly, issues of the substantive law and the provisions of ss 79 and 75(2), which are the main focus of the reform options, were not identified as significant issues for women. This is because for women, the real inequities in matrimonial property settlements do not generally result from the application of the existing substantive law. Rather they result from process issues, 'access to justice' issues and violence.

The discussion paper has not dealt in any way with these matters - the main issues of

³⁹ See P McDonald (ed) *ibid*, K Funder et al *ibid* and for example, J Rea 'The Feminisation of Poverty: An International Perspective' in KP Hughes (ed), *Contemporary Australian Feminism 2* (2nd edn, Addison Wesley Longman Australia, Melbourne, 1997) at 276; S Shaver 'Poverty, Gender and Sole Parenthood' in R Fincher and J Nieuwenhuysen (eds) *Australian Poverty: Then and Now* (Melbourne University Press, Melbourne, 1998) at 276; M Kumar 'Justice Sally Brown: Educating the Bench' (1995) 6(2) *Polemic* 93; M Neave 'Women, Divorce and Redistributing the Cost of Children' in A Edwards and S Magarey (eds) *Women in a Restructuring Australia: Work and Welfare* (Allen and Unwin, Sydney, 1995) at 223. For a Canadian perspective see MJ Mossman and M Maclean 'Family Law and Social Welfare: Toward a New Equality' (1986) 5(1) *Canadian Journal of Family Law* 79.

⁴⁰ *Supra* n 6. When the Women's Legal Services Network and the National Association of Community Legal Centres commissioned this research into the issue of women and property settlements both associations knew matrimonial property reform was on the government agenda, however the current discussion paper had not been released.

concern for women. It has only dealt with the main issues of concern for men – perceptions of bias and uncertainty, and obtaining a 50:50 result. It is little wonder that women's groups are concerned about the proposed options for reform and the ultimate impact they will have on the economic position of women and children.

2.1 Lack of Certainty

Both options presuppose a lack of certainty about the present system.⁴¹ The discussion paper envisages that the changes proposed would enable people to predict more accurately the likely outcomes of a property application, and therefore, assist them in their negotiations.⁴² It also argues that it would decrease the number of property disputes that need to go to the court for resolution.

There is no evidence, as far as we are aware, of an overload in litigation in the property area.⁴³ In our experience, the matters that are litigated at the moment involve small to medium property pools. These matters also usually involve issues such as domestic violence (where there is an intractable party); non-disclosure of assets; and 'unusual' contribution issues such as gifts, inheritances and personal injuries claims.

The proposals will provide no greater certainty for these matters and they will continue to be litigated.

The assumption is also made in the discussion paper that the inclusion of the 'catch all' provision, "any other fact or circumstance" in the "future needs" component is the major reason for the lack of certainty under the present law, as it makes the court's discretion effectively unlimited. No research is referenced that proves this statement. Instead, the Attorney-General's Department has called on those groups making submissions about the reforms to examine the use to which the current 'catch all' factor has been put. With respect we believe that it was the role of the Attorney-General's Department to have conducted this research prior to proposing amendments to the legislation. It is not the role of community groups, interested agencies and individuals to conduct research on behalf of the government. The process of community consultation is important but it should not be a substitute for thoroughness in policy development.

2.2 Mathematical and Formulaic Approach Will Lead to an Increase in Litigation

Both Option 1 (when considering the use of 'binding financial agreements') and Option 2 take an extremely mathematical approach and support the proposition that 'you take out what you brought in' (as long as it is a financial asset). The issues are complex, however, especially if 'binding financial agreements' are in operation. This complexity will inevitably provide fodder for litigation hungry parties and we are surprised that the options are touted as leading to a *decrease* in litigation.

The government does not have to look any further than the Child Support scheme for

⁴¹ See discussion in section 1.3 above.

⁴² The concept of bargaining in the shadow of the law was first articulated by RH Mnookin and L Kornhauser in 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

⁴³ Rather the overload is in children's matters.

evidence of how a formulaic approach to legislative drafting has created an explosion of litigation through review processes and court applications. In New Zealand the community of property regime is said to have become a "fertile field of litigation".⁴⁴ And the discussion paper itself even refers to the United Kingdom experience, where a proposal to introduce a system similar to Option 1 based on a presumption of equality was abandoned because of the concern about costly consequential litigation.

