FAMILY LAW COUNCIL

SUBMISSION ON THE DISCUSSION PAPER

PROPERTY AND FAMILY LAW: OPTIONS FOR CHANGE

July 1999
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EXECUTIVE SUMMARY

EXISTING WORK OF COUNCIL

1. When submissions were sought on the options for property reform canvassed in the Government’s Discussion Paper, Council had already done a considerable amount of work on related issues: principles of a good property law;¹ violence and financial remedies under the Family Law Act 1975(Cwlth),² and the interrelationship of spousal maintenance and the clean break principle. Council considered it appropriate to incorporate that work into this Submission to present an integrated approach to property reform, even though these issues were not given particular prominence in the Discussion Paper.

IDENTIFYING ISSUES FOR REFORM

2. Certain assumptions in the Discussion Paper are considered to be somewhat simplistic, such as. the assumption that certainty of outcome can be achieved by reducing or eliminating judicial discretion, or that equal division of property can be justified on the basis that women are more economically active and therefore must be economically equal to men. More fundamentally, in Council's view the Discussion Paper did not make a persuasive case that the present law is in need of reform. For that reason, Council has taken a starting point on neutrality about the respective merits of the present law and alternatives to it (Chapter 1).

3. A constructive assessment of the issues and challenges in reforming family property law is attempted in Chapter 2. The issues include identifying the basic purpose or principles of property law, transparency or clarity in the legislation, access to justice
either through legal advice, legal representation or legal materials (for the self-represented litigant), and assisting or promoting private settlement of cases.

4. Council also developed a set of principles for a good law against which to measure the effectiveness of the present law and the options in the Discussion Paper, as well as to provide a benchmark for reformers of the law. These principles, set out in Chapter 3, are: the law should reflect the equal status of husband and wife; the law should conform to community values; the law should, as far as possible, be transparent and certain; it should be adaptable, promote settlement between the parties, provide for timely and just adjudication, and harmonise with other laws. These principles were drawn upon in the consideration of the merits of various possible approaches to the law. In accordance with the invitation in the Discussion Paper, Council took a broad approach in responding to the Discussion Paper, and did not confine itself simply to a review of the two options canvassed in the Discussion Paper.

EXAMINING REVIEWS, RESEARCH AND OTHER MODELS OF THE LAW

5. Chapter 4 contains an examination of earlier reviews of the Family Law Act, and some of the relevant Australian research of the last two decades. The examination revealed recurring (and sometimes inconsistent) themes, such as a desire for certainty and clarity in the law, or a need to address inequalities arising from the marriage breakdown, particularly those inequalities causing economic hardship to the primary carer and the children.

6. Legislative models from England, Scotland and New Zealand, and proposed models for legislation, such as those prepared by the Australian Institute of Family Studies (AIFS) and the American Law Institute (ALI), are considered in Chapter 5. Partly because of a lack of information about their practical operation and whether their consequences are perceived as just in those jurisdictions, these models do not necessarily
lead to easy answers. But they do illustrate a variety of ways to approach the problems that are common to all jurisdictions. One lesson appears to be that it is very difficult to design a law that does justice in a wide range of factual circumstances without relying to some extent on judicial discretion or (as in the case of the ALI proposals) a very complex set of rules.

7. The survey in Chapter 5 does yield an interesting and helpful insight, however. It is developed in **Chapter 6**. This is that all models, real and proposed, seem to fall into two stages. The first involves either the assessment of contributions (the present Australian law) or the application of some rule or presumption, usually that the property, or part of the property designated as communal or matrimonial property, should be equally shared between the parties. The second stage is more flexible, allowing the law to take account of the particular circumstances of each case. While imperfect, like any such conceptual analysis or model, Council has considered this useful in analysing the issues and comparing different approaches. We refer to the two stages throughout the Submission as ‘the First Stage’ and ‘the Adjustment Stage’. Important issues of policy arise in relation to both stages. Under the Adjustment Stage, in particular, it is an important question whether the law should involve an adjustment based on the general economic circumstances of each party, or rather be limited to compensate for inequalities that can be shown to have been brought about by the circumstances of the marriage.

**CONSIDERING THE PRESENT LAW AND THE OPTIONS**

8. **Chapters 7, 8 and 9** review in turn the present law, Option 1, and Option 2. An attempt is made to identify the practical operation of each system. Each is assessed against the principles for a good law previously identified. In **Chapter 10**, a set of case studies is used to illustrate the operation of the three possibilities. This discussion provides much of the basis for the recommendations. In summary, the discussion shows that the impact of Option 1, and the extent of its difference from the present law, depends
very much on the way it is drafted. In particular it depends on whether the First Stage involves a presumption of equal contributions, or also the presumption that equal distribution is an appropriate outcome. Option 2 is shown to have a similar application to the present law and Option 1 in some circumstances, but a very different application in others.

**CONCLUSIONS**

**First Stage and Adjustment Stage**

9. Although the Discussion Paper links particular versions of what Council calls the ‘Adjustment Stage’ respectively to Options 1 and 2, in Council's view it would be possible to link any of the Adjustment Stage approaches with any ‘First Stage’. In this summary, therefore, we focus on the first stages of Options 1 and 2 before considering the Adjustment Stage.

10. Council's main conclusions may be summarised briefly as follows.

**Option 1 (the First Stage)**

11. The Discussion Paper proposes that Option 1 contain a rebuttable presumption of equal division of the assets. In Council's view such a presumption, applicable to all marriages, does not reflect the law as it was prior to the decision in *Mallet v Mallet*\(^3\) (*Mallet*) and should not be supported.

12. Council has also considered whether there should be a rebuttable presumption of equal sharing drafted so it arises only in certain situations, reflecting the case law as it was before the decision in *Mallet*. Such a presumption, while less objectionable than one applicable to all marriages, is not supported. It may undermine the importance of the
Adjustment Stage, and it would add little to the degree of certainty that might flow from a mere presumption of equal contributions.

**Option 2 (the First Stage)**

13. Council does not support Option 2. In particular, it does not support legislation that would create, in the First Stage, a rule that matrimonial property is to be shared equally and separate property is to remain the property of its owner. The reason is essentially that the results of such a rule would in many circumstances be so unfair that they would need to be altered considerably in the Adjustment Stage. This would mean that the apparent advantages of certainty would be lost. Further, the application of the First Stage would be likely to involve technical issues and expensive valuation evidence, and thus to add to the complexity, delay and expense associated with the proceedings. Finally, in many of the cases where Option 2 would be straightforward, in practice the existing law and Option 1 would be similarly straightforward.
Contributions as a basis for the First Stage

14. While conscious of the difficulties involved in the concept of assessing contributions, Council considers that this approach has many advantages and conforms in important respects with the principles Council has formulated for assessing the merits of different approaches to the law. It has been used as a basis for State and Territory legislation on property adjustment legislation for de facto and other relationships. Council is not persuaded that any other approach has been shown to be preferable.

Presumption of equal contributions

15. It might be desirable to provide a rebuttable presumption of equal contributions in the First Stage (as distinct from a presumption of equal sharing as the outcome). The drafting of such a presumption should make it clear that it can be rebutted by evidence showing that the contributions are not in fact equal. The legislation might usefully include examples of circumstances in which the contributions might be considered unequal, reflecting current case law. Such a presumption might make the law more transparent and avoid unnecessary evidence being given in some cases.

The Adjustment Stage

16. Council has identified as a major policy issue the extent to which the Adjustment Stage should be based on a range of matters relating to the parties’ general circumstances, as under the present law, or should focus exclusively or mainly on inequalities that can be shown to have been caused by the circumstances of the marriage. These issues are discussed, especially in Chapter 6, but in the time available Council has not been able to form a final or unanimous conclusion on the topic.

Principles and objectives
17. Council's Submission includes discussion of relevant principles and objectives. It is desirable that any change in the law should be based so far as possible on articulated principles and objectives. The main theme of the Discussion Paper, achieving certainty, falls short of this in that it does not identify the purpose intended to be served by the law. Council's Submission canvasses various possible purposes and objectives that might be adopted. It is arguable that the legislation could usefully include a statement identifying the purposes or objectives of the law in relation to property adjustment, beyond such general statements as that the order should be ‘just and equitable’. In Council's view it is not possible to identify a single specific objective which would lead to just results, but a number of relevant objectives, currently found in the case law, may make the law more accessible and more transparent. Such objectives or principles might help to reduce the scope of discretion and assist the parties to understand the purpose of the law. Council also draws attention to possible difficulties and disadvantages in such legislative statements. Council would wish to comment further on this issue in the light of any draft legislation.

**Structured decision-making**

18. While Council does not support a legislative provision requiring reasons to be given for particular types of decisions (because the law already requires reasons to be given for all decisions determining property proceedings), the law might be made more transparent, especially to unrepresented persons, if there were a legislative statement of the steps to be taken in reaching decisions. Again, the merits of any such proposal cannot be finally determined in the absence of draft legislation.

**Drafting of the Adjustment Stage**

19. Council agrees that it would be desirable, as a matter of drafting, for the matters relevant to the Adjustment Stage (presently s. 75(2)) to be set out as part of the property
provisions, rather than in a section relevant both to spouse maintenance and property adjustment.

**Domestic violence**

20. Council emphasises the importance and difficulty of the question how, and to what extent, domestic violence should be relevant to property adjustment. In Chapter 11, the Submission canvasses a number of possible approaches, and sets out responses to Council's Discussion Paper on the topic. Council notes that violence and its consequences have potential relevance under the present law both in the assessment of contributions (the First Stage) and of the s. 75(2) factors (the Adjustment Stage). While the matter deserves further study, Council's present view is that no other approach has been shown to be preferable to the present law and accordingly it does not recommend any change in this area.

**Spousal maintenance and income transfers**

21. The relationship between property adjustment law and spousal maintenance requires careful study. Drawing on earlier work, Council considers the issues in some detail, especially in Chapter 12. While making no specific recommendation, the discussion emphasises that property adjustment law and spousal maintenance law should be considered together, as different aspects of financial re-adjustment. Any consideration of the basic objectives needs to consider spousal maintenance as well as property adjustment. Council hopes that its discussion will promote a more informed discussion of this topic.
CHAPTER 1: INTRODUCTION

An approach to the task

1.1 In the Foreword to the Discussion Paper, the Attorney-General has said that ‘it is timely to assess more broadly the appropriateness of our current family law property regime and to consider possible options for change’. He also referred to the numerous reviews of the Family Law Act ‘all of which have concluded that the law needs to be changed’. The Discussion Paper proceeds on the assumption that the present system allows too much discretion, which in turn leads to a lack of certainty, a lack of predictability, and a lack of transparency. Paragraph 5.42 of the Discussion Paper states that ‘the major reason for the lack of certainty is that under the current law the court is able to take into account “any other fact or circumstance” - which makes the court’s discretion effectively unlimited.’ In a News Release, the Attorney-General referred to implementing reforms “to ensure greater certainty in property settlements”.

1.2 In Council’s view it would not serve the public interest to approach the topic with the assumption that the present law is unsatisfactory and that all problems of uncertainty result from too much discretion, so that some other system, which reduces or eliminates discretion, should be installed in its place. Instead, Council advocates a starting position of neutrality as to the merits of the present law as compared to any other law. That is, Council suggests that it is appropriate to try to identify the characteristics of a good or ideal law, and compare the present law with alternatives in order to identify which system might be most desirable. This task is attempted in this Submission.

1.3 With these issues in mind, Council’s approach in this Submission is first to examine the assumptions and assertions of the Discussion Paper before setting out what it considers to be the issues and challenges of law reform in this area (Chapter 2). The Submission then describes what are considered to be characteristics of a good law, against which the present law can be measured and any proposed reforms assessed (Chapter 3). Existing and proposed models of property regimes in other jurisdictions are discussed (Chapter 5) as are the options from the Discussion Paper (Chapters 8-10). The
Submission discusses the place of violence (Chapter 11) and spousal maintenance (Chapter 12) in any such regime, and ends with Council’s conclusions (Chapter 13).

Consideration of violence

1.4 Council believes that family violence must be taken into account in considering any reform of property law. Because of the importance of this matter and the seriousness with which it must be viewed, the manner in which violence might be taken into account requires separate consideration in this paper. A discussion of how violence might be taken into account under the various options is to be found in Chapter 11.

Consideration of spousal maintenance

1.5 The relationship between matrimonial property law and the law on spousal maintenance requires careful attention. The purposes of spousal maintenance, or more generally any provisions for income transfer, should be identified and integrated with property law. These issues are discussed at various points in the Submission, but particularly in Chapter 12.

Consultation process

1.6 Council welcomes the Discussion Paper as providing an opportunity for public discussion. However given the difficulty of the subject matter and the wide-ranging impacts of the contemplated changes, the time available is likely to be insufficient for adequate public consultation. Although there will no doubt be further opportunities for comment in later stages of the process, in Council’s view there is a risk that the fundamental decisions may be taken with insufficient appreciation of their practical impact, and without the time necessary to develop community support for the proposals. If the fundamental principles are wrong, it may be difficult to make the necessary changes in the later stages of the process. Council therefore urges the Attorney-General to consider extending the time for submissions for a substantial period, for example until 31 December 1999.
1.7 Council is aware that the arguments and presentation of this Submission could have been improved had there been more time available, but thought it appropriate to do its best within the time prescribed. For example, Council has not attempted a comprehensive citation of reported decisions relevant to the issues discussed. Council would of course be willing to make further submissions, or clarify or expand on matters dealt with in this Submission. Another important matter is that as its Submission was being prepared, Council was aware that the Australian Institute of Family Studies was in the process of preparing the results of its Australian Divorce Transition Project (ADTP) research, but those results were not fully available in time to be adequately considered and included in this Submission. Those results have a great deal of importance for any review of property law.
CHAPTER 2: CONSIDERING CHANGES IN FAMILY PROPERTY LAW: ASSUMPTIONS AND APPROACHES

2.1 This chapter attempts to identify the most important issues that arise in relation to considering changes to family property law. It first discusses the issue that appears to be a primary focus of the Discussion Paper, namely certainty. It then identifies and discusses some key assumptions and arguments contained in the Discussion Paper, and then proceeds to identify what Council regards as other important issues.

Certainty and family property law

2.2 The Discussion Paper refers to the numerous reviews of the Family Law Act and suggests there is ‘considerable public dissatisfaction’ with the current property regime. It specifically refers to concerns about unpredictability of outcome, the perception that decision-making is arbitrary, and that decisions are biased towards one of the parties. A theme of the Discussion Paper, and perhaps the main theme, is that its proposals have the capacity to lead to certainty of outcome in the application of the law.

2.3 The Discussion Paper is right to raise questions about the problem of uncertainty of outcome and its effect on the perceptions of the law. These issues are serious, but in Council’s view the problems are more complex, and the solutions more difficult, than the Discussion Paper suggests. The topic will be touched on at various points in this Submission. But the issue is of such importance that it is appropriate to make some comments on it at this point.

Uncertainty of rule and uncertainty of outcome

2.4 It important to note that in any system, certainty of outcome depends not only on the nature of the governing rules, but on other things. In many cases, there are factual differences between the parties on such matters as what the assets are, what is their value, whether one or both parties have disclosed all their assets, whether one or both parties has a higher earning capacity than they are willing to disclose, whether or not a party spent money on particular things during the marriage, and the like. Most of the work associated with presenting a case to court involves preparing and tendering evidence on such matters
and the court determining the issues, accepting one party’s evidence rather than the others, and making related findings and assessments. No matter how clear the rule governing the case, predicting the outcome normally involves predicting what findings the court will make on these matters.

2.5 These matters are relevant to negotiations as well as to the minority of the cases that actually go to court for final determination. To the extent that parties bargain ‘in the shadow of the law’, their negotiations involve predictions of what the outcome might be if the case went to trial. These predictions must take into account not only the governing rules, but the view the court might ultimately take on the facts; and therefore some assessment of the evidence and the likelihood that the court would accept each party’s versions of the circumstances. For this reason, it is wrong to assume that outcomes will necessarily be predictable if the governing rule is certain and unambiguous.

2.6 Nevertheless, the nature of the governing rules may be related to the ability of parties to predict outcomes. One aspect of this is whether the governing rules contain specific rules, or instead require the court to exercise a discretion. Because it is an important issue, and an aspect of the law much emphasised in the Discussion Paper, the question of discretion requires some discussion in this chapter.

**Discretion**

2.7 A discretionary rule involves the application of some general standard to a wide variety of facts. It is common for legislation to provide for the court to exercise a discretion. The most obvious sort of discretionary rule provides that ‘the court may’ do something. Similarly, the rule might say that the court should determine a matter according to ‘justice and equity’ or some similar phrase. The legislation may also set out guidelines for the exercise of that discretion. Those guidelines may be narrowly or broadly stated. Such guidelines may say that the court should take certain things into account. Similarly the legislation may state general objectives or principles that should be kept in mind by the court when exercising the discretion.

2.8 Guidelines for the exercise of discretion take many forms. But it is useful to distinguish between guidelines that state a *purpose* and those that list relevant factors. In
children's law, for example, until recent times the court was governed only by the principle that it must consider the child's best interests as the paramount consideration. This obviously requires the court to make a broad value judgment. But it identifies a purpose. Thus a decision based on the needs of a parent rather than the welfare of the child would clearly be wrong in law. In property law, the provision that the court must not make an order unless it is ‘just and equitable’ may also be regarded as setting out a purpose, although one so broadly stated that arguably it provides little specific guidance. More specific objectives have been spelt out in provisions on child support, and child maintenance under the Family Law Act.

2.9 It is a different matter for the law to set out a list of matters that the court must take into account. This is also done in Part VII in relation to children, and of course in Part VIII in relation to property matters.

2.10 In summary, rules that involve discretions or the application of broad evaluations or value judgments may produce uncertainty of outcome. The degree of uncertainty may be reduced if the rules indicate (1) the matters that should be taken into account and/or (2) the objective of the rules.

The present law and discretion

2.11 The current law is clearly discretionary. It is not an uncontrolled discretion: there are provisions setting out the basis on which the discretion is to be exercised, and identifying the matters that must be taken into account. The court must determine each case on the basis of evaluating a number of matters set out in the Act, rather than applying a rule, such as equal division of assets. In all such systems, especially when the matter is adjudicated, there is a danger that one or both parties will feel that the evaluation is unfair to them, and that a different decision-maker might have reached a different outcome. Indeed, the fact that different judges might reach different conclusions on particular facts is apparent, and frequently referred to, in the reported cases. It is easy to see how such a system can be perceived as biased, or unjust, or capricious, by parties who are dissatisfied with the result of the proceedings. The extent to which the law could be clarified,
reducing the difficulties associated with its discretionary character, is discussed elsewhere in this Submission.

**Discretion is one way of responding to factual diversity**

2.12 It is tempting to say that the law would be improved by eliminating or reducing the amount of judicial discretion. Whether this is so, however, is not at all obvious.

2.13 The reason that the present system contains judicial discretion is, in essence, that the law needs to deal with an enormous range of very different family circumstances. It must provide for property adjustment when there is very little property, and when there is great wealth. It must deal with families in which both parties started with little and built up assets during a long marriage. It must deal with marriages where one party started with substantial assets and the other with very little. It must deal with cases where assets were accumulated by good luck, hard work, inheritances, gifts from family members, and other circumstances. It must deal with marriages which are childless and those in which there are children. It must deal with marriages where the assets are tied up in trusts and family businesses; and where property is held by the spouses jointly with other people. It must deal with marriages where there has been a major loss caused by the actions of one spouse. It must deal with marriages in which, when the parties separate, they have roughly equal earning capacities, and also those in which their capacities are very different. It must deal with families where the assets consist of real property, or share holdings, or motor vehicles, or interests in companies or family businesses or farms, or superannuation, and with many combinations of these and other forms of wealth. It must deal with marriages where there has been violence; where one party has concealed assets from the other; where only one party, or neither party, has legal representation; where only one party, or neither party has English as a first language.

2.14 This list could easily be extended. The challenge is to formulate a law in terms that can do justice in all these cases, and many others. Requiring courts to deal with these matters on the basis of general principles rather than specific rules, and giving the courts discretion, combined with directions as to what matters should be taken into account, is one way in which the law can cope with the bewildering variety of circumstances that
arise. Before the Family Law Act, the *Matrimonial Causes Act 1959* also adopted a discretionary approach. In recent times, the same essential approach has been taken by States and Territories in legislation dealing with property proceedings between partners in de facto and other family relationships, although the terms of the legislation are different from the Family Law Act.

**Advantages and disadvantages of a discretionary system**

2.15 Using judicial discretion as a way of coping with diversity has advantages and disadvantages. The disadvantages are the subject of considerable comment in the Discussion Paper. The advantages are that judicial discretion makes the law an instrument that is flexible and can be adapted to a wide range of circumstances, ideally to achieve justice in all of them. Removing judicial discretion removes that flexibility. It thus poses the problem: what set of rules is capable of doing justice? This is the challenge facing those who seek to eliminate the disadvantages associated with a discretionary system; the challenge of achieving a just result in the infinitely varying circumstances of marriage and its breakdown.

2.16 This problem is discussed at a number of points in this Submission. While certainty is obviously desirable, there are other qualities that a good law should have. We discuss these in Chapter 3. It cannot, of course, be assumed that removing discretion from a part of the law will necessarily reduce the number of complaints. The child support system, which largely substituted a rule-based system for a discretionary system, has been the subject of a great deal of complaint.

**Certainty and rule-based systems**

2.17 It is necessary to stress another point that the Discussion Paper does not appear sufficiently to take into account. This is, that certainty is difficult to achieve, even if one reduces or eliminates judicial discretion. Although this point is discussed elsewhere in this Submission, in particular in connection with Option 2, it is appropriate to say something about it at this point. Because of the diversity of circumstances, referred to above, eliminating discretion tends to lead to rather complex rules. This complexity can cause the results to be unpredictable, even if there is no judicial discretion involved. The
more complex the rules are, the more legal issues there are that can be the subject of dispute.

2.18 To illustrate the point, assume the law provided for an equal division of all property owned by the parties or either of them at the trial. There could be issues relating to what the assets and liabilities were at the time of trial, their values, and perhaps whether particular items were ‘property’.

2.19 Assume, however, that (as in Option 2) the law provided that what should be shared equally was ‘matrimonial property’, and that this included the increase in value, during the marriage, of property owned at the commencement of the marriage. Separate property would be retained by the person who owned it. This rule would require determination of the values of items of property both at the time of the marriage, perhaps many years previously, as well as at the time of the trial. It would thus involve more complex valuation issues than would be involved had the law simply provided for the division of all existing property. Since there could be disputes about these matters, the predictability of the outcome would be likely to be less under the second law. That is, a person trying to predict the outcome might say that it would depend on whether the court accepted that the value of the property owned by Spouse A at the time of marriage was $3,000 as claimed by Spouse B and supported by one valuer, or $15,000 as asserted by Spouse A and supported by another valuer; on whether the funds that went to the purchase of a home in 1987 came from an inheritance, as claimed by Spouse A, or from joint funds, as claimed by Spouse B, and so on. As the number of legal categories increases - because the law is trying to cope with diversity without the use of discretion - the potential for dispute about the relevant facts increases, and with that also increases the difficulty in predicting the outcome of the application of the law.

2.20 One might generalise that the greater the number of relevant categories in the law, the more issues there are to be resolved, and the more room there is for legal and factual disputation, and thus the more unpredictable the outcome.

2.21 But it is more complex than this, because some issues need more detailed evidence than others. For example, if there were to be a system of shared matrimonial property that
included property acquired during the relationship, the period could be characterised as commencing either at cohabitation or at marriage. The question when the parties were married is usually easily resolved by reference to a marriage certificate. However the question when cohabitation commenced can be answered only on the basis of various factual matters, such as residence, sexual relationship, use of common facilities such as bank accounts, names, public behaviour as a couple, and so on. There is considerable room for disputes between the parties on such factual matters.

2.22 Thus, if the legally relevant period commenced at marriage, there would be much less scope for difference and dispute about this aspect. In that respect, using marriage as the starting point would be likely to produce a more certain outcome than using the commencement of cohabitation. The results however, could be grossly unfair if there had been considerable assets acquired and/or income and expenses shared during a long period of cohabitation before marriage. The research evidence to date is unclear as to how common such a scenario may be for those who divorce, and whether the period of cohabitation prior to marriage is static or steadily increasing. To take this into account, the rule would need to be based on the fact of cohabitation rather than the legal event of marriage. But as indicated, a rule based on the date of cohabitation would be more likely to produce factual disputes than one based on marriage, even if ‘cohabitation’ were defined clearly in the legislation.

2.23 One might conclude, therefore, that the predictability of outcomes is reduced as the categories, and thus the issues, become more numerous, and more susceptible of dispute. It follows that under a very complex set of rules, even if they provided for no judicial discretion and were expressed clearly, the outcome could be very difficult to predict.

2.24 Against this background, there are some features of the proposed options that have advantages. For example, the assessment of contributions in the present law is a step that requires evidence to be given on a wide range of matters, and there can be much dispute over those matters. Whether or not one characterises the assessment of contributions as an exercise of ‘discretion’ - a theoretical question that need not be pursued here - it is a step that can involve much disputation. By contrast, a rule of equal sharing of communal assets, because it does not involve assessing contributions, would not involve that set of
factual matters (though it would involve others). However serious questions arise about whether a rule of equal sharing of communal assets would produce a just outcome. Chapter 3 discusses the various qualities that family property law should have, and certainty is only one of them.

2.25 To summarise, Council’s view is that uncertainty - unpredictability of results - is a very serious problem. However addressing that problem is no easy task. In particular:

- While a system that relies on judicial discretion cannot achieve certainty of result, it should not be assumed that any system that excludes discretion will do so.

- Predictability of result is only one of the desirable qualities in family property law. A system which eliminates or reduces uncertainty will not necessarily be preferable to, or be more acceptable than, other possible systems.

**Other assumptions and arguments in the discussion paper**

2.26 The Discussion Paper appears to be based on the position or assumption that there is a demonstrated need to change family property law. The case for change expressed in the Discussion Paper is set out mainly in Chapters 2 and 4 and is summarised in paragraphs 5 to 8 of the Executive Summary, under the heading ‘Problems with the current situation’. It is also, perhaps, implicit in the use of the word ‘reform’, which implies that the need for change is clearly apparent.

**Changes in Australian society**

2.27 Chapter 4 of the Discussion Paper sets out a number of changes in the family unit and its social context. Relevant statements\(^\text{13}\) include:

- that both parties to a marriage contribute equally to the assets of the marriage;

- that marriage is becoming increasingly recognised as an economic partnership as well as a social relationship;
that there is now a tendency for couples to live together before marriage, and to marry and have children at a later age, and for increased workforce participation by women before and during marriage.

2.28 To the extent that these statements identify demonstrable facts, such as increased workforce participation or age at marriage, they should be taken into account. But it is not clear that these facts themselves indicate that there is a need for change, or that any particular change is desirable.

2.29 It is not apparent why the Discussion Paper refers to these matters and not to others which appear at least equally relevant, in particular research on the differential economic effects of divorce on men and women (to which some reference is made in the course of this Submission). The suggestion implicit in the matters identified in the Discussion Paper seems to be that because women are now more economically active, it is more appropriate than it previously was to have a system of family property law based on a principle of equal sharing of assets (whether all the assets as in Option 1 or the communal assets as in Option 2). However this argument is not expressly stated or developed in the Discussion Paper. Any consideration of such an argument would need to consider a much wider range of factual matters, for example those dealt with in the AIFS data from *Settling Up* in 1986. There is no reference to the gender gap in earnings or to data on the long term consequences of divorce. It is fallacious to assert that women are now economically active and therefore equal to men, and then to use this to justify equal shares in property.

2.30 Elsewhere in this Submission Council emphasises the importance of taking into account all relevant information about the situations of families and the operation of the existing law, and related matters. In this connection, the importance of the ADTP data, not yet fully available, is difficult to over-emphasise. The few facts referred to in the Discussion Paper appear do not provide any proper basis to support the case for any particular law reform, including a rule or presumption of equal sharing of property. The social science issues that are relevant to considering law reform are more extensive, and the issues more complex, than is apparent from the Discussion Paper.
Assumed dissatisfaction with the current regime

2.31 As noted at the beginning of this chapter, the Discussion Paper suggests there is ‘considerable public dissatisfaction’ with the current property regime, and refers to unpredictability of outcome, the perception that decision-making is arbitrary, and that decisions are biased towards one of the parties. The Foreword also states that all reviews of existing law about matrimonial property ‘have concluded that the law needs to be changed’. This is true in a sense, but suggests that there is some kind of agreement that a particular change is necessary. This is not so. For example, the major report by the ALRC, *Matrimonial Property*\(^{16}\), proposed changes that preserved and clarified the basic principles of the existing Act, and many of the suggested changes have been achieved by case law developments.

2.32 In this Submission, we consider the available evidence relating to the operation of the present law and the extent of satisfaction or dissatisfaction with it. On this subject as on a number of others, the results of recent research by the AIFS, not yet fully available, will be of great importance. It is important to consider carefully complaints to politicians and submissions from individuals and groups representing particular interests or points of view. On the other hand, it is dangerous to draw hasty conclusions from such material. This matter is considered further in Chapter 4 of this Submission.

‘Transparency’

2.33 The Foreword refers to lack of ‘transparency’ as well as uncertainty. In Chapter 3 Council distinguishes between legal transparency (or clarity) on one hand, and on the other, certainty of outcome. These are both desirable qualities and the extent to which they are achieved by the present law and the Options is considered in some detail in Chapters 7-10. As will be seen, Council proposes a number of ways in which the law may be made more transparent, while drawing attention to the difficulties associated with them.
**Effect of the Child Support Scheme**

2.34 Paragraph 6 of the Discussion Paper’s Executive Summary states that since introduction of the Child Support Scheme 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.

2.35 It is true that an increased financial adjustment between parties through child support means that there is less of a need to take child support into account in property adjustment. But it is not clear that there is no longer a need to do so in any circumstances. For example, in a case where both parents have low incomes and the non-residence parent cannot provide child support, it might still be appropriate to make an adjustment in the division of property to assist the residence parent to make adequate provision for the children’s needs. Further, recent changes in the child support legislation have attempted to redress the position of the liable parent, and there may be greater reliance on property division in future to alleviate the poverty of the residence parent.

2.36 One aim of the child support scheme was to alleviate the poverty of the supported family. The recent data from ADTP suggests that the poverty levels of single mothers have not fallen greatly, while the poverty levels of liable fathers may have risen. In Council's view while the consequences of the child support scheme need to be considered in formulating matrimonial property law, it cannot be assumed that it has the effect that matrimonial property law should ignore a party's child care responsibilities in all cases.

**Equal sharing as the norm**

2.37 The Discussion Paper implies that equal division of property is a natural or self-evident solution to the perceived problems with the present law. This suggestion arises in a number of ways.

2.38 Firstly, the Discussion Paper seems to imply that what we will refer to as the First Stage (the assessment of contributions under the present law, the presumption of equal sharing of all property under Option 1, and the rule of equal sharing of matrimonial property in Option 2) will determine the matter in most cases, and a much smaller
proportion of cases will be affected by what we will call the Adjustment Stage (the s.75(2) factors under the present law and variations of this under Options 1 and 2). This seems to follow, for example, from the suggestions that reasons must be given for departing from the rule of equal sharing, there being no proposed requirement for reasons to be given to justify making no adjustment under the Adjustment Stage.

2.39 Secondly, as mentioned above, the reference to social facts seems to emphasise those facts that might support a rule of equal sharing and says little or nothing about other facts that might suggest a different approach. A similar emphasis can be found in Chapter 3 of the Discussion Paper, discussing overseas laws. In relation to the US, for example, there is discussion of equal division laws, but no mention of the fact that in many States with such laws, they are accompanied by alimony/compensatory payments provisions. Indeed, some US States (like Arizona) have abandoned the idea that future needs can be met from property altogether, and deal with compensation issues through periodical payments. This fact is invisible in the Discussion Paper. Thus the Discussion Paper creates the impression that a half share is all that can be expected in these jurisdictions. That is emphatically not the case.

2.40 Thirdly, the emphasis on bringing certainty to the law, and the apparent belief that Option 2 will achieve this, suggests that the focus is on the First Stage (which could theoretically produce a predictable outcome) rather than the Adjustment Stage (which is much less likely to do so). It emerges from this Submission, however, especially in chapters 7-9 and the case scenarios in Chapter 10, that in practice it seems likely that under any of the options the question whether to depart from the rule of equal sharing will arise in many situations, and is unlikely to be exceptional or unusual.

2.41 For these reasons, while the Discussion Paper appears to favour equal sharing as an important reform of family property law, it does not present a reasoned argument in favour of this approach. A principle of equal division of property, whether of all property (Option 1) or of communal property (Option 2) of course deserves consideration. While there might well be arguments for that position, however, they need to be identified and assessed: equal division should not be assumed to provide the solution.
Other issues that need to be addressed

2.42 As is clear from the above discussion, the Discussion Paper addresses some important issues, notably the importance of clarity and certainty of outcome, and the difficulties in this respect with any system that relies on judicial discretion. It canvasses some possible alternatives which deserve careful consideration. In Council’s view, however, there are a number of other issues that need to be considered (or considered in more detail than is done in the Discussion Paper) in assessing the merits of changing family property law, and they are the subject of the following discussion.

Basic purposes or principles

2.43 The Discussion Paper does not identify what basic purpose the law of family property is intended to achieve, or how such a purpose would be achieved by the various proposed models. Nor is there any real discussion of basic principles, and why they might be considered desirable. The main theme appears to be the reduction of uncertainty. It is clear, however, that reducing uncertainty cannot be the only basis on which proposals should be evaluated.

2.44 Council’s view is that despite the difficulties involved, any reform of family property law should involve a consideration of the purpose of the law, or the key underlying principles. The various options canvassed in the Discussion Paper are means to an end, rather than ends in themselves, but the end, or objective, is not identified or discussed. Council considers these issues at a number of points in the course of this Submission.

Accessibility of the law

2.45 In principle, the law should be accessible to everyone. In relation to family property law, there are obvious problems of translating this ideal into practice. Many people do not have the means, ability or information necessary for them to obtain appropriate legal advice or legal representation. Without these things it is very difficult for people to conduct litigation or, in some situations, to bargain effectively. Particular difficulties arise in this regard where one spouse is unaware of the full assets and liabilities of the
other party. Where there is no agreement on the relevant financial facts, it can be difficult indeed for a party without proper legal representation or advice to do what is necessary to obtain the evidence to establish the facts. Similarly, an unrepresented person may not be able to prepare his or her own case, and the court may be left with the impression that the unrepresented person has greater assets or financial capacity than he or she has admitted. These problems are also relevant to settlement negotiations, since a party who is disadvantaged in these ways is likely to be in a very poor bargaining position, and may have little alternative than to agree to an unfavourable settlement proposal or face litigation he or she is unable to manage.

2.46 No amount of reform will improve the system if at the end of the day, the ordinary person in a family law matter does not achieve a fair outcome. Access to justice issues include educating people to understand the law as well as being able to conduct cases in court. This means access to legal advice or to the court, or to legal materials if they are self-represented. Access also involves various components such as access to the statutes, being able to read the legislation, and availability of legal aid. It is not necessary to labour this obvious point, but it has practical implications given the increasing numbers of unrepresented litigants.

2.47 Many of these problems are not directly affected by the content of family property law, and thus to some extent would remain whatever the outcome of the present review. However settlement negotiations are likely to be influenced, to a greater or lesser extent, by what the parties believe the law to be, and what the outcome would be likely to be if the matter were to go to trial. It is important, therefore, that as far as possible the relevant rules and principles should be accessible to all those involved in family property disputes.

2.48 Achieving this is no easy task. To some extent, because the law is dealing with a difficult problem, it must have a degree of complexity. No matter how clearly it is expressed, some people will find it difficult to understand, especially in its application to their particular circumstances. Nevertheless, reviewing this area of law faces the challenge of ensuring, so far as possible, that the law is available to all. Achieving this objective requires work to be done on the formulation of the rules and questions of drafting, which perhaps have sometimes received too little attention from law reformers.
Emerging research on the impact of the 1995 amendments to Part VII of the Act indicates how easy it is for people to have different understandings of what the law is, even (perhaps because) when it has been drafted specifically to make it widely understood.

2.49 A related set of issues involves matters of process. We know that in the majority of cases the assets available for distribution are rather modest. There is much to be said for the view that one way or another the law should provide a cheap and swift process for the resolution of these cases. This is not because they are less difficult or complex than others, but simply because dealing with them through the full adversary process can easily involve legal and associated costs that are quite disproportionate to the resources of the parties.

2.50 On the face of it, this problem is arguably separate from the question what should be the principles that govern family property law. The solutions to it might be thought to lie in improved procedural reform and case management, the use of magistrates, or arbitration, and other such strategies, many of which are receiving current attention. However it might be arguable that the substantive rules governing the matter might be modified in cases where the assets are limited. Council has not developed its thinking on these matters (which are not canvassed in the Discussion Paper), but they are important in any review of family property law.

**Settlement**

2.51 For those with no access to legal advice or legal aid, there is a strong argument that providing clearer rules may help to reduce the risk of one party conceding property in return for retention of residence of children or out of a fear of violence. This has sometimes been raised as a concern, especially in relation to the shift towards private ordering of family disputes. A clear and readily understood framework of entitlements, if it could be formulated in the legislation, might have a number of advantages. It might encourage weaker parties not to abandon legitimate claims, clarify the legal entitlements of the parties, assist parties to acquire realistic expectations of the outcome, and assist the litigant in person to negotiate a fair settlement.
2.52 Legal aid is rarely available in property proceedings. This means that many separating or divorcing couples now have no or very little legal assistance in settling property matters on separation or divorce.

**Spousal maintenance and family property law**

2.53 The subject matter of the Discussion Paper is property, and one effect of this is that the proper role of spousal maintenance never really comes into focus. The Discussion Paper appears to assume that spousal maintenance will stay as it is, although this is not clear. In Council’s view it is important that the review carefully considers the relationship between property law and spousal maintenance. That relationship might become clearer if some identifiable objective were formulated.

2.54 To anticipate a later discussion in this Submission, assume for the sake of argument that it was accepted that it was not the objective of family property law to attempt to achieve a reasonable standard of living for each party, or to reduce general inequalities, but only to deal with those inequalities that could be shown to have resulted from the marriage. If this approach were taken, for example, the property adjustment would be affected where a spouse’s employment capacities had been reduced because of child care during the marriage, but not where they had been reduced by some factor unrelated to the marriage, such as a motor accident after the parties had separated. If that were to be the approach of property law, the question would arise whether the spouse whose earning capacity had been reduced because of the motor accident would be able to have that taken into account in an application for maintenance. If it were, there would be an apparent inconsistency in approach between the law on property adjustment and the law of spousal maintenance.

2.55 The relationship between spousal maintenance and family property law is discussed in Chapter 12.

**Financial agreements**

2.56 A similar point must be made about financial agreements. The government has already announced changes on this subject. Obviously, it will be necessary to ensure that
there is no inconsistency between the provisions for financial agreements and whatever other legislation is proposed.

**Violence**

2.57 The Discussion Paper does not discuss the important question to what extent, if at all, family violence should be taken into account in family property law. This question is discussed in this Submission.

**Costs of change**

2.58 Although it considers transitional problems in relation to Option 2, the Discussion Paper does not deal with the costs and problems inherent in changing the principles for family property law. There will be initial costs, both private and public in financial and emotional terms in making reforms. For example, there will be confusion to the public and the profession for a time, and there will be a need for public and professional education, test cases, and appeals. The present law consists of the legislation and a large body of case law interpreting it. Changing legal principles would raise numerous issues of interpretation, some of which, experience indicates, may take years to resolve. Further, change could lead to understandings of the law, especially by unrepresented people, which may be quite different from, and unanticipated by, those who drafted the legislation. These and other costs associated with legal change would need to be considered.

2.59 Council does not seek either to recommend or oppose change for its own sake. However it is appropriate in considering any change to assess not only the intended outcomes but also the likely unintended outcomes. The case for change requires an argument that the new system would be preferable to the old, and sufficiently preferable that its advantages would outweigh the costs associated with its introduction.

**Difficulties in evaluating present law and other systems**

2.60 There are difficulties in evaluating the present law because apart from the research of the AIFS in *Settling Up* and *Settling Down*\(^20\) and the Australian Divorce Transition Project (ADTP),\(^21\) there is not a great deal of data on which to make reasonable
evaluations. There is limited knowledge of how and why cases settle. In the absence of relevant data, there is a danger of relying on selective material such as complaints to Members of Parliament or submissions by interest groups to parliamentary committees.  

2.61 The law in other countries may be even more difficult to evaluate. Just as with the law in Australia, a reading of the statutes of other countries gives an indication of the written rules but there is no indication of how they operate in practice, or whether those rules are seen as fair and just in those countries.

**Problems of different perceptions of justice in community**

2.62 Another challenge to law reformers is the need to take account of different perceptions of justice in the community. The law has to operate amid diverse views of what outcomes are fair, as well as take into account the numerous sources of perceived inequity. People’s feelings about the fairness of the settlement outcome will also reflect judgements about perceived procedural injustices experienced in attaining the settlement outcome. Such matters as negative experiences with the former spouse, and expectation of legal procedures all may have coloured parties’ views of the property settlement outcome, irrespective of how equitable the settlement may have been or how well the current law functions.