A formulaic approach will also increase the likelihood that litigants will appeal decisions. Under the current discretionary system, if parties obtain a judgement within the 'accepted range' then it is unlikely the disgruntled party will take a chance on appealing the decision to the appellate jurisdiction. The introduction of a more rigid system will mean there is no longer a 'range' of accepted outcomes. Judicial decision-making will be more constrained thus making it easier to appeal decisions. With the practice of self-representation becoming more acceptable, we would not be surprised if there is a substantial increase in the numbers of matters proceeding to the appellate court.

2.3 Concerns for Women Arising From Option 1 – Separate Property Subject To Reallocation - 50% Starting Point

The first concern here is that there is no doubt that the 50:50 starting point will become an end point for many women. This is because even though the government may argue the 50% division is only a starting point, the policy emphasis on equal sharing will certainly be used by men and their lawyers to promote the idea that a 50% split is the new way property settlement is determined.⁴⁵ We can anticipate this on the basis of the documented responses by men to the 1996 children's changes. For example, the emphasis placed on the children's right of contact with both parents has been interpreted by some fathers as giving *them* a right of contact with their children.⁴⁶

Equally divided property will inevitably result in more women and children living in poverty in Australia and an increased reliance on social security and for longer periods of time. This is because, as we have said above, an equal division of the assets of a marriage does not equitably reflect the impact a marriage and its breakdown have on women.

Bordow and Harrison have conducted research which indicates that currently 50:50 property splits almost never occur.⁴⁷ This indicates an awareness in the Court's development of the law in this area of the way property needs to be divided to reflect an equitable settlement. It also means that any legislative scheme which increases the

⁴⁴ Judge P Boshier 'Developments in Matrimonial Property' in papers presented at the Family Law Conference of the Family Law Section, New Zealand Law Society, 31 August – 2 September 1998, Christchurch, New Zealand at 51.

⁴⁵ Steven Strickland QC has said of the impact this may have on women: "I am concerned that this 50/50 division perception will pervade the community to the effect that the weaker party to the marriage, usually the parent with the care of young children, will believe (accurately) that unless they go to court, 50/50 is all they will get. ... This option may turn back the clock on matrimonial property law in Australia": S Strickland QC 'Property Law: A New Era' Campbell Chambers Adelaide, 1999 at 6-7.

⁴⁶ Rhoades et al *supra* n 3.

⁴⁷ S Bordow and M Harrison 'Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases' (1994) 8(3) *Australian Journal of Family Law*.

likelihood of a 50/50 division of property will represent a radical change to the current law which the community will find confusing.⁴⁸ It is clear that, based on experience in relation to the changes to the children's provisions, this uncertainty will fuel the arguments of men's groups that the "reforms" are their reforms.

The second concern for women in relation to option 1 concerns the downgrading of future needs. Under the present system 'future needs' are considered automatically, at the same time as contributions are assessed.⁴⁹ It is unclear, but would appear from the discussion paper, that under option 1 future needs will not continue to be considered 'as a matter of course'.⁵⁰ If the relevance of future needs is downgraded this will be very damaging for the quality of life of women and children in Australia, post separation. This is because it is often through taking account of the future needs of women and their children that the Court can compensate women for any economical disadvantage suffered by them as a result of their role in the marriage, and/or their need to provide for the future care of the children. Currently, it is often the future needs component of a woman's case that results in a property settlement of more than 50% in her favour.

A third concern for women in relation to option 1 is the inclusion, in the factors for consideration in the prospective component, of whether a person is supporting a new de-facto partner. It is our experience from discussions with clients that men often enter new relationships after marriage breakdown more quickly than women. This means that it is far more likely that the man will be in a new relationship by the time of any trial or negotiated process. Consequently, it is far more likely that a woman will be disadvantaged in a property settlement as a result of her former husband's new relationship. This may particularly affect older women whose partners commence relationships with younger women, but who may be far less likely themselves to enter a new relationship before the trial. We argue that the first wife and children should not suffer economically out of the property settlement because the husband has chosen to enter another relationship.

In Queensland it is ironic that a man's relationship with a new de-facto spouse may reduce his financial obligation to his first family, but if he eventually separates from the de-facto, there are no sufficient laws to protect her rights in a de facto property settlement. The obligation on the man to contribute to his families would be minimised on each occasion. It is little wonder women feel alienated by the legal system.