**Conclusion**

2.63 As indicated in the Introduction, in this Submission Council takes a starting position of neutrality as to the merits of the present law as compared to any other law. For reasons partly set out in this Chapter and partly discussed elsewhere in this Submission, Council does not consider that the Discussion Paper makes out a case for change, or satisfactorily identifies all the issues that need to be addressed in considering reform. In this Submission Council attempts to assess the strengths and weaknesses of the present law and some of the alternatives to it. This task requires some preliminary survey of the issues, and this has been attempted in this Chapter. In the following Chapter an attempt is made to identify the characteristics of a good law, so that the existing law and various alternatives can be compared in a systematic way.
3.1 In the introduction to this Submission, it was stated that Council would attempt to identify the characteristics of a good or ideal matrimonial property law. This is the subject of this chapter, which reproduces with some modifications the substance of a letter of advice to the Attorney-General dated 12 March 1999.

3.2 Testing proposed revisions against these principles necessarily involves value judgments and matters of degree. Some of the principles involve matters on which compromise is necessary. However Council considers that testing proposed laws against these principles would provide a disciplined form of review that might help to identify the strengths and weaknesses of particular proposals or options.

**Principle 1: Equal status of husband and wife**

3.3 In *Mallet*, Gibbs CJ said that a principle implicit in many of the sections contained in Part VIII is ‘that the parties to a marriage are equal in status’. This is the first general principle that we propose. It embodies a sentiment which is important and which seems likely to command widespread community support.

3.4 This principle should not be confused with the proposition that the division of property should necessarily be equal, or indeed with any other particular rule for division of property. However, in some cases, for example in long marriages where there are children and where the parties have commenced with roughly equal resources, the actual result may well be an equal sharing of property (as in the sense of a 50/50 split).

3.5 The question whether the law should provide for equal sharing is in fact difficult. Questions arise, for example, about whether the equal sharing should apply to all property or only, for example, property acquired during the marriage. And where the division of responsibilities within the marriage has involved one partner in developing a career in paid employment, and the other concentrating wholly or partly on caring for children and the home, an equal division of property may well not be a just outcome, because it would
produce unequal consequences for which there is no proper justification. Thus a rule of
equal sharing may produce equality in one sense: each party receives the same share of
the property. But it may produce inequality in another sense: one party may have
economic advantages as a result of the division of responsibilities during the relationship.

3.6 Nevertheless, despite its indeterminacy, this principle may be useful. While there
may well be room for difference of opinion about whether particular rules do or do not
comply with it, Council’s view is that it is appropriate to consider whether any proposed
rules do or do not conform with the principle. Rules which lead in practice to results
which favour either husbands or wives would need to be scrutinised to see if they violate
this principle.

**Principle 2: The law should conform with values accepted in the
community**

3.7 Like the first principle, this principle does not lead self-evidently to particular
results. Indeed, it might well be questioned whether, in a pluralistic community such as
exists in Australia, it is possible to identify any ideas of fairness that are accepted in the
community. It is obvious that people would not necessarily agree on the fairest outcome
for financial adjustment in particular cases, or on which rules would be most appropriate.

3.8 In Council’s view, however, it would be wrong to assume that there are no
commonly held views on these matters. There is some research evidence on people’s
views about what outcomes are fair in family property division. Those views are not
randomly spread. It is possible to say that certain propositions or approaches are seen as
fairer, or more just, than others. This principle means that in considering the merits of
any existing or proposed law, it is desirable to assess, as best one can, the extent to which
it conforms with people’s views about what is fair. In general, such conformity, if it can
be identified, is desirable.

3.9 It does not follow that rules which do not have a high level of community support
should necessarily be rejected. The area is complex and people’s intuitive views on
whether particular rules are fair may reflect a limited understanding of the issues, or more simply that they have not thought about the problem. For example, a person might instinctively consider an 80:20 division of property to be unfair, but might reconsider that reaction if it is pointed out, for example, that the assets amount to $30,000, and one partner earns $250,000 per annum and the other is dependent on social security.

3.10 Council does not underestimate the difficulty of applying this principle. There may well be some issues on which there is no available evidence on what people consider fair, and others on which it can be shown that there is little agreement. Nevertheless, Council considers that it is useful to apply this principle, as best one can, in assessing the merits of particular rules and principles.

3.11 Council has not had the opportunity to formulate what principles would have significant community support. It would be easy, but perhaps unhelpful, to state principles in such general terms as, for example, that the law should be ‘fair’ or ‘just and equitable’. However, it might be possible to identify principles that are a little more concrete. By way of example, there may be significant support for such principles as the following:-

**Spousal autonomy**

3.12 The law should respect decisions by spouses themselves as to how their financial affairs should be regulated in the event of marriage breakdown. The Attorney-General has recently announced that financial agreements are to be made legally binding. Such agreements should be subject to safeguards intended to ensure that such decisions are fully informed and freely given, that their consequences have not been rendered unjust because of dramatically changing circumstances, and that it would not be contrary to public policy to enforce the agreement. The parties must obtain appropriate legal or financial advice about the agreement to make it binding.

**Economic consequences of division of responsibilities**
3.13 Property adjustment should take into account, among other things, the economic consequences for the parties of the division of functions during the marriage. This principle has its most obvious application to cases where one party has developed a career in the work force and the other has lost career skills, contacts and professional qualifications by caring for the home and children. The cases of *Best and Best* and *Mitchell and Mitchell* illustrate this point very well.\(^{26}\)

3.14 In effect this principle seeks recognition of the effect of the economic consequences of marriage by acknowledging that upon breakdown, there must be an equitable sharing of both the advantages and disadvantages from the division of responsibilities in the household, especially the economic disadvantages accruing to a spouse who worked in the home during the marriage rather than developing an income earning capacity.

3.15 For the purposes of property settlement, it may often be appropriate to proceed on the assumption that the parties to the marriage have agreed to a division of responsibilities in the household, for example, one party as homemaker and one party as income earner to support the household. These arrangements may at different times be a source of benefit or of disadvantage to the parties during the marriage, but upon its breakdown, the legislation should provide for a fair and equitable distribution of resources to alleviate the economic consequences of marital roles taken on by both spouses, regardless of gender. The reality, however, is that in many if not most, marriages, the wife still remains the economically disadvantaged partner. There may be times when the reverse is true and the legislation should equally be able to accommodate this eventuality.\(^{27}\)

*Not compensating for all inequalities*

3.16 Property adjustment should not be expected necessarily to produce an equal standard of living for the parties, particularly where their inequalities are not related to the circumstances of the marriage but to inequalities in society or differences in abilities
between the spouses. An example of this might be a case of a very short and childless marriage between a wealthy and highly skilled professional and a person with few qualifications: there might be general agreement that whatever re-adjustment should be made, it should not necessarily be such as to ensure that each party had an equal standard of living for the rest of their lives.

3.17 On the other hand, it is an important question of policy whether and if so to what extent the law should take into account circumstances that produce inequality between the parties but may be unrelated to the marriage relationship (such as a lottery win, or sudden ill-health, subsequent to separation).

**Priority to the welfare of dependant children**

3.18 Property adjustment should take account of the best interests of dependant children. This might imply a principle that orders for property adjustment should, so far as possible, be framed to minimise the disruptive impact of parental separation on children, for example, by seeking to avoid an immediate sale of the family home.

3.19 In England and Wales, the court is required to give ‘first consideration’ to the welfare of dependent children under legislative guidelines for the making of property orders (see Chapter 5).

**Principle 3: Transparency**

3.20 The law and the principles on which it is based should be as clearly stated as possible, so that they can be understood not only by legal practitioners but by litigants and members of the public. The clearer the law is, the more predictable the results are likely to be. Obscurity or confusion in the legal principles will presumably make it more difficult to predict the result of cases that go to trial. The more complex and difficult to understand the rules are, the less the outcomes will be predictable.
3.21 The law may be clear for some people but not others. For example, principles that are clearly established by case law may not be apparent to litigants in person, even if they read the relevant sections of the Act. Again, if some matters that are unclear in the written law are resolved by consistent unwritten practice, the law will be unclear to people who are not aware of that unwritten practice.

3.22 This point could therefore be expressed more completely by saying that predictability of outcome is likely to be increased if the law is clear and as intelligible as possible to all who refer to it.

**Principle 4: Certainty**

3.23 It is desirable that as far as possible the application of the law to particular cases should yield predictable results. From this point of view, systems that involve a high degree of judicial discretion may provide less certainty of outcome than those that involve the application of a definite rule.

3.24 As shown in Chapter 2, however, it does not follow that reducing judicial discretion is the only or even the main measure that would promote certainty. Predictability of results depends on a number of matters. In particular, outcomes may be hard to predict because of uncertainties of a factual kind, such as the existence or value of particular assets. Further, outcomes may be hard to predict where a rule, although not providing for judicial discretion, is uncertain in its application. For example, systems that distinguish between ‘matrimonial property’ and ‘separate property’ may lead to highly complex and uncertain disputes about whether particular assets or interests fall in one category or another.

3.25 In Council’s view, therefore, it is important to stress that what is desirable is *certainty or predictability of outcome*. This means that people can predict in advance the outcome of property proceedings if they are to be adjudicated by the court. A number of points need to be made about this notion.
3.26 First, this is not the only desirable quality in the law. It would be possible for example, for the outcome to be predictable, but unjust. It is clearly a matter of degree. The outcome can be more, or less, predictable. The notion is, no doubt, that predictability of outcome is a desirable characteristic of the law: the more predictable the better.

3.27 Second, outcomes may be predictable by some people but not others. Again, the most desirable situation would no doubt be that the outcomes be as predictable as possible by everyone involved, including litigants in person. If the outcomes are predictable only by those who are ‘insiders’, such as specialist family law practitioners, this, while no doubt preferable to no predictability, is less desirable than a situation in which all involved can predict the result.

3.28 Third, predictability of outcome presumably refers to the situation on separation, during negotiations, or at the commencement of the trial. Of course, at those times none of the parties will be in a position to know what findings of fact might be made on matters in issue between the parties. For this reason, as well as others, it may often be impossible to predict the outcome of a case no matter how clear and free of discretion the legal rule may be.

3.29 The predictability referred to presupposes that the parties do not know the identity of the judge. That is, a desirable quality is that the results be as predictable as possible regardless of which judge hears the case.

3.30 Predictability of outcome seems desirable for at least two reasons. Firstly, it is consistent with the rule of law, in that the result varies as little as possible with the identity of the particular judge. To the extent that the outcome can be predicted by litigants who do not know who is to be the judge, the law will not be vulnerable to the criticism that the result depends not on the law but on the particular preferences of the judicial officer.
3.31 Secondly, it is reasonable to suppose that the more predictable the outcome, the easier it will be for the parties to settle the matter on the basis of the law. The relationship between predictability of outcome and settlement negotiations may be rather complex and we do not wish to enter into this topic in detail. It is not at all clear how far, if at all, a greater predictability of outcome would increase the proportion of cases that are settled. Cases may settle for all sorts of reasons, for example because one party finds the prospect of litigation unpalatable. It seems likely that increased predictability of the results of litigation would make it more likely, where cases do settle, that the result would reflect ‘the law’, in the sense of the result that could be predicted if the case went to trial. And it may be that the proportion of cases that settle would increase, or that cases would settle somewhat earlier in the process than they now do. It should be kept in mind, however, as noted later, that under the present law (as under most or all systems, it seems) the vast majority of cases are resolved by agreement rather than going to trial.

**Principle 5: Adaptability**

3.32 The law should recognise and accommodate diversity and be capable of applying to all kinds of marriages, including marriages of long or short duration, marriages with or without children, and marriages with substantial or few assets.

**Principle 6: Promoting settlement**

3.33 The law should provide guidelines and procedures to help spouses to resolve property matters informally, without oppressive bargaining and, wherever possible, without resort to litigation.

3.34 A law comprising all the characteristics of a good law contained within a clear legislative framework should in most cases encourage settlement between the parties, because a court-determined outcome will be seen as unlikely to produce a significantly better outcome than one agreed to by the parties, especially when the cost in financial and emotional terms of going to trial is taken into account.
**Principle 7: Timely and just adjudication**

3.35 The law should provide mechanisms for timely and just adjudication of those matters that cannot be settled. All people, not only those with wealth or legal representation, should have access to such adjudication.

**Principle 8: Harmony with other laws**

3.36 The law of matrimonial property should not be in conflict with other areas of the law. Of particular relevance to family law, are laws relating to child support, spousal maintenance, superannuation, bankruptcy, social security and taxation.
CHAPTER 4: REVIEWS AND RESEARCH FINDINGS ON THE FAMILY LAW ACT

4.1 This chapter summarises the major Australian reviews of and research into the operation of the Family Law Act. Some of this work has evolved into the models for reform which are considered separately in the following chapter.

PARLIAMENTARY REVIEWS OF THE FAMILY LAW ACT

1980 Joint Select Committee Report

4.2 In 1978, a committee was established to consider criticisms of the property provisions of the Act for their perceived injustice to both men and women, and their lack of precision and certainty in prescribing the property rights of parties to a marriage. Nevertheless, the Committee rejected calls for the implementation of a new property regime as the Act had only been in operation for four years at that time. The Act itself had made major changes to all aspects of matrimonial law and a further overhaul of the property provisions would only create greater confusion and uncertainty. Time was also needed to allow the Family Court to develop a body of law which would clarify basic principles as more decisions were made.

4.3 For these and other reasons, the Committee recommended a thorough study of matrimonial property law by the Australian Law Reform Commission before the introduction of any new property regime was contemplated. A number of other recommendations to improve the operation of the existing property provision were implemented quite quickly.

1992 Review of the Operation and Interpretation of the Family Law Act

4.4 The Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act also looked at previous reviews and reports covering property matters, namely the 1980 Joint Select Committee Report, the 1986 AIFS study entitled

4.5 The Committee reported that three broad issues predominated in submissions made to it: the length of time and expense involved in achieving a post-separation property settlement; the perceived imbalance between the percentage of property which is being awarded to custodial parents - mainly women - compared to that awarded to non-custodial parents - mainly men; and the costs of proceedings.31

4.6 The Family Court submission indicated a divergence of views on an appropriate property regime. One approach favoured the ALRC recommendation for a more structured system of property law, but with sufficient discretion to meet the needs of unusual or complex cases. The other approach supported the High Court decision in *Mallet*, that there should be no presumption of equality for distribution of property, and the existing unfettered discretion of judges as to the weight to be given to particular matters should be retained. The latter approach argued that the existing discretionary system was more likely to produce a just and equitable outcome than a structured system, or worse, a fixed formula system.

4.7 In response, the Government accepted the property recommendations of the Committee,32 (summarised at paragraph 2.18 of the Discussion Paper ) although they have not yet been implemented by legislation.33 Option 2A of the Discussion Paper is a model based on the Committee’s recommendations.

**RESEARCH ON THE FAMILY LAW ACT**

**Matrimonial Property: ALRC Report no. 3934**

4.8 The ALRC Report on *Matrimonial Property* arose out of a recommendation of the 1980 Joint Select Committee Report that the ALRC should thoroughly investigate the subject before any proposal was made to change the existing law. The 1980 committee
found that there was widespread dissatisfaction with the provisions of the Act as it related to the reallocation of property.

4.9 The ALRC made recommendations for the adjustment of property on marriage breakdown. It outlined the principles on which those recommendations were made and pointed out the serious shortcomings of the existing law for which new legislation was the only remedy. The findings and recommendations of the ALRC report are summarised at paragraphs 2.6-2.77 of the Discussion Paper.

4.10 None of the recommendations have been implemented.

1986 - 1993: AIFS Studies: *Settling Up* and *Settling Down*

4.11 The Australian Institute of Family Studies conducted a longitudinal study of the economic consequences of marriage breakdown during the 1980s, prior to the introduction of the child support scheme. The research was a component of the ALRC reference on Matrimonial Property, referred to in the previous section. The AIFS research appears to have been largely ignored in the Discussion Paper.

4.12 The research was intended to provide a coherent picture of the economic and other consequences of divorce, empirical evidence of which was until that time, lacking in Australia. Hence the research studies of the ALRC and the AIFS were to ‘complement each other and together provide a picture of both the law’s role and other relevant circumstances affecting people after marriage breakdown’.35

4.13 The research also sought to examine the adequacy of the basic principles and provisions of the Family Law Act when applied to property and income distribution upon divorce. The longitudinal nature of the research enabled the extent and duration of the differences in standards of living between resident mothers and non resident fathers to be measured over the 5 to 8 year period since separation.
Conclusions of the study

4.14 The research showed that the short and longer term economic impacts of separation were experienced differently by men and women, and their adjustments to them were consequently different. Women were found to be particularly vulnerable, largely because their participation in the paid workforce had been interrupted during the marriage by their child rearing responsibilities, which in turn restricted their access to earnings and related benefits such as superannuation and job training. These disadvantages were seen as opportunity costs attributable to the division of responsibilities within the marriage; and they were not experienced by men, whose standards of living were only minimally affected and tended to rise within three years of the separation. The costs were neither factored into property settlements nor were they reduced to any significant extent by child support payments from men. Women were found to be far more likely than men to have the primary care of the children following marriage breakdown, usually as a result of privately negotiated arrangements. The children therefore shared their carer’s financial disadvantages and reduced standard of living. This was particularly marked where pre-separation wealth levels had been higher than the norm, as these cases were associated with women receiving smaller property shares.

4.15 Hence the study concluded that ‘the disjunction of an underlying philosophy of equality of husband and wife and the reality of patent economic inequality upon breakdown of the marriage is the dilemma facing family law reform in Western societies today’. 36

Reform of matrimonial property law

4.16 The study considered that matrimonial property law could be evaluated on three aspects: justice, predictability and efficiency. The current system rated poorly on each criterion. The most commonly reported problems in settling matrimonial property disputes, apart from dealing with the former spouse, were: delay, expense and uncertainty.
4.17 The basic principle of the present law is that justice can be achieved if every case is considered to be unique. This results in inefficiency and unpredictability as ‘the law provides few guidelines and relies on the capacities of those involved to sort out a solution based on the balance between the relative contributions of the parties and their envisaged future needs... Couples may bargain in the shadow of the law but when the law itself is shadowy, they have little or no basis to estimate what would be a fair result in their case’.37

*Other findings*

4.18 Other findings were:

- that outcomes generally did not represent a fair balance of the relative contributions of each party against their respective future needs;38

- that the only future need found to have any bearing on outcomes was that of the future need of custodial parents for children of the marriage;39

- that the most important reason for the low income earning potential for women after separation is the disruption to their workforce participation resulting from child rearing. Hence the low income earning potential of women is directly attributable to the division of functions within the marriage partnership. The AIFS concluded that the disparity of post-separation incomes is the dominant source of injustice in the present Australian system;40

- that the contributions versus needs approach of Australian matrimonial property law was not operating fairly or efficiently, and the AIFS argued that the problem, or part of it, was inherent in the law itself;

- that it was very difficult for women to work their way out of poverty, despite the fact that many resumed work within 5 years of the separation. Their financial
situation was such that 80 per cent of women had been dependent on social security for some period of time after the marriage breakdown;

- that re-partnering provided something of an economic ‘solution’ for the future, but could not remedy past discrepancies which flowed from parental responsibilities assumed during the marriage;

- that there was generally a low level of wealth accumulated by separating couples, with basic assets such as a small equity in the former matrimonial home; furnishings, a car of little value and a small bank balance forming the total matrimonial assets for most couples;

- that the dearth of assets for division amongst respondents in the survey resulted in the discrepancy between husbands and wives being much more financially significant than was the share of the property. Its division also proved to be variable. Mothers received a little more of the basic assets, but men received the larger share where non basic assets such as businesses, superannuation and farms were present; and

- that resident parents were somewhat more likely to remain in possession of the family home in the short term and housing costs were found to form a very high percentage of their budget, particularly where they were sole mothers.

4.19 The economic consequences of marriage breakdown research concluded that principles of property distribution and income transfers between couples after separation were far from obvious. This was attributed to a number of confusions and conflicting views about what is equitable, what factors are relevant in calculating shares, which individual needs or losses have arisen during or as a consequence of the marriage, and where a remedy for these should lie. The research demonstrated that equality of result was patently different from equality of rules.
4.20 *Settling Up* proposed, and *Settling Down* further developed a method by which, it was argued, the distribution of the assets and liabilities of the marriage partnership might be distributed more equitably than under the existing law which is still the current law. This method is discussed in Chapter 4, ‘Models for reform’.

**1997-1999: Australian Divorce Transition Project (ADTP)**

4.21 The ADTP is a large national study of divorce, conducted in 1997 by the AIFS. The findings from this study are generally consistent with those from *Settling Up*. The ADTP findings suggest that settlement outcomes do not represent a fair balance of the relative contributions of each party taking into account their respective future needs.\(^{41}\)

4.22 Consistent with *Settling Up*, differences between men and women in the share of property received were determined primarily by financial contributions to non-basic assets such as businesses and farms, superannuation and investments. The wife’s share of total assets tends to be reduced in cases where non-basic assets comprise a high proportion of the couple’s total asset wealth. According to McDonald,\(^ {42}\) women with primary responsibility for the care of children post-separation and divorce typically receive a larger share of the basic assets than men. Conversely, men tend to receive a greater share of non-basic assets (such as businesses, investments or superannuation) than women. McDonald argues that irrespective of the parties total asset wealth, basic assets appear to comprise the form of matrimonial property most often used to compensate women for costs associated with the marriage and to ensure that their future needs are addressed. Non-financial contributions made directly to the home and family appeared to make little or no difference to the shares of property received.\(^ {43}\)

4.23 Further, status as a resident parent post-separation was the only future needs factor that predicted settlement outcomes in favour of the wife. In response to a similar finding in 1986, the AIFS considered it astounding that the future need for income on the part of wives was not a significant factor in property divisions and concluded that as long as survival income is available through government benefits, there appeared to be no need to consider the impact of the marriage partnership on the income earning potential of
husbands and wives. It is also noteworthy that the latest research takes account of child support, while the earlier study did not.

4.24 Of the data from the ADTP that has been published to date, the following patterns emerge with respect to the distribution of property, work history during marriage and the current living standards of women and men who divorce.

Asset wealth

4.25 The majority of women and men (79 per cent v. 82 per cent) reported asset wealth below the cut off for the social security non-home owner Pension Assets Test (i.e. $268,500). This includes the couples’ net equity in their home and excludes superannuation. Further, of the men and women interviewed around 40 per cent reported assets valued at below $114,000. It appears that the majority of divorced women and men have limited asset wealth prior to separation with which to address any economic disadvantage associated with the opportunity costs of marriage.

Share of property received

4.26 Consistent with the earlier findings in Settling Up, the mean share of property received by women is 64 per cent, however this drops to 52 per cent for women when superannuation is included in the asset pool. Further, almost two thirds of women received 60 per cent or more of the property when superannuation is excluded as an asset for division, but this drops to 39 per cent when superannuation is included.

4.27 The value of superannuation was self-reported and valuation of it is a complex exercise. It is often undervalued and if this is the case, the position of the majority of women is much worse.

Work history
4.28 A traditional work history profile was evidenced in the data.48 A significantly higher proportion of divorced men were in paid work compared with divorced women (a) at the time of marriage (97 per cent v. 89 per cent), (b) at the time of separation (90 per cent v. 59 per cent), and (c) at the time of interview (82 per cent v. 67 per cent). The majority (76 per cent) of men interviewed had worked throughout the duration of the marriage. Only eight per cent of women had done the same. Women’s time out of the work force varied: about two-fifths (42 per cent) of women spent less than one-third of the marriage out of paid work, about another third (34 per cent) spent between one-third to two-thirds of the marriage out of the workforce, and one quarter spent somewhere between two-thirds to all of the marriage out of the workforce. Most of the women who took an extended break from the workforce (around 75 ) did so specifically to have, or to care for children, compared with one per cent of men. These differences in workforce participation rates for women and men are consistent with earlier findings49 as well as more recent data.50

Living standards

4.29 Since almost two-thirds (62 per cent) of women in the sample were sole parents, and sole parenting by women and poverty go hand in hand, a relatively high level of economic disadvantage was predicted and found to exist for women who had been divorced. Divorced women were significantly more likely than divorced men to be ‘poor’51 (55 per cent v. 34 per cent).52

Superannuation53

4.30 The ADTP also looked at superannuation in divorce. Its main findings were:

- The proportion of couples where at least one party has superannuation is now 82 per cent (up from 55 per cent in the 1980s);
- Superannuation entitlements are unevenly distributed between genders, in favour of men (76 per cent of men and 34 per cent of women had superannuation on divorce);
• The median value of women’s superannuation was 1/5 that of men;
• Superannuation accounts for approximately 25 per cent of the parties’ total asset wealth;
• Superannuation is taken into account in only 46 per cent of cases; and
• The more valuable the superannuation in absolute terms, the more likely it is taken into account (usually high asset marriages) and the more valuable it is in relative terms, the less likely it will be taken into account (low asset marriages).

4.31 This study also found that men and women were generally ill-informed about their spouse’s superannuation (whether the existence of it or its value) and women were less informed than men. This continues a ‘disturbing’ trend noted by Bordow and Harrison from surveys in 1986 and 1983.54

4.32 The conclusions of the study of superannuation were that:
• Women in low asset marriages may be leaving the only asset of value with the husband without obtaining compensating transfer of other assets.
• The significance of superannuation as a non-basic asset is growing. Women usually get more of the basic assets and less of the non-basic assets. This points to a possible trend for less property for women.
• A 50/50 split of superannuation assets under the new proposals would improve the position of women from low asset groups. The position of other women may only improve if other asset transfers are still made, and it is not clear if this will occur under the new proposals.
• Some women may be worse off under the new scheme immediately after divorce where there are no offsetting asset transfers and the superannuation benefit is not available until some future time.
An equal split of superannuation fails to recognise that men and women are not equally able to provide for their own retirement and that may justify women getting more than a half share.

1992 Study of defended cases

4.33 The 1992 study of contested property cases in the Family Court in 1990 obviously does not provide data on settlement rates, but does provide a useful profile of defended cases. Although the study is almost 10 years old and there have been many changes in family law, there has not been any more recent study.

4.34 The total number of defended property cases in 1990 was 349. The age of the parties was older than the general divorcing population (43 per cent of men and 33 per cent of women were over 40) and the length of the marriage was longer than in the general divorcing population (in 46 per cent of cases the marriage lasted more than 15 years). In 28 per cent of cases there were no dependent children, in 12 per cent there was one child and in 25 per cent there were three or more children. The large proportion of non-dependent children is consistent with the ages of the parties and length of the marriages. In 75 per cent of cases, the children lived with the mother, in 15 per cent of cases they lived with the father, and the other 10 per cent lived elsewhere.

4.35 It is interesting to note that in 49 per cent of cases the matrimonial home made up 80-100 per cent of the value of the contested property. In 33 per cent of cases the property was valued at $200,000 or less.

4.36 The outcomes of these contested cases showed that in 47 per cent of cases, the property was divided in the range of 40-60 per cent. In only 11 per cent of cases was an equal division ordered.
CHAPTER 5: MODELS FOR REFORM

5.1 There is a developing international consensus that property reform needs to address two issues: providing clear prima facie principles for an initial division of assets, while addressing certain disparities in earning capacity that are likely to exist after divorce, particularly those which have arisen through, or been exacerbated by, the division of labour adopted by the parties during their relationship. These are sometimes called the ‘contribution’ and ‘equity’ issues.\(^{57}\) For the purposes of this Submission, Council has used the terms ‘First Stage’ and ‘Adjustment Stage’. This is the framework informing the models of the ALRC, the AIFS and the ALI, although there are important variations in detail between these models. Whatever form legislation might take in Australia, if there is to be a presumption of equal sharing, then there must be some provision for addressing equity issues (see Chapter 6).

5.2 This Chapter considers a number of different models of property distribution on divorce, including those of the ALRC, AIFS and ALI referred to above. The models considered are either already enshrined in legislation, or have been proposed as models for future legislation. As such, this Chapter firstly sets out Council’s consideration of existing legislative models and then a consideration of various proposed models. As indicated in paragraph 2.61, Council is aware of the difficulties in evaluating other countries’ laws.

EXISTING LEGISLATIVE MODELS

England and Wales

5.3 The law of financial provision in England and Wales is governed by the Matrimonial Causes Act 1973 (UK) (as amended). Sections 25 and 25A of that Act set out general principles and specific factors governing orders for transfer of property and for periodic payments between former spouses. There is no separate threshold for spousal maintenance.
5.4 Sections 25 and 25A require a court to have regard to ‘all the circumstances’ when making an order under the Act, and stipulate that it should ‘in particular’ have regard to a list of specific factors. The sections also set out some general guidelines which govern the exercise by the courts of their jurisdiction to make orders under the Act. The general guidelines are:

- that ‘first consideration’ be given to the welfare of a child of the family;
- that the court must consider whether to exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the divorce decree as possible; and
- where the court makes an order for periodical payments, that the court ‘shall in particular’ consider whether it would be appropriate to require those payments to be made only for such term as would be sufficient to enable the recipient to adjust without undue hardship to the termination of their financial dependence on the other.

5.5 The court is also given the power to direct, when dismissing an application for periodical payments, that no further application for such payments shall be brought by the unsuccessful applicant. Orders for periodical payments terminate on the remarriage of the payee.

5.6 In practice, the courts focus on satisfying the parties’ ‘reasonable requirements’ out of the available assets. There is less emphasis than in Australia on contributions. Where there are sufficient assets, it has become common practice for a spouse’s future needs to be provided for by way of a lump sum, calculated using the so-called ‘Duxbury’ formula. Periodic payments between spouses are very rare. Where there are children, a high priority is given to preserving the matrimonial home for the primary carer and the children, at least until the children reach 18. Various forms of order have been devised to achieve this.
5.7 Child support legislation was introduced in 1991. Like the Australian scheme, the English scheme assesses child support liabilities according to a statutory formula, with assessed amounts being collected by a government agency. In almost every point of detail, however, the English scheme differs from the Australian. There have been considerable doubts expressed about the ability of the English scheme to do more than achieve modest benefit recovery targets.70

5.8 Recent legislation has paved the way for both ‘earmarking’ of pensions.71 and for pension-splitting on divorce.72 It is unclear as yet how the latter will be implemented, although there is draft legislation currently before the British Parliament.73

5.9 A recent survey of the law and practice in England and Wales has concluded that it is ‘very difficult to detect any overt policy objectives in the exercise [by the courts] of the adjustive jurisdiction’ and that ‘the general objectives of the higher courts have remained … first, that adequate provision must be made to ensure the support and accommodation of the children of the marriage and, second, that provision must be made to meet the needs of each spouse which have been occasioned by the marriage breakdown’.74 This makes it difficult to generalise about the effects of the law in practice, although one consequence of the emphasis on needs is that wives of wealthy men tend to receive very small percentage figures of the parties’ total wealth.75

5.10 In its Consultation Document entitled Supporting Families (1998)76, the Labour government has indicated that it is considering changes to the law of matrimonial property.

5.11 First, the government is considering making nuptial or pre-nuptial agreements about property binding, subject to six safeguards (eg, concerning legal advice, change of circumstance or lack of disclosure).77

5.12 Second, the government is considering a set of objectives and principles that would provide greater structure and certainty to the law. The proposed over-arching objective is
that ‘the court should exercise its powers so as to endeavour to do that which is fair and reasonable between the parties and any child of the family’. The accompanying principles, or aims, would be as follows:

- to promote the welfare of any child of the family under the age of 18, by meeting the housing needs of the children and the primary carer, and of the secondary carer; both to facilitate contact and to recognise the importance of the secondary carer’s role;

- the court would take into account the existence and contents of any written agreement about financial arrangements, reached before or during a marriage, which has not been enforced owing to one or more of the proposed safeguards (see above) having not been met;

- having dealt with the needs of children and the housing needs of the couple, and having taken into account a nuptial agreement, the court would then divide the surplus so as to achieve a fair result, recognising that fairness will generally require the value of the assets to be divided equally between the parties; and

- the court would try to terminate the financial relationships between the parties at the earliest date practicable.\(^{78}\)

If implemented, these proposals would further increase the emphasis on meeting the housing needs of the parties.

**Comment**

5.13 The emphasis placed in English law on satisfying ‘reasonable requirements’ stands in stark contrast to the current Australian emphasis on contributions. The concept of ‘reasonable requirements’ can be a limiting factor, especially where there are significant assets. Where the assets are limited, however, it is possible that awards based on reasonable requirements would be higher in percentage terms than those obtainable under Australian law. The possibility of placing greater emphasis on the welfare of children in property distribution is considered elsewhere in this Submission.

**Scotland**

5.14 *The Family Law (Scotland) Act* 1985 came into force in 1986. The key section of that legislation for present purposes is s. 9, which sets out the principles which a court
must take into account in making orders for financial provision on divorce. The expression ‘financial provision on divorce’ is the financial settlement that parties make, by agreement, in anticipation of a divorce or the court imposes if no solution has been reached prior to the granting of decree of divorce. It includes ‘aliment’ which is the right of one spouse to be maintained by another, and the amount to be paid (if by court order) is based on what the court considers reasonable, having regard to all relevant circumstances.

5.15 The purpose of s. 9 is to ‘provide more specific guidance to the courts, the legal profession and the public on the purpose or purposes of financial provision on divorce and the principles to be applied and the factors to be taken into consideration in connection therewith’. 79

5.16 Section 9 sets out five principles: 80

- The net value of the matrimonial property should be shared fairly between the parties to the marriage;
- Fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or the family;
- Any economic burden of caring, after divorce, for a child of the marriage under the age of sixteen years should be shared fairly between the parties;
- A party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust over a period of not more than three years from the date of the divorce to the loss of that support on divorce; and
- A party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

5.17 The legislation provides for the more detailed application of these principles. The following points deserve particular attention.

5.18 The definition of ‘matrimonial property’ for the purposes of the first principle excludes property acquired before marriage or property acquired during a marriage by gift
or succession. Otherwise, all property (including interests under a superannuation scheme attributable to the period of the marriage) is included. A home that is owned before a marriage but which becomes the parties’ matrimonial home is also included.

5.19 For the purposes of the Act, ‘fair sharing’ is deemed to be equal sharing, subject to some exceptions. In special circumstances, the court may decide that there should be an unequal division of the matrimonial property and it may, for example, take into account the economic burden that one party has for caring for the children of the marriage. Typically in those circumstances the court might divide the property 60 per cent to the person having care of the children and 40 per cent to the other spouse. However, there is no fixed rule and everything has to depend on the circumstances of each case. There is no express reference to contributions as the basis of equal sharing, nor as a basis for departure from equal sharing.

5.20 The legislation specifies five circumstances in which equal sharing of matrimonial property may be departed from:

- where there is an agreement specifying some other ratio of division, or exempting property from equal division entirely;
- where the source of funds used to acquire an asset is not derived from the income or efforts of the parties during the marriage;
- where one spouse has destroyed, dissipated or alienated property that would otherwise have been available for sharing;
- the nature of the matrimonial property and the use made of it (e.g., as matrimonial home or for business purposes) and the extent to which it is reasonable to expect it to be realised or divided; and
- liabilities for expenses of valuation or transfer or property in connection with the divorce.

5.21 The second principle, fair account of economic advantages and disadvantages, will result (where it applies) in a further adjustment of the distribution of matrimonial property, but can also be made by lump sum which may be paid periodically. Additional adjustments under the second principle are only made where fair sharing under the first
principle has not yielded a fair distribution of the gains and losses of the marriage. This means that the first two principles are usually considered together.

5.22 The third principle may result in further property adjustment or in periodical payments.

5.23 Any payments of ‘transitional’ maintenance under the fourth principle are limited to three years from the date of the divorce.

Comment

5.24 The Scottish system offers a much clearer framework of principle than its English equivalent, although the detailed working out of those principles is likely to be complex. Yet it has been suggested that, in spite of the differences between the jurisdictions, the practical outcomes of cases in Scotland will be very similar to those in England and Wales. Practitioners in Scotland, it seems, attach the same importance to the housing needs of parties, and especially children. There is considerable emphasis on a clean break and capital settlement. Another feature common to both jurisdictions is the rarity of spousal or periodical maintenance payments.

5.25 In Council’s view, current Scots law is similar to Option 2B in that it applies a presumption of equal sharing to a defined pool of marital property, subject to adjustments. In that sense, Scots law could be said to suffer some of the defects Council has identified with Option 2 (see Chapters 9 and 10). However, one attractive feature of Scots law, in Council’s view, is the way in which the legislation is drafted in terms of a series of general principles which make the purpose of the law clear, while leaving some discretion in the application of those principles to the facts of each case. Council draws attention to the possible advantages of this legislative technique, whatever might be thought about the substance of the law.

New Zealand
The Matrimonial Property Act 1976 (New Zealand) first defines ‘matrimonial property’, and then applies presumptions of equal division of varying force to the property so defined, depending on the nature of the property.

The definition of matrimonial property is similar to that in Scotland. Thus, property acquired during a marriage is included, unless it is acquired by succession or survivorship. The matrimonial home and chattels are included, whenever acquired, along with other property acquired before the marriage if that property was intended for the spouses’ common use and benefit. Anything else is separate property, although property acquired from separate property during the marriage will be matrimonial, and increases in the value of separate property attributable to the efforts of the non-owning spouse will be included.

Domestic property (the house and chattels) will be divided equally, unless a specified exception applies. Where the marriage has been short (less than three years), then equal sharing will not apply to any property (a) owned by one party at the date of the marriage, (b) which has been inherited or received as a gift by a party during the marriage or (c) where one spouse’s contribution to the property has been significantly greater than the other’s. Another exception to equal sharing is where for any reason equality would be ‘repugnant to justice’. In each case to which an exception applies, the property is distributed according to the parties’ contributions ‘to the marital partnership’.

The remaining property is termed ‘balance’ property. Here, there is a weak presumption of equal sharing which is rebutted by evidence that one party’s contribution to ‘the marriage partnership’ has been greater than the other’s, in which case the property will be distributed according to those contributions.

The New Zealand legislation has been criticised on the ground that the presumption of equal sharing is too easily rebutted in the husband’s favour, and that it takes account only of past events and ignores the parties’ future needs. There is no equivalent of the Australian section 75(2) factors, for example. It has been said that a presumption of equal
distribution will operate unfairly where child care responsibilities are unevenly distributed and where earning capacities are unequal. 89

5.31 There is separate provision for spousal maintenance. 90 Once again, it seems that they are rarely used. 91

Comment
5.32 In Council’s view, the limited scope for adjustment to equal sharing creates potential for significant inequity in the distribution of the gains and losses of married life. The only point for departure from equal sharing to make an equity adjustment is where it would be ‘repugnant to justice’ which is a very high standard. While there is no empirical data, it is widely accepted that women are severely disadvantaged by this model. 92

PROPOSED MODELS

Australian Law Reform Commission


5.34 The ALRC reviewed the operation of the provisions of the Family Law Act and commissioned detailed research by the Australian Institute of Family Studies into its effects. 93 The ALRC concluded that reform was justified for the following reasons: 94

- that the present legislation contains no clear statement of principle and therefore causes confusion and uncertainty;
- that the emphasis on contributions is ‘impractical and inappropriate’;
- that the legislation creates confusion surrounding the relationship between property and spousal maintenance orders; and
- that the legislation does not clearly distinguish assessment of shares in property and the way in which that assessment is to be implemented.
5.35 The ALRC went on to recommend that revised legislation should give effect to three principles:  

- that spouses are of equal status in marriage;
- that spouses should be seen as having a single, shared responsibility for the nurture of children, household management and the acquisition and management of income and property, and that the allocation of these tasks between spouses is a matter for the spouses themselves; and
- that there should be a just distribution of the economic hardship arising from marriage breakdown.

5.36 With these principles in mind, the ALRC recommended the following statutory scheme:

- that the existing law on what property is available for distribution should be retained, so that all property beneficially owned by the parties is potentially available for distribution;
- that there should be a ‘rule’ of equal sharing of matrimonial property so defined;
- that this rule could be departed from where one or more of the following circumstances applied:
  - that one party has made a substantially greater contribution to the marriage than the other;
  - where parties have engaged in certain post-separation conduct (e.g. paid off the debts of another, or spent money on maintaining property);
  - where one party has the benefit of financial resources other than matrimonial property (e.g. trust beneficiaries); and
  - where one party has brought property to the marriage or acquired it by way of gift or inheritance.
- that there should be an adjustment of equal shares in property to take account of possible disparities in the future needs and resources of the parties. This adjustment would be made only if the court is ‘satisfied that that there is a disparity in the standards of living reasonably attainable by the parties, and that this disparity is wholly or partly attributable to a party’s responsibility for the future care of the children of the marriage or to a party’s income earning potential having been affected by the marriage’; and
• that there should be minor drafting changes to the provisions concerning spousal maintenance.

5.37 These proposals have not been implemented.

Comment
5.38 In Council’s view, this model is similar to Option 1 and, for practical purposes, the present law. In so far as the grounds for an adjustment to equal shares would be clearly spelled out under this model, it echoes Council’s suggestion that the purpose of any such adjustment should be stated clearly on the face of the legislation.