The fourth concern about option 1 relates to the discussion of spousal maintenance.⁵¹ Currently, in our experience, applications for periodic spousal maintenance by women are rare. They are largely limited to cases of older women (without dependent children

⁴⁸ As Steven Strickland has put it: "Although we as lawyers understand the concept of a presumption and the ability to rebut the same, the fact that will stick in the minds of the public when they hear of these changes is that 50% is all you will get (or have to pay) unless the case goes to court, and it will take years for the legal culture to reorientate itself to the present situation where a mass of decided cases, developed over the 20 plus years during which the Act has been in operation in its present form, have made it clear that the 'starting point' in cases where a parent has the day to day care of young children and is in a financially weaker position than the other party is that he or she will receive substantially more than the other party." Strickland *supra* n 45 at 6.

⁴⁹ *Family Law Act* 1975, s 75(2).

⁵⁰ Note that the JSC recommendations definitely downgraded consideration of future needs, as did the 1994 Bill.

⁵¹ See discussion paper *supra* n 2 at paras 5.21 – 5.28 and paras 5.23 and 5.25 in particular.

and with no independent income) who bring interim claims to assist with their financial survival while awaiting the property trial. Lump sum claims are only made as part of the global claim in property applications. The paper, however, refers to (again without an adequately referenced source for the claim) "considerable confusion and community perceptions that the court is overcompensating when making property orders because, for example, the proposed property allocation is adjusted on the basis of the future financial needs of a spouse without precluding the making of an order for spousal maintenance."⁵²

The proposal then, to stop women from making later additional applications for spousal maintenance, in effect results in a requirement that spousal maintenance claims be considered as a part of the property proceedings. But current family law practice in this area is in fact for this to be done. That is, it is current standard practice to ensure that an agreement which sets out the terms of the property settlement also finalises any spousal maintenance claims. Further, the provisions of s 77A and s 87A of the *Family Law Act* require the amount relating to spouse maintenance to be specified.

Separate spouse maintenance claims are not, therefore, a regular feature of litigation in the Family Court. And the "confusion and community perceptions" the paper refers to are again merely the assertions of a few misogynist activists who have caught the ear and sympathies of the policy makers. To entirely preclude the making of a later application for spousal maintenance may, however, cause injustice for some women.

Finally, neither option addresses the issue of violence appropriately or sufficiently. The paper recognises (very briefly) that family violence could be relevant as both a retrospective and prospective factor to be taken into account when adjusting property under option 1.⁵³ However, under option 2 there seems to be no room for taking violence into account. This significantly reverses the recent developments in this area and there is no rationale provided for this.⁵⁴

2.4 Concerns for Women Arising From Option 2 – Community Of Property Built Up During Cohabitation/Marriage

As with Option 1, Option 2 is presented in a way that is apparently equality based and which 'values' non-financial contributions. However, in practice it is about the protection of assets and financial contributions, which will mainly benefit men. The losers will be women and consequently the children they care for.

Our general concerns for women arising out of option 2 are based on the experiences of women in New Zealand where there is also a communal property system in operation. The contemporary research emanating from New Zealand about the impact of the legislation is that "... it is not serving families well into the 1990's and is out of step with social change. It is said to be operating harshly on women."⁵⁵

⁵² *Ibid* at para 5.23.

⁵³ *Ibid* at paras 5.15 and 5.17.

⁵⁴ See *Response of the Family Court of Australia to the Discussion Paper 'Property and Family Law: Options for Change'* Family Court of Australia, July 1999 available at <<http://www.familycourt.gov.au/papers>> at para 53.

⁵⁵ M O'Dwyer 'More than Money and Bricks and Mortar: Development in Matrimonial Property' in papers presented at the Family Law Conference of the Family Law Section, New Zealand Law Society, 31 August – 2 September 1998, Christchurch, New Zealand at 73.