Australian Institute of Family Studies

5.39 In its report on the research conducted on behalf of the ALRC, the AIFS made its own recommendations for reform of the law. This model was subsequently reiterated by Dr Kate Funder.\textsuperscript{98}

5.40 The basis of the model is the principle of compensation and the process by which this is assessed focuses on earnings foregone due to child raising. The integrity and applicability of the method are based on the identification of economic loss, its attribution to child raising and the ability to quantify the sum foregone. This is described as the ‘opportunity cost’ of raising children. That cost should then be charged as a ‘partnership debt’ against the matrimonial property. Whatever remains after that debt has been repaid to the spouse incurring the cost would then be divided equally between the spouses. Thus, equal division would apply \textit{after} the debt had been calculated and deducted, rather than being a starting point to be departed from (as in other proposals).\textsuperscript{99}

5.41 The method suggested for calculating the ‘debt’ is to measure the difference between lifetime earnings of women with, and women without, children. Using data from existing national surveys, it would be possible to estimate the opportunity costs of children, in terms of reduced life-time earnings, provided that certain other socio-
economic, fertility and labour market variables were known. This would provide a ‘band of values’ which would set parameters for adjudication or negotiation.

5.42 The loss calculated in this way is then characterised as a debt chargeable to the marriage partnership. The discharge of that debt is therefore a shared responsibility and becomes an entitlement of the economically weaker partner, and consequently is unaffected by post separation events such as re-marriage or illness. The amount owing could be paid by way of a lump sum or in periodic instalments.

Comment

5.43 In Council’s view, the objects of this model are commendable but it is questionable whether it can be implemented. Very reliable opportunity costs tables would be needed and, without them, the system would quickly collapse. However the central principle is an important one, i.e. compensation for the economic consequences of the division of labour in marriage.

5.44 One possible implication of this principle is that it does not explicitly provide for future needs. For this reason, it may lead to an increase in the numbers of women dependent on welfare payments. In terms of public policy, this seems contrary to the government’s push to privatise financial responsibilities for the family.

The 1995 Bill

5.45 In December 1995, the then Labor government introduced the Family Law Reform Bill (No. 2) 1995. This Bill adhered to the general principle that property should be distributed initially according to the parties’ contributions ‘to the marriage as a whole’, but would have altered the current law by creating a starting point that the parties to the marriage have made equal contributions. However, this assumption or starting point would be displaced if the parties’ contributions were not in fact equal. In deciding whether to displace the initial presumption, the following factors were relevant:

- the duration of the marriage and the parties’ cohabitation;
• the financial and non-financial contributions made, directly or indirectly, to the acquisition, conservation or improvement of the property and to their financial resources, and to the welfare of the family including any contribution made in the capacity of homemaker or parent; and

• any other relevant factor.

5.46 The court would have been given an overriding obligation to make orders that were ‘just and equitable’, and the Bill supplied a list of factors relevant to what would be ‘just and equitable’ in all the circumstances. This included a reasonable standard of living in all the circumstances, and the extent to which the role of parent has affected a spouse’s ability to earn or derive income. The Bill also made provision for the enforcement of pre-nuptial agreements.

Comment
5.47 In Council’s view, this model is similar to Option 1 and the current law. One defect of the Bill, however, was that it failed to state any clear principle of adjustment.

American Law Institute

5.48 Family law is predominantly a matter of State law in the United States. The ALI has drafted a proposed uniform law governing family dissolution, which includes provisions covering property distribution and ‘compensatory spousal payments’ (hereafter referred to as ‘the Draft’). The recommendations are comprehensive and are accompanied by supporting comment, analysis and illustrative examples. Only a brief summary can be offered here.

5.49 The Draft deals separately with the division of property and compensatory payments. The ‘opportunity costs’ of marriage are dealt with primarily by way of compensatory payments rather than through property distribution, but there are some circumstances where adjustments of property may be made for compensatory purposes. The Draft states that one of the objectives of a reformed law is to allocate property by principles that are ‘consistent and predictable in application’. 
Property division

5.50  The basic principle is that marital property and marital debts are to be divided so that spouses receive net shares of equal value, although not necessarily identical in kind. The notions of ‘contribution’ and ‘need’ as bases for property distribution are comprehensively abandoned as unsatisfactory. Instead, the presumption of equal shares of marital property is grounded in principles of partnership, coupled with a clearly articulated principle of compensation for the ‘opportunity costs’ of marriage (see below). The only grounds for departing from equal sharing are (a) where a compensatory payment is justified (see below) and it is appropriate to adjust the shares of property instead of making a compensatory payment; (b) where one party has made ‘improper dispositions’ of marital property; or (c) cases where marital debts exceed marital assets and it is ‘just and equitable’ to assign excess debts unequally, having regard to certain factors.

5.51  The Draft defines marital property for the purposes of applying the rule of equal division. The basic principle, subject to exceptions, is that marital property is property acquired during marriage. Inheritances and gifts received from third parties are separate property, whenever received; and property received in exchange for separate property is separate property, even when acquired during the marriage. The Draft defines ‘during marriage’ for these purposes, and deals with pre-marital cohabitation and pre-dissolution separation. Income from separate property, and increases during the marriage in the values of separate property, may be treated as marital property if either the income or the increase in value is attributable to the labour of either spouse, or if the underlying asset is ‘recharacterised’ as marital property under rules discussed below. Otherwise, income from, and appreciations in the value of, separate property remain separate property.

5.52  The Draft deals with some specific assets. Thus, earning capacity, skills, post-dissolution spousal labour, occupational licences and educational degrees are not property divisible on divorce. On the other hand, business and professional goodwill earned during marriage are marital property ‘to the extent that they have value apart from the
value of spousal earning capacity, spousal skills, or post-dissolution spousal labour’. 112

Other work-related assets, such as pensions, compensation rights, insurance proceeds, disability pay or workers’ compensation are marital property in so far as they are attributable to labour performed during the marriage, or relate to (or replace) income that would have been earned during the marriage but for the qualifying event. 113

5.53 The Draft further proposes that spouses in long term marriages should be given a share in the separate property of the other, according to a formula which will increase that share according to the length of the marriage. Thus, separate property may in some circumstances be ‘re-characterised’ as marital property by the passage of time. 114 The Draft also proposes that there be a specified marital duration at which all separate property should be treated as marital. This principle could be excluded in respect of gifts or inheritances received during the marriage either by written notice or by a specific provision in the relevant will or deed of gift.

5.54 The Draft preserves the power of couples to make binding agreements affecting property distribution at any time before, during or after marriage. The freedom of spouses to make such agreements is probably wider in most US States than it is in Australia at present, and in some States is governed by the Uniform Premarital Agreement Act.

Compensatory payments

5.55 Chapter 5 of the Draft begins by setting out the case for replacing existing concepts of spousal maintenance or alimony with that of compensation for losses. For the most part, existing spousal maintenance laws depend heavily on the concept of ‘need’. As the Draft points out, need is an unsatisfactory basis for the law because it offers no explanation for why one spouse should be obliged to meet the other’s needs, and ‘need’ itself is hard to define precisely. Instead, the Draft proposes that need be abandoned and replaced by compensation for certain financial losses arising from separation, which it terms ‘compensable losses’. Amongst other things, the virtue of this change is that it
‘transforms the claimant’s petition from a plea for help to a claim of entitlement’.\textsuperscript{115} The \textit{Draft} also suggests that a compensatory rationale in fact underlines much existing practice, so that the conceptual shift would not be an ‘alteration of existing practices but an explanation of them’.\textsuperscript{116}

5.56 The principle underlying compensatory payments is that ‘the division of one household into two typically creates financial losses for the spouses’ and that ‘without reallocation these losses are not likely to fall equitably as between them’.\textsuperscript{117} Compensation is for financial loss flowing from dissolution. The loss in question is to be measured by reference to one of two baseline measures: (a) each spouse’s pre-marital living standard or (b) the living standard enjoyed by the parties during the marriage. Which of these baselines is selected depends on the length of the marriage and on the duration of the period in which the claimant was the primary caretaker of children. The losses in question are measured without reference to marital misconduct, but spouses are left free to pursue independent claims for redress for conduct occurring during the marriage.

5.57 The \textit{Draft} goes on to specify in more detail the kinds of losses that are compensable. These are:\textsuperscript{118}

- in long marriages, the loss in living standard experienced on dissolution by the financially weaker party;
- a loss of earning capacity incurred during the marriage and continuing after dissolution arising from one spouse’s disproportionate share, during the marriage, of the care of the marital children or of the children of either spouse;
- a loss of earning capacity incurred during the marriage and continuing after dissolution arising from the care provided by one spouse to a sick, elderly or disabled third party, in fulfilment of a moral obligation of the other spouse or of both spouses jointly;
- the loss incurred by either spouse when the marriage is dissolved before that spouse realises a fair return from his or her investment in the other spouse’s earning capacity; and
- in short marriages, an unfairly disproportionate disparity between the spouses in their respective abilities to recover their pre-marital living standard.
5.58 The first three heads of loss stem from the fact of a disparity in earning capacity, coupled with either a long marriage or the undertaking of primary child care responsibilities during the marriage. The last two are more restitutionary, or at least seek to return a spouse to the position they were in before the marriage took place.

5.59 There are further principles preventing recovery of duplicate compensation and setting limits on the combined value of awards.

5.60 The Draft further elaborates the principles for measuring the loss under these general headings. For example, in relation to the first head (loss of marital living standard), the Draft proposes that there be a formula that would set the award at a specified percentage of the expected income disparity between the spouses, that percentage varying according to the duration of the marriage.\textsuperscript{119} Other formulae are proposed to calculate the loss under the other heads. There is an overriding judicial power, exercisable on specified grounds, to modify the size of awards produced by these formulae.\textsuperscript{120} Although compensatory payments generally take the form of periodic payments, there is also a general provision permitting a court (‘where equity requires’) to adjust the parties’ equal shares of marital property for compensatory purposes.\textsuperscript{121} The Draft also suggest rules to govern the length of awards - that is, whether they should be indefinite or of fixed duration and, if the latter, what their duration should be.\textsuperscript{122}

Comment

5.61 In Council’s view, this model is very complex, but if an extensive rule based system is wanted to provide for all circumstances, this is how it would appear, especially if discretion is to be reduced. It also has an extensive definition of matrimonial property. The problems in having a consistent and certain system are clear from the ALI model. At the same time, this model is also important for the way it reconceptualises the Adjustment Stage (and spousal maintenance) as compensation for various forms of loss. In this sense the complexity of the form should not conceal the value of the substance.
5.62 There is an important analogy here between the Australian Child Support system and the ALI model. One aim of child support was to minimise discretion and in practice it is a very complex system.

5.63 A rule based system which excluded discretion would be very complicated, otherwise it would work great injustice in unusual situations. But in a system that has straightforward rules and which applies satisfactorily to the majority of cases with a discretionary Adjustment Stage, the lack of absolute precision in the initial rule of division is less important.
CHAPTER 6: THE ADJUSTMENT STAGE

Introduction

6.1 From the consideration of various models in Chapter 5 it appears that all models, real and proposed, seem to fall into two stages: an initial stage, which we call the First Stage, and an Adjustment Stage. This proposition is developed further in this chapter.

6.2 The strict application of a principle of equality, either of contributions to or of division of matrimonial property, could be productive of great injustice where the parties are clearly unequal in their abilities to support themselves in the future. Council believes that this potential for injustice can be avoided only if there is a principle that equality will be departed from where certain inequalities are likely to persist beyond the marriage. For this reason, Council has already indicated in this Submission that it considers any reform of matrimonial property law which introduces an initial presumption of equal contributions to, or division of, matrimonial assets, should also include a clearly articulated set of principles for departing from that starting point in certain defined circumstances. This is what we have termed the ‘Adjustment Stage’. The need for an Adjustment Stage is implicit in many of the principles set out in Chapter 3, specifically equal status of husband and wife, conformity with community values, transparency and adaptability.

6.3 The Discussion Paper includes very little discussion of these adjustive principles, yet Council believes that they go to the heart of a just and equitable matrimonial property regime. Unfortunately, Council has not had the opportunity to consider these principles in depth in the time available for consultation. This Chapter therefore contains an outline of the issues that Council believes should be considered in more detail as part of the reform process.

Preliminary observations
6.4 Two preliminary points need to be made before proceeding to consider the principles that might underlie the Adjustment Stage:
No necessary connection between the First Stage and the Adjustment Stage

6.5 Contrary to the impression given in the Discussion Paper, there is no necessary connection between the principles underlying the First Stage and the Adjustment Stage of a property distribution regime. A starting point of equal contributions is consistent with a variety of principles of adjustment. For this reason, the Options set out in the Discussion Paper do not represent the only possible combinations of First and Adjustment Stages.

Adjustment Stage not necessarily discretionary

6.6 It is easy to assume that if the initial starting point for distribution, the First Stage, leaves limited room for judicial discretion, that any Adjustment Stage will necessarily leave considerable room for discretion to be brought back in. This need not be so. Merely because an Adjustment Stage is designed to rectify inequalities does not mean that it need be discretionary in order to achieve that objective. The ALI principles concerning ‘compensatory payments’, outlined in the preceding Chapter, are a good example of how an adjustment may be made on a formulaic basis. This is not to suggest that the Adjustment Stage should be formulaic in nature, merely that it could be.

Underlying principles

6.7 The notion of an Adjustment Stage in property matters is not a new one. It could be said that the current role played by the s.75(2) factors in property adjustment is a good example of an Adjustment Stage in the sense we have in mind. Indeed, in developing adjutive principles, Council is strongly attracted to the following formulation of the general principles said to underlie the existing s.75(2) factors:

‘Disparity in income and income earning capacities is a common basis for making an adjustment under s. 79, quite independently of its maintenance implications. The rationale for that usually lies in the circumstance that the difference in income earning capacities is significant and/or has arisen either directly or indirectly as a consequence of the marriage and the roles which the parties played during the marriage.'
In most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests as individuals and as a partnership. The parties make different contributions to the marriage, which the law recognises cannot simply be assessed in monetary terms or to the extent that they have financial consequences. Homemaker contributions are to be given as much weight as those of the primary breadwinner.

On separation, the partnership, and the division of roles and responsibilities which it produced, come to an end. Individually, the parties are left largely in the personal situations that the marriage has assigned to them. However, the world outside the marriage does not recognise some of the activities that within the marriage used to be regarded as valuable contributions. Homemaker contributions, for example, are no longer financially equal to those of the breadwinner. Post-separation, the party who had assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. Yet that party often cannot simply turn to more financially rewarding activities. Often, opportunities to do so are no longer open, or, if they are, time is required before they can be accessed and acted upon.

When the marriage ends, especially where that marriage has been a long one, one cannot separate the parties as individuals from the people they became in the context of the marriage relationship, and the allocation of roles, duties and responsibilities which it entailed. In some cases, an adjustment is called for because it would be unjust for the roles and activities of a party, which were recognised until separation, and which largely determined or influenced the personal development of that party and the arrangements between the parties, to suddenly count for little, while those of the other party, which were of equal significance during the marriage, to now have a far greater financial impact outside the home in circumstances where it was the joint decision of the parties that that be the way in which they would conduct their affairs, and where that decision was made in the expectation of the relationship continuing.

This passage expresses the core idea that divorce leads potentially to an unfair distribution of the gains and losses of married life, and that it is an important objective of the law to ensure that these gains and losses are distributed equitably. This suggests that it might be possible to leave the Adjustment Stage as it currently is, in the shape of the s.75(2) factors. However, consistent with its other recommendations, Council believes consideration should be given to the possible desirability of spelling out these principles clearly on the face of the legislation wherever possible.

The principles set out in the Scottish legislation, the draft ALI Principles on compensatory payments (see Chapter 5) and the Canadian law on spousal support (see Chapter 12) all seek, in different ways, to address this notion of marriage-related gains...
and losses. Drawing on these models, Council suggests that the following general principles might be considered for the Adjustment Stage:

- that fair account be taken of a loss of earning capacity arising from the allocation during the marriage of primary child care (or other caring) responsibilities, where that loss of capacity is one that continues after the dissolution; and

- that fair account be taken of one party’s contribution to the enhanced earning capacity of the other, wherever dissolution occurs before the contributing spouse realises a fair return on what can be seen as his or her investment in the other’s earning capacity.

6.10 To some extent, these principles would codify the principles said to underlie some (but not all) of the existing s.75(2) factors.

6.11 The advantage of these principles is that they express clearly the idea that adjustment is only required where it can be shown that there is some loss accruing to one party, or some lost opportunity, that is clearly attributable to the marriage and its dissolution. Under these principles, an adjustment would not be justified on the basis of need alone unless that need was linked to the factors specified. Spouses would cease to be guarantors of each other’s needs, whatever their source. Further, the principles would recognise that there are clear limits to the ability of family law to address problems of structural disadvantage.

6.12 However, these principles would entail significantly different operation of the Adjustment Stage from the current law. For example, they would not trigger an adjustment where a party’s employment prospects are poor for reasons unconnected to the marriage. Nor would they trigger an adjustment where a party has great needs (eg, arising from an illness) but where those needs cannot be attributed to the marriage itself. Nor would these principles necessarily prevent a party suffering a dramatic drop in living standards after a divorce. Neither principle addresses directly the needs of children, or the consequences of violence.
6.13 It may be desirable, therefore, to include further principles to cater for such cases, for example:

- that the welfare of children and their primary carer should be a factor in departing from equal shares or contributions;

- an ongoing principle of avoidance of hardship;

- a principle that in longer marriages, a party is entitled to some preservation of living standards (which could increase the role of income transfers); or

- that lasting consequences of violence should be taken into account (this would be a different means of considering violence from taking it into account as a matter of contribution).

6.14 As already noted, Council has not had time to consider these principles in detail, or to consider how principles might rank in priority (if at all).

**The role of income transfers**

6.15 A final issue, which again Council has not had time to consider fully (and which not all members of Council are agreed should be considered at this stage), is a possible role for income transfers as a way of meeting claims arising out of the Adjustment Stage. At present, income transfers after divorce take the form of spousal maintenance or child support. The current law and practice of spousal maintenance is considered in Chapter 12.

6.16 One possibility is that spousal maintenance be abolished in its present form and that income transfers between spouses be seen instead as a way of giving effect to the adjustive principles described above. This would be a way of adding flexibility to the means by which adjustive claims might be met. Indeed, where the capital assets are of limited value, it would be the only way of preserving flexibility. Income transfers also
offer a way of dealing directly with the parties’ future income, which is frequently their most valuable resource.

6.17 One issue that would arise from any reformulation of spousal maintenance in this way is the relationship between property distribution and income transfers. At present, this relationship is relatively clear (see Chapter 12). However, if income transfers were reconceptualised in the way suggested above, the question arises whether adjustments would be made primarily through altering shares in property, with income transfers as an auxiliary measure where there is insufficient property to meet an adjustive claim, or whether income transfers would be the primary or sole means of giving effect to adjustive claims (as they are under the ALI Principles, described in Chapter 5).

6.18 Council does not underestimate the difficulties entailed in a significant shift towards continuing income transfers. It would run against a professional culture in which the clean break philosophy has become widely accepted (see Chapter 12); and it is arguable whether a further impost on post-separation income, over and above child support, would be acceptable to the community. Nevertheless, Council raises these questions (although some members have reservations about doing so) because it holds the view that reform to the law of property should include consideration of the role of what is currently called spousal maintenance, given that both concepts deal with essentially the same question - namely, the redistribution of economic resources after divorce. These matters are discussed further in Chapter 12.
CHAPTER 7: THE PRESENT LAW CONSIDERED

THE PRESENT LAW: A SUMMARY

7.1 The legal principles governing property adjustment are primarily contained in the Family Law Act, sections 79, and 75(2). To summarise, the court may make such order as it considers appropriate altering the interests of the parties in the property. It must not make an order unless it is satisfied that, in all the circumstances, it is just and equitable to make the order: s. 79(2). In considering what order (if any) should be made, the court must take into account the matters specified in the provisions.

7.2 These fall into two broad categories. The first refers to the contributions made by the parties. These are of two kinds. The first kind is contributions to the property: financial contributions and non-financial contributions, made directly or indirectly, by or on behalf of a party to the marriage to the acquisition, conservation or improvement of any of the property. The second kind is contributions to the welfare of the family; in the words of the section, ‘the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent’. It is clear from the authorities that this second kind of contribution must be given appropriate weight and not treated as a token matter or as inherently less valuable or important than contributions to property.

7.3 The actual terms of the section are as follows (so far as they are relevant):

79 (1) In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines.[…]

79 (2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.[…]
79 (4) In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;

(d) the effect of any proposed order upon the earning capacity of either party to the marriage;

(e) the matters referred to in subsection 75(2) so far as they are relevant;

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

7.4 The second category of matters that the court must take into account is generally referred to as the ‘section 75(2) factors’. This is convenient rather than strictly accurate, since the second category includes, as well as s. 75(2), the matters arising under s. 79(4)(d) (the effect of any proposed order on the earning capacity of either party), (f) (any other order made under the Act affecting a party or a child of the marriage), and (g) (child support). It also includes a consideration of what orders are ‘just and equitable’ under s. 79(2). However for the purposes of this Submission it is helpful to treat the assessment of all these matters as part of the assessment of the s. 75(2) factors. As will be seen, this conforms with the general analysis of family property legislation into what we have called a ‘First Stage’ (under the present law, the identification and valuation of property and financial resources) and the ‘Adjustment Stage’ (under the present law, the s. 75(2) factors).
7.5 This list of matters in s. 75(2) is expressed to apply to applications for maintenance, but because of the provisions of s. 79(4)(e), is also to be taken into account in property proceedings. Section 75(2) is as follows:-

‘75(2) The matters to be so taken into account are:

(a) the age and state of health of each of the parties;
(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;
(d) commitments of each of the parties that are necessary to enable the party to support:
   (i) himself or herself; and
   (ii) a child or another person that the party has a duty to maintain;
(e) the responsibilities of either party to support any other person;
(f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under:
   (i) any law of the Commonwealth, of a State or Territory or of another country; or
   (ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia; and the rate of any such pension, allowance or benefit being paid to either party;
(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
(l) the need to protect a party who wishes to continue that party's role as a parent;
(m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation;
(n) the terms of any order made or proposed to be made under section 79 in relation to the property of the parties;
(na) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and
(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.’

7.6 Some further features of the present law may be usefully identified.
7.7 The legislation itself does not set out the steps that the court should take. Instead, the structured approach has been identified with considerable clarity as a result of a well-known series of Full Court decisions.\textsuperscript{125} That process has developed considerably since the Australian Law Reform Commission's review of the law in the mid-1980s, although the development had started in at least the late 1970s.\textsuperscript{126}

7.8 Judges are required to give reasons, and routinely set out reasons in judgments structured in the way indicated. Failure to give full and adequate reasons is a well-recognised ground of appeal.\textsuperscript{127} The Discussion Paper's assumption to the contrary is incorrect.
Assessing the present law: some general comments

7.9 The task of assessing the present law is a difficult and complex one. An accurate and objective assessment cannot be made by relying simplistically on complaints, or relying on reported cases or on settlement rates alone (see paragraph 2.60).

7.10 Council would like to emphasise that in any consideration of the law, legislation is but one element, albeit fundamental. Legislation is part of the broader system which delivers actual outcomes. There can be significant differences between the law on the statute books and the law in practice. Any consideration of reform needs to consider what the practice will be, not just how the statute will look.

7.11 In the remainder of this chapter, Council attempts to assess the present law against the principles for a good law outlined in Chapter 3. In Chapter 10, Council sets out some case scenarios in an attempt to compare how the present law and the two options might apply.

ASSESSING THE PRESENT LAW AGAINST THE PRINCIPLES FOR A GOOD LAW

Principle 1: Equal status of husband and wife

7.12 In formal terms, the legislation meets this principle, as one would expect: the rules do not discriminate on their face between husbands and wives. Any of the contemplated reforms would be similar in this respect.

7.13 In substantive terms, the law appears to meet the principle because in practice the contributions of spouses are generally treated as equal by the court in so far as one spouse, most often the wife, makes a contribution mainly as homemaker and parent and the other mainly as income earner. In practice, contributions are likely to be treated as equal whether or not these roles are clearly defined. For example, where a wife is in employment on a part-time or full-time basis and the children are cared for in part by others, the parties’ contributions are still likely to be treated as equal. The ADTP findings show that contributions are generally treated equally for ‘basic’ assets, such as the home
and motor vehicles, but not for ‘non-basic’ assets such as business assets. In effect, for basic assets a community of property regime already operates for those who have only basic assets to divide.

7.14 There is a considerable gap in this respect between the law as set out in the Act and as laid down in some authorities, notably Mallet, and the way the system works in practice. While the legislation might be read as suggesting that the court should identify and evaluate all the contributions of each party, in practice this exercise is often carried out rather briskly. For example, the assessment of contributions does not usually involve a detailed examination of the contributions of each party. At least where the behaviour of the parties is not exceptional, the court does not, for example, make findings on the adequacy of a party’s cooking, or whether a party took all available opportunities to work overtime and seek promotion. In cases where a party’s performance can be shown to be exceptionally good or exceptionally poor, these matters are sometimes examined, but typically the court fairly readily comes to the conclusion that the contributions should be treated as equal in weight though different in kind.

7.15 Although this is a pattern, it is not a legal presumption, and it is common for contributions to be assessed as being unequal. This is mainly because particular matters are taken into account. Examples are as follows:-

- One party owns substantial assets at the beginning of the cohabitation, or inherits assets, while the other has minimal assets (weight is given to the disproportionate financial contribution of each, in assessing overall contributions);
- Assets are wasted or destroyed;
- Important contributions are made by the relatives of one party, as where one party’s parents provide significant financial gifts, or provide accommodation for the parties, or care of children, or assistance with house renovations. Such contributions are normally considered to be made on behalf of the party whose family makes them;
• Between separation and trial, where this is a period of some years, one party has the care of the children (and thus continues to make a contribution as a parent) and the other makes no financial or other contribution to the children; and

• Between separation and trial, where this is a period of some years, one party has the sole use of property, such as the home to live in or a family business, and the other party has no such benefit.

7.16 It may well be that in the early years of the Act inadequate weight was given to non-financial contributions. In part this was because prior to an amendment, the legislation appeared to require that homemaker and parent contributions were only to be considered if they could be shown to have increased the value of property. However subject to the exceptions mentioned below, the law does seem to avoid attaching different weight to the contributions commonly made by wives (homemaker and parent contributions) and those commonly made by husbands (financial contributions). In that respect, it seems to conform with this principle.

7.17 One broad category of case at least presents a difficulty in this regard. We refer to the cases where the parties have great wealth (which could include a very successful and profitable business or out of the ordinary superannuation), which has been mainly created by the endeavours of one party, for example by spectacularly successful business ventures or artistic excellence. Where great wealth is generated in such ways by one party (in the reported cases is it almost always the husband), the court tends to assess those contributions as more than 50 per cent. These cases are rare, but no doubt because of the wealth involved, they tend to go to appeal and thus feature unduly in the law reports. They raise difficult questions of principle, and there is room for debate about whether they depart from the principles of treating spouses as having equal status.

7.18 The advantages and disadvantages of making contributions a primary basis for property adjustment are considered elsewhere in this Submission, especially in Chapter 13. Subject to what has been said in paragraph 6.9 about the category of high
wealth/asset cases, however, in Council’s view the present law at least substantially meets this principle of respecting the equal status of husband and wife.

**Principle 2: The law should conform with values accepted in the community**

7.19 Before considering the specific community values identified previously it is necessary to make a number of comments. First, the specific values identified are not presented as the only community values that could be taken into account: as in other respects, this response does not attempt to be comprehensive. Secondly, there are inevitable tensions between the various values: to some extent, achieving one must be at the cost of the other. For example, if the law were to allow parties to make a binding agreement to divide their party equally, it would be conforming with the ‘spousal autonomy’ value but perhaps at the expense of taking into account economic consequences of the division of responsibilities.
Spousal autonomy

7.20 The law may be regarded as supportive of spousal autonomy in that, for reasons already pointed out, its approach to the assessment of contributions is generally neutral as between different types of contributions, thus leaving spouses free to choose their respective roles without being disadvantaged.

7.21 A more obvious matter, however, is the extent to which the law allows spouses to make binding agreements between themselves. In this context, an agreement may be referred to as binding if it determines the property dispute and prevents the spouses from having it litigated in court under the ordinary principles. Under the present law, it is open to the parties to make agreements on financial matters that are binding in the sense of being contracts under the law of contract, but such contracts do not prevent the court from applying the principles in the Act if either party asks it to do so. In applying those principles, the agreement made by the parties does not determine the outcome. It is simply a matter that the court may take into account.132

7.22 The Government’s announcement relating to its intention to make laws for binding financial agreements between spouses will have the potential to increase the law’s conformity with this community value. No final view can be expressed at this stage since the legislation is not available. Such legislation faces the challenge of identifying those agreements which do indeed embody the informed and free choice of those involved. Obviously a law which made legally enforceable agreements reached in circumstances involving such matters as violence, duress, misunderstanding or non-disclosure of relevant information would not be consistent with this principle.

Economic consequences of division of responsibility

7.23 As discussed above, under Principle 1, the law conforms with this value, in that it takes such consequences into account. There is room for argument of course about whether it does so to the appropriate extent. Some would argue, for example, that the
present law does not sufficiently take into account earning capacity as in effect an ‘asset’ that should be available for distribution. This issue is considered elsewhere. (Chapter 6)
Not compensating for all inequalities

7.24 The Act does not direct the court to make orders which would attempt to give the parties an equal standard of living. Obviously, therefore it does not attempt to use property adjustment simply to offset all financial differences between the parties, however caused.

7.25 We have seen that the law does require the court to take into account the economic consequences of marriage. However it also goes beyond this, to a certain extent. A number of matters to which the court must have regard, such as the income and health of the parties, are not necessarily connected to events during the marriage. Thus the court would have to take into account the disparity of income between the parties, even if that arose after the parties had separated, and for reasons unrelated to the marriage.

7.26 On the other hand, the weight to be attached to various factors may be affected by whether they are related to the cohabitation. For example, the court would be likely to consider the lifestyle of the parties during the marriage (among other things) in considering what would be a reasonable standard of living. And of course many factors, such as care of children of the marriage, are very closely connected to the marriage circumstances.

7.27 In effect, the law does not expressly or systematically attempt to adjust for all inequalities, but at the same time, it can go beyond those inequalities arising out of the marriage. There is no clear principle operating.

Priority for the welfare of dependent children

7.28 The Family Law Act itself makes it clear that children’s interests can be taken into account in property proceedings. Section 79 provides that ‘the court may make such order as it considers appropriate altering the interests of the parties in the property, including ... an order requiring either or both of the parties to make, for the benefit of
either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines.\textsuperscript{133}

7.29 Despite this, and in somewhat curious contrast with the principles that apply in relation to parenting cases (formerly known as custody cases),\textsuperscript{134} the interests of children do not loom large in case law on s. 79 or in most academic commentary. This may be in part because the later provisions of s. 79 provide relatively little guidance to the court on the extent to which and the ways in which children’s interests should be taken into account in property proceedings, or it may be in part because children are not usually represented in property proceedings. There are, however, a number of paragraphs of s. 75(2) that seem relevant.\textsuperscript{135} There are early cases in which the court made orders having the effect of allowing the parent with the children to remain in the home until the children reached majority, and deferring the sale of the home until that time. However, perhaps because they do not sit comfortably with the ‘clean break’ principle of s. 81, such orders do not now seem common, and it seems, are rarely sought in contested cases.

7.30 It is arguable that the law falls somewhat short of this principle. It is a matter that may require careful consideration, especially as children themselves are not in a position to lobby government to protect their interests. Orders that the parent with the children keep the house were more common under the Matrimonial Causes Act 1959 (Cwlth) and in the early days of the Family Law Act, but seem to have diminished as a result of emphasis on the clean break principle. If more attention were to be given to the welfare of dependant children, such orders could become more prevalent. The ADTP research may shed some light on this issue.

**Principle 3: Transparency**

7.31 The present law can be regarded as meeting this principle in a number of ways, and falling short of it in others. Apart from the reference to ‘just and equitable’ in s.79(2), the current law is not seen to be based on any clear principle (beyond recognition of past contributions and the factors in subsection 75(2), which are not themselves expressive of any wider principle or related to any particular conception of marriage). This lack of clear
principle may promote a sense of grievance or unfairness amongst sections of the population experiencing marriage breakdown, as well as exacerbate the uncertainties in the law already referred to.

7.32 The law meets the principle in that the Act contains rather detailed provisions setting out the orders the court can make, and identifying the matters it must take into account. The body of case law under the Act provides a guide to the practical operation of the law, and sets out guidelines and principles. Inevitably, the guidance is less than precise, and, as with all bodies of case law, there are differences of emphasis and opinion among the cases. To an extent, the law remains in flux. This involves a degree of uncertainty, but also a capacity to adapt to changes in society, as well as to the circumstances of each individual case.

7.33 Apart from the principles and guidance available from case law, the day to day practice of the court provides a degree of transparency.

7.34 The guidance provided by the case law and practice is however available only to those who are familiar with the cases and the court’s practice. Thus the law is more ‘transparent’ to experienced family lawyers than it is to unrepresented litigants, and (to a lesser extent) to lawyers who do not specialise in family law. This is not a characteristic distinctive to family law, of course. A possible analogy is the Constitution: readers of the Constitution alone would have a limited understanding of how the system of government actually works. In those respects, the Family Law Act, like the Constitution, are not ‘transparent’ in the sense of telling people what they might need to know about the operation of family law and constitutional law respectively.

7.35 There is room for disagreement about the extent to which the law is transparent to specialist family law practitioners. It is clear, however, that it is a lot more transparent to them than it is to other people who do not have a familiarity with the case law and the law’s day to day operation. The law could arguably be made more transparent if the knowledge available from case law and practice could be presented in written forms.
readily available to everybody. The most obvious way of doing this would be to spell out the principles from the case law and practice and put them in the Family Law Act. However as we will see making the law transparent to everyone, especially litigants in person, is no easy task.136

7.36 There is a related aspect, that can conveniently be dealt with under this heading, namely the extent to which the law is coherent, in the sense of having a clear objective or purpose. Commentators have pointed out that while the legislative provisions spell out in detail the relevant matters, they do not set out the specific purpose to be achieved, other than in very general terms such as ‘just and equitable’. The Act does not, for example, say that the court should make such orders as would, so far as possible, provide equal financial positions for each party, or that it should make such orders as would compensate for the economic consequences of marriage. Arguably, a law that gave the court a specific objective, while remaining discretionary, would be more ‘transparent’ in that everyone would know what was intended to be achieved.

7.37 To summarise, the present law has a considerable degree of transparency, in that the legislation provides detailed instructions as to the matters to be taken into account, and the case law establishes a structured approach. However, there are limits to its transparency, notably:

- much of the law about the decision making process is contained in reported case law rather than the legislation itself, making it less readily available to persons other than experienced family law practitioners; and

- the legislation does not contain a specific objective or purpose to be achieved by the court, other than in general terms such as ‘just and equitable’.

**Principle 4: Certainty**

7.38 So far as Council is aware, there is no research on the certainty or predictability of outcome in relation to the existing family law in Australia or indeed elsewhere.
7.39 There is an obvious and important point to be made about any discretionary system, namely that even if one knows all the facts, it is not normally possible to predict the precise outcome in dollar terms or in terms of the percentage of the net assets each party will receive.

7.40 Since the present law is a discretionary system, it can reasonably be said that even in straightforward cases the precise outcome cannot be predicted.

7.41 Even in a discretionary system, however, though the precise outcome cannot be predicted, it may be possible to predict the range of probable outcomes. Opinions differ on the ease of such prediction under the present law. Some would claim that the result can usually be predicted within a few per cent. Others would claim that there is a wider range. Some would claim that the result can be predicted with greater confidence if the identity of the judge is known. Council knows of no satisfactory evidence on this subject, in relation to Australian law, or, indeed in relation to other systems.

7.42 Some would argue that the high settlement rate indicates that the results must be reasonably predictable. In Council’s view it is important to note that under the present system the settlement rate in property cases is very high. But settlement rates do not indicate that results are predictable or unpredictable. Nor does the fact that 95 per cent of cases settle indicate that the settlements are necessarily fair and just. Certainly if new laws led to a higher proportion of cases being litigated because fewer are settled, they would be disadvantageous in that respect. It is easy for changes to have unwanted and unexpected consequences. It is arguable, for example, that the 1995 changes in relation to Part VII, have increased the amount of litigation over children, though that was clearly not the intention.137

7.43 Nevertheless, although the current settlement rate is consistent with the law working satisfactorily and the outcomes being predictable, it is not proof of these things. People may settle for many reasons.
7.44 In principle, a system based on specific rules is capable of producing a predictable and precise outcome. This point seems to underlie the assumption that underlies the Discussion Paper, namely that a rule-based system will lead to more certain results. That assumption is deeply flawed, for reasons discussed elsewhere.\textsuperscript{138}

7.45 To summarise: the present law being discretionary, it will rarely be possible to predict the precise outcome, though it may well be possible at least for experienced family lawyers to predict the likely outcome within a reasonably small range. It should not however be assumed that a non-discretionary system would be likely to produce more predictable outcomes.

**Principle 5: Adaptability**

7.46 The most obvious strength of a discretionary system is its adaptability to a wide range of cases. This is true of the present law and all options. While it provides a structured approach to the exercise of discretion, and guidelines, it is flexible enough to deal with the extraordinarily various situations that come before the courts every day.

7.47 In this respect, a discretionary system has an obvious advantage over a system based on specific rules. Because of the diversity of situations that must be dealt with, it is difficult to design rules that will produce an appropriate or fair outcome in all cases. As is often noted (though not in the Discussion Paper) the challenge of reform is, at least in part, to design a system that draws an appropriate balance between certainty (which is desirable but risks producing injustice in some cases) and adaptability (which can produce justice because the result is tailored to each case, but risks producing uncertainty).

7.48 This is an important matter. Consider the following case:

*During the parties’ 15 year marriage, Spouse A gave up a career to care for the home and the children (now adult), taking only part-time employment, while Spouse B’s career prospered. At the end of the cohabitation, because of the way they divided their*
tasks, Spouse B, with a high and secure income, is in a much stronger financial position than Spouse A, who finds it difficult to get a job.

7.49 The division of tasks in this example, while of course not universal, is common. To the extent that the law fails to take this marriage-caused inequality into account, it would seem to violate the principle that husbands and wives should have equal status. A law that divided the parties’ property without regard to such consequences of the marriage would disadvantage those who took the homemaker and parent roles, and thus would, in general terms, unfairly favour men over women. In this important respect, because the present law takes account of such disparities, it may be regarded as meeting this principle.

Principle 6: Promoting settlement

7.50 The relationship between the rate of settlement, and the terms on which cases are settled, is complex and Council has not had time to review this difficult topic in detail. It would seem, however, that the present law meets this principle. The latest data on settlement rates from the ALRC show that 92 per cent of cases settle,\textsuperscript{139} and this is consistent with the law working well. However, as noted earlier, a high settlement rate does not indicate that the settlements are necessarily fair and just. Delays and costs are some of the many other factors influencing settlement. Council is not aware of any evidence that the settlement rate is lower in Australia than it is in other countries.

Principle 7: Timely and just adjudication

7.51 All systems have to work out a balance between thoroughness and speed in dealing with property disputes. This problem has been much discussed in recent times. There has been much experimenting with changing procedures in order to try to deal with cases as thoroughly as necessary and yet within a reasonable time. The topic is a major one in the ALRC’s work on the adversarial system.\textsuperscript{140}

7.52 While it is procedural law and practice that is most obviously relevant to this issue, substantive law can also be relevant. It is arguable that the present law, being discretionary, requires a reasonably thorough treatment. This is because a considerable
amount of evidence must be adduced to deal with all the matters that are relevant to the ultimate decision. If the law were based on simple rules, the range of evidence might be less. Thus the preparation and conduct of the case might be simpler, faster and cheaper. Whether this is in fact likely, and whether this gain would involve unacceptable costs (for example by producing unjust results) are questions that need to be addressed, and are considered elsewhere in this Submission.

7.53 In relation to this principle, therefore, it can be said that the present substantive law requires a fairly detailed and thorough treatment of property disputes in its attempt to ensure a just outcome, and this limits the extent to which cases can be disposed of quickly and cheaply. If delays are attributable to the discretionary approach, then delays will continue. But there is often a linkage between children and property, and litigation about children matters will cause delays in settling property matters.

**Principle 8: Harmony with other laws**

7.54 It has not been possible for Council to address the extent of harmony between present matrimonial property law and other laws, such as child support, spousal maintenance, superannuation, bankruptcy, social security or taxation.
CHAPTER 8: OPTION ONE CONSIDERED

PRELIMINARY: SOME OBVIOUS PROBLEMS WITH OPTION ONE

8.1 Option 1 is considered below by measuring it against the characteristics of a good law as previously identified. As noted in the previous chapter, there are some case scenarios set out in Chapter 10, against which Council appraisers how the present law and Options 1 and 2 might apply. There are some obvious problems with Option 1 as set out in the Discussion Paper. It will be convenient to deal with these immediately.

8.2 As noted earlier, we will refer to the presumption of equal contributions and of equal distribution as the ‘First Stage’ and to the effect of the s. 75(2) factors as ‘the Adjustment Stage’.

Option 1 is not pre-Mallet law

8.3 The Discussion Paper states that Option 1 ‘returns family law to its original position prior to the decision in Mallet’. This is not so, however. Under Option 1, the court would ‘assume, as a starting point, that the parties have made equal contributions to the acquisition, conservation and improvement of the property and equal contributions to the welfare of the marriage’. The pre-Mallet law involved no such broad starting point in relation to marriage as such, but only to certain types of marriage. For example, in a childless marriage of only some months’ duration where one party had large assets and the other only moderate assets, it would have been quite contrary to the law prior to Mallet (as well as contrary to common sense) to start with the assumption that the assets should be equalised.