More specifically, we are particularly concerned with a number of issues. First, there is no justification offered for such a significant departure from the current system. This issue has been the subject of discussion by the Family Court which has said that Option 2:

... would represent a dramatic change from the position which has existed in Australia in relation to the property rights of persons who are or were married, not only since the 1975 Act, but since its predecessor, the *Matrimonial Causes Act 1959*, and previous state and colonial legislation and at common law. There is nothing in the discussion paper which demonstrates a need for such a change.⁵⁶

Secondly, the narrow definition of what will constitute 'communal property' will work effectively to reduce the property available for division. This issue may work to the significant disadvantage of rural women, as is illustrated by the following example provided in the submission by the WLSN:

The only property of the marriage is a property bought into the relationship by one party, such as a farm or business. Although both the husband and the wife work hard in the business or on the farm for 10 years, its value only increases slightly. Under a community of property system as set out in the discussion paper, the wife in those circumstances would walk away from her 10 years of work with half of the small increase in value of the property, not half of the whole value of the farm or business. This represents minimal recognition of her contribution during the relationship.⁵⁷

Thirdly, the limited scope under the option for providing for the future needs of the parties may create significant injustices for women. One of the alternatives for taking future needs into account offered in the paper is a limited list of factors for consideration similar to the current list in s 75(2) but which would exclude the "catch-all" provision allowing the consideration of "any other fact or circumstance."⁵⁸ The Family Court has commented that this proposal "... appears to ignore the cases which have used this sub-paragraph to produce an equitable result in unusual sets of circumstances."⁵⁹ The use of the current "catch all" provision is relatively rare but it does provide for a just outcome in economic circumstances which are outside of the norm. We would argue that for this reason it is an important provision for the protection of the interests of women, who might otherwise fall victim to their husband's unusual structuring of finances and property.

And finally as we commented above, the uncertainty surrounding the option and the way it would work in practice will inevitably create an increase in litigation – something women cannot afford.

⁵⁶ Family Court of Australia *supra* n 54 at 8.

⁵⁷ WLSN submission *supra* n 19 at 18.

⁵⁸ See *Family Law Act 1975*, s 75(2)(o).

⁵⁹ Family Court of Australia *supra* n 54 at 10.

Part 3: Further Research Required

If the government is to make gender appropriate reforms to the matrimonial property laws then, as the Attorney-General has acknowledged,⁶⁰ it needs to obtain a more accurate picture of how property settlements are currently negotiated. Research in this area should be focussed on consent orders and out-of-court agreements, not case-law. This is because the majority of property matters in family law are settled outside the court. Bourke supposes that the reasons for this include that parties believe they can do a better job and want to avoid solicitors fees and other transactions costs.⁶¹ We would add, many women settle out of court and often without any formal agreement for reasons such as: domestic violence, the property pool is too small to litigate over, and there is no legal aid for property settlements to allow women to pursue their proper entitlement.⁶²

Research is made difficult, however, by the fact that there are often no consent orders in these circumstances and no 'real' agreement. The women often simply 'walk away' as it would be too dangerous to do otherwise. Where there is domestic violence, no matter what the size of the property pool, many women will settle for substantially less than their equitable entitlement to avoid confrontation. We have little doubt that the AIFS study into violence and property settlements will evidence this assertion.

When the government does decide to act in reforming the matrimonial property laws it is crucial that the development of any future proposals be informed by a number of important research projects/investigations which are either being currently conducted or have recently been completed. These projects include: the Australian Divorce Transitions Project by the Australian Institute of Families Studies (AIFS); an AIFS study into the impact of violence on property settlements commissioned by the Office of the Status of Women (which we understand is completed but has not been released publicly); and, finally, the Family Law Council's response to the discussion paper on *Violence and the Family Law Act: financial remedies*.

Conclusion

The future of matrimonial property law in Australia must not be determined by reference only to the agenda of men's rights lobbyists. The *Family Law Act 1975* (Cth) affects the lives of so many Australians. Reform of its provisions should therefore be based on empirical research and evidence and not on the *unproven* concerns of particular groups. It must also be founded upon a serious policy objective. To achieve this government should access the expertise and knowledge of women's groups such as the National Women's Legal Services Network and the National Women's Justice Coalition on matters of special concern to women and children.

⁶⁰ See Introduction and n 6.

⁶¹ S Bourke 'Matrimonial Property Law: A Discussion of the Reform Options' an address to a NSW Bar Association public forum, 20 May 1999, available at <<http://www.familycourt.gov.au/papers>> at 6.

⁶² See, for example, the Access to Justice Advisory Committee *Access to Justice – An Action Plan* (AGPS, 1994).