8.4 The pre-Mallet law was summarised as follows by Gibbs CJ in Mallet itself:

‘In some cases, the Family Court, rightly starting with the proposition that the contribution made by the wife as a homemaker and parent should be recognized “not in a token way but in a substantial way”: Rolfe and Rolfe has gone on to conclude that, at least in ordinary circumstances, such a contribution “ought to be equally equated to the efforts of the husband who is thus freed to pursue his direct outside employment”: Wardman and Hudson, and see Rolfe and Rolfe,'
supra and Crawford and Crawford. Even if it were assumed that the contribution made by one party to the home and family should be regarded as of equal value to the financial contribution made by the other, it would not necessarily follow that an equal division of property should be made by the order of the court: see Albany and Albany. However, it has been said there is a “general rule … that where the parties have been married for a substantial time, and there have been contributions by each of the parties, there should be an equal division”: Racine and Hemmett. In other judgments, the matter has been stated more circumspectly; it has been said that “after a long marriage, where both parties have worked together and built up such an asset as the matrimonial home by their joint efforts, even if the efforts of one were that of homemaker alone, equality should be considered the normal starting point”.

8.5 It can be seen from this passage that the pre-Mallet law attempted to identify certain types of marriage in which an equal division was likely to be a result that was in accordance with the legislation.

Two different presumptions: equal contribution and equal sharing

8.6 Another fundamental problem with Option 1 is that it contains two assumptions: first, a presumption of equal contributions and second, a prima facie presumption, or a ‘soft’ presumption of equal sharing of property, because it is in accordance with equal contributions that the property should be equally divided. These are very different matters, and each requires separate justification.

8.7 The first, the presumption of equal contributions, is attractive, when applied to the sort of case referred to in the above quotation from Mallet. It appeals to the intuitive sense that where both parties have made contributions over a long marriage, and where, as is now clearly the law, there is no assumption that some kinds of contributions (eg financial) are inherently more valuable than others (eg child care and homemaking), they should be considered to have made equal contributions. And it removes, or at least eases, the difficult, complex and arguably impossible task of comparing contributions of different kinds over a substantial period.

8.8 To implement the second assumption, however, assumes that in such cases the law should normally make no adjustment to compensate for the fact that one partner,
commonly the husband, might have advanced in his career during the marriage, and now be capable of earning a high income, because the other, commonly the wife, had attended to most of the child care and homemaking; and as a result of being out of the full time workforce for many years has a much lower capacity to earn income. An equal division in such cases would mean that the husband would take advantage of the consequences of the division of labour during the relationship. Under the present law, it is treated as normal, not exceptional, that some adjustment should be made on account of these consequences. Under Option 1, such a result would seem more difficult to achieve, involving a departure from the norm.

8.9 The proposed legislative requirement that the court should give reasons for departing from the equal sharing principle is difficult to understand. As mentioned above, there is presently an obligation on judges to provide adequate reasons for all decisions: failure to do so is a clear error that would normally lead to the judgment being set aside on appeal. To require reasons to be given only for departing from the equal division implies that no reasons need be given for an equal division. That would involve a departure from ordinary principles of justice, in cases where an argument for a non-equal split had been dismissed. If the requirement is not intended to relieve the courts from the present obligation to give reasons for all decisions, it does nothing but re-state the present law. While such a requirement would not serve any purpose in producing reasons that would not otherwise be provided, it may well be taken to mean that equal division should be departed from only in limited or exceptional circumstances. If such a result is intended, it would be appropriate to say so, rather than to do so by implication drawn from a provision which has no other beneficial effect.

**Presumption inappropriate for many marriages**

8.10 By making the presumption of equal division applicable to *all* marriages, Option 1 creates a presumption that would be clearly inappropriate in a large number of marriages. Option 1 is fundamentally defective in this respect.
8.11 Ironically perhaps, in practice, the difficulties that theoretically arise from the decision in Mallet do not seem to cause great practical problems. Recent decisions of the Full Court are to the effect that while there is no presumption of equality, in substantial marriages where there have been many contributions of various kinds, and in the absence of particular factors such as one party bringing significant assets to the marriage, the court can come fairly readily to the conclusion that the contributions should be regarded as equal.

8.12 It does not follow that the division of property should be equal. In the case, say, of a lengthy marriage where there have been a number of children, and the assets have been mainly built up during the marriage, and where the wife, having been out of the full time work force for many years and perhaps still caring for children, the husband having prospered in his career, the court would normally award more than 50 per cent of the assets to the wife, although finding the contributions equal.

Likely impact of Option 1

8.13 In Council’s view, therefore, Option 1 is not at all a re-statement of the law as it was prior to Mallet. It is the creation of a presumption that has never represented the law. It would, if implemented, suggest that the normal operation of the law would be to ignore the economic consequences of marriage arising from the division of functions during the relationship. In practice, it would appear to lead to a smaller share of assets for women who had devoted much of their adult life to child care and homemaking. It would be particularly likely, perhaps, to have this effect in cases that are settled, because it would create the impression that it would be unusual or difficult to achieve anything other than an equal division of assets. If it to be implemented, these consequences would need to be justified.

Assessment of Option 1 against the characteristics of a good law

Principle 1: Equal status of husband and wife
8.14 As previously indicated, Option 1 would be inconsistent with the principle in its original form, because it would be likely to disadvantage those who brought significant wealth to the marriage, especially where the marriage was short. However, if Option 1 were revised so that it more accurately reflected the pre-\textit{Mallet} law, Council believes that it would not have this defect.

**Principle 2: The law should conform with values accepted in the community**

8.15 Again, Option 1 appears to conform with accepted community values to much the same extent as the present law, in so far as it contains a presumption that in marriages of substantial duration the contribution of each spouse should be usually regarded as equal.

8.16 In so far as it contains a presumption that an equal division of assets is normally the correct outcome, it appears to be inconsistent with community values. This is because such an outcome would not take into account the overall circumstances of the parties, and in particular any differences in financial situations flowing from the division of roles during the relationship.

8.17 Option 1 does not directly address the position relating to children. To the extent that it might lead to an equal division in circumstances where otherwise the party having the children would receive a larger portion, it would disadvantage the children.

**Principle 3: Transparency**

8.18 The presumption in Option 1 would appear to make the law a little more ‘transparent’ than the present law, by expressing in the legislation what is presently contained in case law. This is, indeed, its obvious virtue.

8.19 The re-drafting of the s. 75(2) factors so that the matters relevant to spouse maintenance would be separately stated from those relevant to property adjustment would also be an advantage. With hindsight, it can be seen that the drafting device of cross-referring in s. 79(4) to the list of factors relevant to maintenance, contained in s. 75(2),
has produced considerable confusion that has persisted to some extent despite numerous statements by the Full Court about the relationship between the two provisions. Council supports the view that the provisions should be re-drafted accordingly. It is a separate question, of course, precisely what matters should be taken into account in property proceedings.

**Principle 4: Certainty**

8.20 Council's view is that Option 1 would have a very limited impact on the predictability of outcomes. The reason is that in the cases which are now difficult, the difficulty would be reflected in argument about whether the circumstances justified a departure from the starting presumption of equal contribution.

**Principle 5: Adaptability**

8.21 Option 1 retains the adaptability of the present law because it involves only a presumption.

**Principle 6: Promoting settlement**

8.22 Option 1 seems likely to affect settlement negotiations in a number of ways, some desirable, some not.

8.23 In the more straightforward cases, the parties, where they are properly advised, already agree without too much difficulty that the ‘ordinary’ contributions should be regarded as equal. They move on to consider any specific contributions, such as pre-marriage assets. In this respect the legislative presumption in Option 1 would reflect present practice.

8.24 Where the parties are not represented, or are represented by lawyers inexpert in family law, Option 1 may assist the parties to reach agreement on what the contributions are. It could also assist mediators and registrars to assist the parties reach agreement by pointing out to them the legislative presumption. However its capacity to do so should
not be overemphasised, since unrepresented or poorly represented litigants may find it difficult to agree on whether in a particular case the presumption is rebutted.

8.25 In these respects, Option 1 has potential to make a modest improvement in the law. If the presumption is that equal distribution is the correct outcome, however, it has considerable potential to mislead. It seems likely that some people, particularly when they are unrepresented, and particularly when they have other disadvantages such as poor education, stress and confusion arising from the proceedings, and the like, may assume that the presumption of equal distribution is a firm rule of law, or that it is difficult to depart from it. In this event, people might settle on a false understanding of the law. This would mean that those who would otherwise receive more that 50 per cent would be unfairly disadvantaged, and the other party correspondingly advantaged. In general, if this does happen, wives would be more likely to be disadvantaged than husbands, since generally they receive more than 50 per cent, due to the operation of the s. 75(2) factors. In particular cases, of course, either the husband or wife could be disadvantaged. It may be that to some extent the unfairness resulting from such a misunderstanding could be alleviated by educational strategies.

**Principle 7: Timely and just adjudication**

8.26 Option 1 has the potential to reduce the extent of evidence and argument, in cases where neither party wishes to argue that the presumption of equal contribution should not apply. In such cases, it would not be necessary to include material on contributions in affidavits. That would save some time and expense. Even in litigated cases, Option 1 might mean that parties could limit the proceedings, for example, by leading evidence only on the Adjustment Stage, or leading evidence only on the specific contributions alleged to require a departure from the presumption of equality.

8.27 Such advantages, however, should not be overestimated. In practice, little time is wasted on these matters under the present law in the ‘straightforward’ cases, and in the ‘difficult’ cases, even under Option 1, the parties are likely to insist on arguing that it is
necessary to consider contributions overall to determine whether to depart from the presumption.

**Principle 8: Harmony with other laws**

8.28 It has not been possible for Council to develop its thinking on this aspect. Broadly speaking, neither of the options canvassed in the Discussion Paper seems to raise urgent issues relating to the harmony between family property law and other laws, such as child support, spousal maintenance, superannuation, bankruptcy, social security or taxation. This aspect should however be kept in mind as the exercise progresses.

**Preliminary Conclusion on Option 1**

8.29 The above discussion indicates that Option 1 in some forms may have some modest advantages over the present law. If the presumption is limited to one of equal contributions, then if appropriately drafted it could make the law a little more transparent than it now is, somewhat reduce the length and costs of proceedings, and assist the parties in settlement negotiations, especially where they are unrepresented.

8.30 If the presumption were not merely of equal *contributions* but of equal *sharing* (as in the Discussion Paper), the law would have to be carefully drafted to indicate the sort of cases in which the presumption is intended to apply. A final evaluation could only be made having regard to the provision as drafted.

8.31 However a presumption of equal sharing, while having the potential to make the outcomes a little more predictable and the law a little clearer, also has the potential to create an expectation that equal sharing will be the outcome even in cases where the presumption would be rebutted. This seems especially likely where litigants are unrepresented, and thus in those families where the assets are not extensive. In such families, there appears to be a serious danger that cases would be settled on the basis of an equal division in circumstances where this would be unfair to the party who would have had the benefit of an adjustment had the matter gone to trial. Most commonly, the effect would be to disadvantage women and children.
8.32 Finally, Option 1, like any legislative change, would carry with it the disadvantages and costs of change. In principle, before it is adopted the legislature should be satisfied that its advantages outweigh its disadvantages.

8.33 It follows that if Option 1 is to be considered, careful attention needs to be paid to the drafting. In particular, decisions would have to be made about: (i) the circumstances in which the presumption would arise; and (ii) whether the presumption is of equal contributions or equal sharing. In Council's view, a carefully worded presumption of equal contributions might well be desirable, while a presumption of equal sharing carries a serious risk of leading to injustice.
CHAPTER 9: OPTION 2 CONSIDERED

PRELIMINARY: SOME OBVIOUS PROBLEMS WITH OPTION TWO

9.1 Option 2, like Option 1, comprises two parts. The first part of both options has to do with equal sharing. The second part of both options has to do with what Council calls the “Adjustment Stage”. The most important difference between the two options appears to be that in the case of Option 2 the law distinguishes between communal property (which is to be shared equally) and separate property (which remains with the party who owns it) while the presumption in Option 1 applies to all property. When discussing Option 2, we will refer to the first part, the community of property rule, as the “First Stage” and the second part as the “Adjustment Stage”.

9.2 In connection with Option 2, the Discussion Paper develops a distinction between two forms of adjustment. The first is somewhat similar to the existing s. 75(2), and the second is a more limited adjustment, adjusting only for the economic consequences of the marriage. However there seems no obvious reason for the different treatment of the adjustment in connection with Option 1 and Option 2. Whichever Option is used, it seems appropriate to consider the scope and purpose of the adjustment. For example, the question whether a catch-all provision like s. 75(2)(o) is desirable, and the question whether the adjustment should be limited to adjusting for the economic consequences of the marriage, appear to be proper questions to ask of the Adjustment Stage in connection with each Option.

9.3 There are some possible ambiguities in the Discussion Paper's treatment of Option 2. It is not clear whether losses as well as gains in the communal property are to be shared. It is not clear whether the increase in value (which forms part of the communal property) is to be adjusted to take account of inflation. Nor is it clear whether the adjustment can involve separate property or is limited to communal property. The analysis of Option 2 obviously depends on the answers to such questions. Council proposes to proceed on the following bases:
• That the increases in value that form part of the communal property are not adjusted for inflation. Thus if a home was bought before cohabitation for $100,000 in 1980 and is worth $400,000 on separation in 1999, there is communal property of $300,000;

• That decreases in the value of communal property are ignored. Thus if a business was acquired during the marriage for $200,000 and was worth only $100,000 at the end of the marriage, the $100,000 would be equally divided. There would be no inquiry as to whether the loss in value was attributable to either party; and

• Losses would be equally divided. So if the business acquired for $200,000 were $50,000 in debt at the end of the marriage, as between the parties each would be equally liable to the extent of $25,000, again regardless of whether one party had caused the loss.

9.4 The question whether the Adjustment Stage can apply to all property or only to the communal property is of great significance.

**Assessment of Option 2 Against the Characteristics of a Good Law.**

9.5 The distinctive feature of Option 2 is in the First Stage, the rule of equal sharing of matrimonial property and separate entitlement to separate property. The First Stage is different from Option 1 and the present law in two main ways. Firstly, it involves a rule rather than a presumption, and there is no room for the exercise of judicial discretion. Secondly, it requires a distinction to be drawn between matrimonial property and separate property. In these respects it would involve a radical change to the law in principle, and also in practice, since the consequences of the First Stage are very different, in some situations, from the consequences of the First Stage of the present law, or of Option 1.

9.6 The point is made earlier in this Submission that while the Discussion Paper canvasses two different forms of the Adjustment Stage in relation to Option 2, it would be
possible to combine the First Stage with any version of the Adjustment Stage. Obviously, the outcomes of Option 2 would depend on the content of the Adjustment Stage.

9.7 A detailed assessment of Option 2 against the characteristics of a good law would be possible only in relation to a particular form of Option 2, and indeed, as with Option 1, much would depend on the drafting of the provisions. With these provisos, we set out below a brief discussion of the assessment of Option 2 against the earlier principles for a good law.

**Principle 1: Equal status of husband and wife**

9.8 The First Stage of Option 2 is an example of *formal* equality between husband and wife, in that the law does not in terms distinguish between the two. However it is well known that the application of rules of formal equality to unequal situations can produce unequal outcomes. To take a classic example from another context, a rule that forbids all school children to wear hats or other headgear may discriminate against school children of a religion that requires them to wear particular headwear, such as a turban. The rule is formally equal in its application, but in practice, in its operation on the unequal situations of Sikh children and other children, is unequal, and discriminatory.

9.9 Applying this insight to the First Stage of Option 2, while the rule achieves formal equality, it produces unequal results in many factual situations, as illustrated in the case studies below. There is a concern that the rule would violate Australia's international commitment to principles of non-discrimination, because in general men have more separate property than women.

9.10 Whether the ultimate outcome of Option 2 is vulnerable to this criticism would depend on the operation of the Adjustment Stage. This is illustrated in the case studies.

9.11 It would seem, then, that Option 2 conforms with this principle only to the extent that: (i) the formal equality in the First Stage coincides with actual equality; or (ii) the outcome reflects the Adjustment Stage.
**Principle 2: Conformity with accepted community values**

9.12 As pointed out in Chapter 3, community standards cannot be easily identified, and on many issues there are different views held in the community about what is fair or just. Nevertheless, because it disregards contributions, the First Stage of Option 2 would lead to results that in some situations would appear to be widely perceived as unjust. Again, this is illustrated in the case studies.

9.13 If the ultimate distribution is to conform with community standards, it would seem that in many cases this would require extensive use of the Adjustment Stage.

9.14 As in the case of Principle 1, it would seem that Option 2 conforms with community standards only where the First Stage coincides with those standards on the facts of the case, or that the outcome reflects the Adjustment Stage.

**Principles 3 and 4: transparency and certainty**

9.15 The apparent attraction of the First Stage of Option 2 is that it excludes discretion, and does not appear to involve factual determination involving broad evaluations (such as are involved in assessing contributions). The rule of equal sharing of matrimonial property and retention of separate property is, in some ways, clear and easy to understand.

9.16 Unfortunately, these apparent advantages are considerably compromised by the practical operation of the First Stage. As shown in the case studies, while in some cases it would apply in a straightforward way, there are many situations involving mixed separate property and matrimonial property in which the application of the First Stage would be extremely complex, and would appear to involve valuations that would be expensive and difficult. The complexity of these issues, while in a sense not involving judicial discretion, has the potential to make the application of the First Stage fraught with difficulty and likely to lead to technical disputes and expensive and protracted litigation.

9.17 Further, if the Adjustment Stage is frequently used, as seems likely, the operation of Option 2 is likely to lose much if not all of any certainty associated with the First Stage,
since the Adjustment Stage seems likely to involve either discretion in the usual sense, or
matters of evaluation that are complex and difficult to predict.

9.18 To conclude, Option 2 would have some advantages in terms of clarity and
certainty, but only in a limited number of circumstances, namely where the operation of
the First Stage is free of difficulty and where there is no prospect of an adjustment under
the Adjustment Stage.

**Principle 5: adaptability**

9.19 The fact that the First Stage of Option 2 is in the form of a rule rather than a
presumption or discretionary exercise make it obviously lacking in capacity to adapt to
particular situations. The Adjustment Stage might be expected to have that adaptability,
and for that reason seems likely to be required in many situations.

**Principle 6: promoting settlement**

9.20 It might be thought that the First Stage of Option 1 has the capacity to promote
settlement. It may do so in some situations, in that where the First Stage has a clear
operation (where there are no difficulties about the value of assets at the relevant times, or
about which assets are separate property and which are matrimonial property) the result
will be clear. Even in those situations, however, uncertainty may be involved if there is
an argument that the Adjustment Stage has application.

9.21 A further question relates to the fairness of settlements under Option 2. To the
extent that people might be confused or mistaken about the application of the First Stage
to the facts of the case, or to the extent that they might believe or assume that the
Adjustment Stage does not apply to them, there may be a doubt about the fairness of
settlements.

**Principle 7: promoting timely and just adjudications**

9.22 In some limited situations, namely those where there is no problem with the
application of the First Stage and no adjustment under the Adjustment Stage, Option 2
might promote timely and just adjudications. Unfortunately, for the reasons already given these would appear to be a minority of cases. There is a danger that Option 2 would lead to slower and more complex litigation, essentially because it would add a complex and technical First Stage to an Adjustment Stage that seems likely to be as difficult to manage as the present law or Option 1.

Principle 8: Harmony with other laws

9.23 See paragraph 8.28.

PRELIMINARY CONCLUSION ON OPTION 2

9.24 Council's view is that after a consideration against the above principles, it can be readily seen that Option 2 conforms with those principles no better, and arguably considerably worse, than either the present law or Option 1.

9.25 Further, the consideration of the cases set out in the next chapter appears to show that Option 2 has few, if any, advantages over the present law or Option 1, and some serious disadvantages.

9.26 While Council can see how Option 2 might be seen as bringing the advantage of certainty, a careful consideration of its application in actual cases indicates that it might unfortunately have the opposite results in many cases. The proposal requires a determination to be made of the value of assets at various times: in particular, of property at the time of the cohabitation or marriage and of separation. It also requires valuation of community property from the time of acquisition to separation. The rules require detailed factual determinations to be made relating to the acquisition of all items of property, and the use of funds. It is common in families for money to be applied to various purposes, often without detailed records being kept.

9.27 For example, it may at the time be seen as of little consequence whether funds from a particular bank account are applied to reduce the mortgage or for household expenses.
Under the present law, and Option 1, little may turn on these matters. However under Option 2 it may be necessary to determine, for example, whether funds from a bank account that was held before cohabitation went towards increasing the value of community property or for other purposes. These matters could be extremely complex where, as is common, there is a degree of intermingling of funds and assets of a family business and the parties personally. Often the family home is used as security for borrowings that may be used for business purposes, or for several purposes. Such transactions could lead to complex arguments under Option 2. There will often be disputes about the facts, and there could be complex legal arguments arising from such transactions.

9.28 The formulation of the rule poses significant difficulties. For example, the Discussion Paper refers to “cohabitation/marriage”. If the starting point is marriage, the law could have capricious results in cases where (as is common) there was a period of cohabitation prior to the marriage. If the rule is to be in terms of cohabitation, experience suggests that there will often be issues about the date on which cohabitation commenced. In practice, where there is some sharing of resources, and for example one partner visits the other and stays overnight on several occasions during the week, there is great potential for argument about when the cohabitation commenced. Uncertainty on this point goes to the heart of the rules, because the date of cohabitation is a critical date not only for the valuation of property but a determinant as to whether it is separate or communal. The formidable difficulties of retrospective valuation are confounded where there is uncertainty about whose evidence will be accepted as to when the cohabitation commenced.

9.29 These difficulties are important because valuations are expensive to obtain and are often the subject of considerable disagreement. The system requires the valuing of particular items of property at particular times. Obtaining such valuations will often be a costly exercise, and the problem will be multiplied if there is debate or uncertainty about what are the dates on which the value needs to be determined.
9.30 To conclude, Council's view is that Option 2 has serious inherent defects. These may be summarised as follows:

- In practice, the application of the First Stage of Option 2 would often involve the resolution of complex and technical issues, which could well make the determination more expensive and protracted than under the present law or Option 1. In many of the situations in which the First Stage of Option 2 has a clear and simple application (eg where there is only community property), the present law and Option 1 might be similarly straightforward.

- In many cases, there would need to be an adjustment to make the results of Option 2 just and equitable. If the Adjustment Stage were sufficiently flexible to redress these injustices, the law would lose any certainty that Option 2 is supposed to have.
CHAPTER 10: CASE SCENARIOS CONSIDERED

10.1 Council has considered how the options canvassed in the previous two chapters might apply in particular cases. It is not feasible to attempt to survey their application in a large number of cases, but the following cases, which in Council's view are not unrealistic, illustrate how the options might apply in practice. For each case, this submission performs a brief comparison of the effects of the present law, Option 1, and Option 2. For the purpose of this analysis the "present law" will be treated as including proposed amendments that will enable the court to make orders re-arranging interests in superannuation. The use of case studies in this way has obvious limitations. In particular, there will always be far more detail than can be given in these brief descriptions. Nevertheless, it is hoped that these abbreviated accounts usefully illustrate the differences and similarities among the various legal regimes under consideration.

CASE 1

10.2 Spouse A is aged 26, Spouse B is 25. They have separated after a 4 year marriage. They had no significant assets initially. Spouse A was in employment throughout the marriage. Spouse B was employed in the first 2 years of the marriage but gave up employment with the birth of the first child. Spouse B was the primary homemaker and parent.

10.3 At separation, they have a house, valued at $100,000, with $70,000 owing under a mortgage, and thus an equity of $30,000. They also have a car, worth $1,000, and $500 in the bank. There are two children, aged 1 and 2, with Spouse B. Spouse A is employed at a salary of $30,000 and has superannuation in the accumulation phase presently worth $5,000. Spouse B has a small amount of superannuation.

Present law

10.4 Under the First Stage of the present law, all of the property, including the superannuation in the accumulation phase, is available for distribution. The court will
identify and determine the value of the property. It will then consider and assess the contributions of each party. In this unexceptional case it is almost inevitable that the parties' contributions will be regarded as equal.

10.5 The court would then consider what adjustment should be made having regard to the s. 75(2) factors. There would be an adjustment in favour of Spouse B, having regard to her weaker economic position which is largely attributable to her care of the children (although the court would also take into account child support).

**Option 1**

10.6 Under Option 1, First Stage, all of the property, including the superannuation in the accumulation phase, is available for distribution. There would be a rebuttable presumption of equal contributions and equal sharing. Under this presumption, each party would be entitled to half of the net assets’ value ($36,500 plus B’s superannuation). It would seem clear that the rebuttable presumption of equal contributions would not be rebutted. Thus under Option 1 as under the present law contributions would be treated as equal.

10.7 Under the Adjustment Stage, the questions would be whether the rebuttable presumption of equal sharing is rebutted, having regard to factors similar to the s. 75(2) factors and what orders should be made. On the face of it, the result might be assumed to be the same as under the present law. However much will turn on the way the legislation is expressed in relation to the presumption of equal sharing. A "strong" presumption might say, for example, that the presumption of equal sharing will be rebutted only in exceptional circumstances, or some similar phrase. A "weak" presumption, such as appears to be contemplated in the Discussion Paper, might merely say, for example, that the court could consider whether in the circumstances the presumption had been rebutted.

10.8 The result of a court adjudication in Case 1 would probably be the same under Option 1 as under the present law.
10.9 Even if there were a "weak" presumption, unrepresented people negotiating their own arrangements might well treat the presumption as having a greater force than was intended. It may be that in practice, therefore, the result in *negotiated outcomes* under Option 1 would be more likely to be an equal division than negotiated outcomes under the present law.

**Option 2**

10.10 All the assets are community property, having been acquired during the marriage, and Option 2 is in that respect easy to apply.

10.11 Under Option 2, First Stage, there would be equal division of all the property (since it is all communal property in this case).

10.12 The next question would be what adjustment should be made, whether for future needs or as a result of the economic consequences of the marriage, depending on which version of the Adjustment Stage is adopted. It would seem that some adjustment would be made in favour of Spouse B whichever approach were to be taken. Again, it is possible that because of perceptions of the law, unrepresented parties negotiating their own arrangements might be more likely to divide the property equally.

**Comments**

10.13 In practice, therefore, there would be minimal if any difference in the application to this case of the present law, Option 1, and Option 2. In all cases, the First Stage leads to an equal distribution, and the question, equally at large under each of the possibilities, is what adjustment should be made. It does not seem that the Adjustment Stage necessarily varies as between Option 1 and Option 2. It may be however that the impact of Option 1 and Option 2 on negotiated outcomes, where the parties are unrepresented, will be more likely to produce an equal division, because of misunderstanding of the law.
CASE 2

10.14 The parties were married for 20 years. They had no significant assets on cohabitation. They had three children, the youngest aged 10 on separation. During the marriage, Spouse A indulged heavily in gambling and drinking, often being unemployed and absent from the home. Spouse B was required to be in employment, part time and full time, during most of the relationship, and in addition did most of the domestic work. Spouse B’s parents helped financially and by assisting with the children.

10.15 On separation, the only significant asset is the home, now unencumbered and worth $200,000. The children reside with Spouse B, who looks after them full time. Spouse A pays no child support. Spouse A has set up a business, and discloses a minimal taxable income.

Present law

10.16 In this case the contributions of Spouse B would be assessed as being considerably greater than those of Spouse A. A possible assessment would be 70/30 or more in favour of Spouse B. The s. 75(2) factors would lead to a further adjustment in favour of Spouse B, perhaps 10 per cent. In actual amounts, Spouse B might receive something like $160,000, and Spouse A $40,000.

Option 1

10.17 Under Option 1, First Stage, the presumption of equal sharing would mean a split of $100,000 to each spouse.

10.18 In the Adjustment Stage, the presumption of equal contributions would be clearly rebutted, and again they would probably be assessed at something like 70:30 or more in favour of Spouse B. A further adjustment similar to the present law might be made under the equivalent of the s. 75(2) factors.
10.19 As suggested above in Case 1, although there is no doubt that a court would proceed in this fashion, it is a difficult question whether unrepresented parties negotiating their own affairs would make similar adjustments: even in such a case as this, the idea that equal sharing is the norm might have a powerful influence.

**Option 2**

10.20 Under Option 2, First Stage, the communal assets would be equally divided: each would receive $100,000. That would leave Spouse B with the children to support and with Spouse B's much greater contributions ignored.

10.21 In the Adjustment Stage, there would be a strong argument for adjustment in favour of Spouse B, whether the adjustment were similar to the present law for future needs or based on marriage-caused inequalities. It is difficult to estimate what adjustment would be made under Option 2. To achieve a similar result to the present law, it would have to be about 35 per cent. The difficulty is that, as contributions are not an adjusting factor, there may not be grounds to reach a similar result. Again, much would depend on the formulation of the Adjustment Stage.

**Comment**

10.22 This is a case in which there is no separate property. While the starting point is predictable - each receives $100,000 - it is clear that some adjustment must be made, unless the view is taken that it would be just and equitable to ignore Spouse B's much greater contributions and also Spouse B's worse position as a result of the division of responsibilities during the marriage, in particular Spouse B's care of the children. But the adjustment would mean that the outcome would be no more certain under Option 2 than under the present law or Option 1.

**CASE 3**
10.23 *Spouse A has a shop which includes a small residence above it. It was worth $75,000 at the time of marriage. On marriage, Spouse B gives up a career as an accountant and lives with Spouse A, working in the shop, and caring for the children and the home. After a marriage of 10 years, the property has increased in value only to $100,000, mainly because Spouse A has refused to maintain it properly. Spouse B leaves, and, because of having been out of the workforce and having the care of the children, is unable to find work. Spouse A remains in the shop and living above it, earning just enough to live on.*

**The present law**

10.24 The First Stage assessment of contributions would involve balancing Spouse A's major financial contribution (the shop and residence) and Spouse A's other contributions with Spouse B's contributions. Contributions would greatly favour Spouse A.

10.25 Under the Adjustment Stage - s. 75(2) - there would be a substantial adjustment in favour of Spouse B, having regard to Spouse B's weaker financial situation and child care obligations, as well as having particular regard to the consequences of the division of roles during the marriage on Spouse B's capacity for employment.

**Option 1**

10.26 The shop and residence are available for property distribution under Option 1. With a presumption of equal sharing, each would be entitled to $50,000 under the First Stage.

10.27 In the Adjustment Stage, the spouses’ contributions, financial and otherwise, will be considered as will future needs. It is likely that there would be a substantial transfer to Spouse B.
Option 2

10.28 Under the First Stage, the community of property rule, Spouse A would be entitled to the shop and the residence as separate property, except that Spouse B would be entitled to an amount representing half the increase in value, i.e. $12,500. Since Spouse B has no separate property, Spouse B would be entitled to no more than this before the Adjustment Stage.

10.29 Without adjustment, if Spouse A could not borrow or otherwise obtain the $12,500, the property would have to be sold and the proceeds divided so that Spouse B got $12,500 and Spouse A $87,500.

10.30 In relation to the Adjustment Stage, the result will depend on whether separate property is available. If it is not, the adjustment could result in Spouse B getting the full amount of the increase in value, i.e. $25,000. If so, Spouse B would get 25 per cent of the assets and could not get more.

10.31 If separate property is available for the Adjustment Stage, Spouse B might obtain more. Spouse B might receive all of the communal property ($25,000), and some portion of Spouse A's separate property.

10.32 How much adjustment there would be would depend on the nature of the adjustment, i.e. whether it is for future needs or for the economic consequences of the marriage. As with Case 2, Spouse B would be entitled to an adjustment under either version of the Adjustment Stage.

Comment

10.33 Under the First Stage, there would be quite different results under the three scenarios. Under the present law, Spouse A could expect an initial apportionment in his or her favour. Under Option 1, the apportionment would be 50:50. Under Option 2, the apportionment would be 87.5:12.5 in Spouse A’s favour.
10.34 The Adjustment Stage under either Option 1 or Option 2 would create a degree of uncertainty not obviously different from the uncertainty existing in the present law.

10.35 Since Spouse A has a minimal income, spouse maintenance would presumably be unavailable. If, however, the law of spouse maintenance were to be such that the injustice of the property adjustment could be remedied by a substantial payment (which would require the shop to be sold), the adjustment would effectively have been done by spouse maintenance. The overall result would be uncertain, since the adjustment elements removed from the property proceedings would re-emerge in the context of maintenance.

**CASE 4**

10.36 The parties start with no assets, but Spouse A is brilliant in commercial investments and other business activities. Through Spouse A’s talent and energy, the parties acquire considerable wealth. Spouse B contributes nothing to this, but enjoys using the money and spends much of the marriage (which lasted 8 years, and produced no children) on overseas trips with friends. On separation, the assets are $4 million.

**The present law**

10.37 Obviously the evaluation of contributions would greatly favour Spouse A. Indeed it is somewhat difficult to identify any contributions by Spouse B.

10.38 Under the Adjustment Stage, it is difficult to identify any economic disadvantages to Spouse B arising from the marriage. On the other hand, a result in which Spouse B ended with nothing would probably be regarded as paying inadequate attention to a number of factors in s. 75(2), such as paragraphs (b) and (g). It seems likely that the court would order that the bulk of the assets would go to Spouse A, but that some would
go to Spouse B, perhaps enough to enable Spouse B to acquire a residence and some funds to live on.

**Option 1**

10.39 Under Option 1, First Stage, there would be equality of sharing. This would result in each being entitled to $2 million, before adjustment.

10.40 In the Adjustment Stage, the issues of contributions and future needs would see a substantial adjustment in favour of Spouse A, similar to the present law. It is obvious that the presumption of equal contributions must be rebutted.

**Option 2**

10.41 Under Option 2, First Stage, the community of property rule, Spouse B and Spouse A each receive $2 million.

10.42 To what extent would that result be altered under the Adjustment Stage? There could be no adjustment on account of the differing contributions (unless the Adjustment Stage provided for contributions to be taken into account, which has not been contemplated).

10.43 Would there be an adjustment on other grounds? If the basis were the economic consequences of the marriage, there is no evidence that Spouse B's position has worsened as a result of the marriage, and presumably no allowance would be made on this basis.

10.44 If the basis for adjustment were more widely cast, like s. 75(2), it is not easy to see that any particular adjustment would be appropriate. Thus, it would seem that there may be no adjustment from the rule of equal sharing, although of course this would depend on the precise terms of the Adjustment Stage.
**Comment**

10.45 This is an example of the relatively uncommon cases where there are substantial assets. Nevertheless the law must deal with these cases.

10.46 In this case, there appears to be a substantial difference between the present law and Option 1 on one hand, and Option 2 on the other. Under the present law and Option 1, Spouse A would receive the bulk of the assets. Under Option 2, while the result would depend on the wording of the Adjustment Stage, it would seem that the result would be an equal division of the assets. In Council's view, it is difficult to regard an equal division of assets in this case as an acceptable or just and equitable outcome.

**CASE 5**

10.47 Spouse A and Spouse B, both aged 58, separate after 34 years of marriage, having married in 1965. Their two children are now independent adults. At the start Spouse A had a block of land, obtained by inheritance. It was sold for $20,000 in 1970, and the proceeds used towards the purchase of the first house. Spouse B had a stamp collection, and a small portfolio of shares, at the commencement of the marriage. Spouse B retains the stamp collection, having added slightly to it during the marriage. Spouse B sold the shares hastily in 1977 and used the proceeds, some $10,000, for a number of purposes: to provide nursing for Spouse B’s mother, who was ill at the time and lived with them; to assist Spouse A in starting a small home based business venture, which failed after 1 year, leaving some debts; and to reduce household debts.

10.48 Spouse A always resented Spouse B’s mother living with them, and was upset at Spouse B having sold the shares hastily for $10,000 and at what Spouse A considered was an undervalue. Spouse A says the stamp collection is worth at least $5,000 and Spouse B says it is worth no more than $500. Neither has obtained a valuation. Nor is there a valuation of the block of land as of the time it was acquired.
10.49 *Spouse A was in employment as a public servant throughout the marriage. Spouse B was in employment until the first child was born, and thereafter was the main homemaker and parent, and was in occasional part-time employment.*

10.50 *On separation, they have an unencumbered house now worth $300,000. They have the stamp collection. Each has a car, and modest funds in bank accounts. Spouse A remains employed as a public servant, at a salary of $60,000, and has substantial superannuation. Spouse B has part-time work and earns $15,000.*

**Present law**

10.51 Under the present law, the various matters would be taken into consideration in connection with contributions. For example, Spouse A would receive credit for the block of land, and Spouse B for the shares and stamp collection, all these being initial financial contributions. As is commonly the case, the evidence does not permit precise valuations: we do not know the precise value of the land, or the values of the shares or stamps at the time of marriage, and even the present value of the stamps is a matter of dispute (and no good evidence). It would seem from the later sale prices that the land was somewhat more valuable than the shares and stamps combined. However in a long marriage it is unlikely that there would be a significant adjustment made on this account.

10.52 In principle, there is room for much argument about the respective contributions and benefits associated with the use of the proceeds of the shares. Spouse A might protest that some of it was spent on Spouse B’s mother, and it should be seen as a contribution by him to Spouse A that part of the parties’ assets should be used in this way. On the other hand, Spouse B might seek to argue that Spouse A had the sole benefit of the funds that went to the unsuccessful business. While the outcome would depend on the details, it seems likely that a court would, in the end, take the view that in this long marriage these matters roughly balance each other out and the contributions should be assessed as equal.
10.53 Under the s. 75(2) factors, there would be an adjustment in favour of Spouse B, having regard in particular to the differences in their economic circumstances.

**Option 1**

10.54 Under Option 1, it would probably be a case in which the First Stage presumption of equal contributions would not be rebutted. (In this respect, while the result would be the same as under the present law, Option 1 might have the advantage that the equality of contributions would be more apparent to unrepresented parties.)

10.55 Under the Adjustment Stage, there would be likely to be a similar adjustment as under the present law in favour of Spouse B for future needs. The end result, therefore, would probably be the same under Option 1 and the present law.

**Option 2**

10.56 It can easily be seen that the application of Option 2, First Stage, the rule of community property, involves a number of determinations that are likely to be difficult, both because the assets have become mixed and because it would be unreasonably costly to obtain the necessary valuations to identify what increased values should be regarded as community property. Although this case is unexceptional, and the assets are relatively modest, the application of the community property rule would be extremely uncertain, complex and expensive. In particular:

- Spouse A is entitled to the stamp collection, which is separate property, but the increase in value is communal property. Thus it would be necessary to attempt to establish the value of the stamps at the time of marriage and at the time separation, so that the increase in value can be calculated. If either party used their separate funds to buy stamps, that would also have to be taken into account;
- Valuations would similarly be required of the land, and the shares, at the time of marriage and at the time of separation would be required; and

- Difficult questions would arise from the various uses of the funds from the sale of the shares (which were separate property), to determine what portion remained as separate property and what portion became communal property.

10.57 In the Adjustment Stage, either adjustment base under Option 2 would be likely to lead to an adjustment in Spouse B’s favour. Since the economic differences between the parties seems attributable to the division of roles during the marriage, there would be little difference between the two forms of discretionary adjustment.

Comment

10.58 Under any of the three systems of law, there would seem to be a need to apply the Adjustment Stage. Thus the outcome would in all cases have whatever uncertainty is involved in the Adjustment Stage.

10.59 This case, although having a little more detail than the other cases, is reasonably straightforward. There are many marriages in which assets are more complex and held in different ways, with numerous transactions during the marriage, properties held jointly or in trusts, funds used variously to increase the value of assets (as where a home is renovated), debts incurred, with diverse tax consequences, and so on. Yet even in this simple case the application of the First Stage of Option 2 is difficult and expensive. By contrast, the operation of the First Stage of Option 1 and the present law is relatively simple. This example illustrates that Option 2 would be more complex, and expensive and less predictable in the starting point, and no different in the Adjustment Stage from many commonly-occurring cases.
CHAPTER 11: VIOLENCE

11.1 In 1998, Council published a Discussion Paper entitled *Violence and the Family Law Act: financial remedies*. The purpose of the paper was to gather the views of interested persons and groups on the appropriateness of making financial remedies for domestic violence available through the Family Law Act or other avenues. Council received 18 submissions. This chapter draws on Council’s Discussion Paper and the submissions received in response to it.

11.2 The Discussion Paper examined the change in attitudes towards domestic violence, both in the community and the courts, starting from the introduction of the Family Law Act in 1976. The 1980s saw increasing public awareness of the social and individual damage caused by violence in the home, and significant changes to the policy and practice of organisations such as police and welfare authorities which dealt with domestic violence on a regular basis. By the mid 1990s, the Full Court was willing to uphold the relevance of violence in property proceedings.150

11.3 The issues canvassed in the Discussion Paper include: problems of access to justice for indigenous people and people from culturally and linguistically diverse backgrounds; how victims of violence, including those from low-income households, might be compensated, for example through a victim’s compensation scheme or by the perpetrator; whether violence should be grounds for variation or setting aside of property orders; how violence should be defined for the purposes of compensation; the relevance of restraining orders; and cross-vesting of personal injury cases in the Family Court.

11.4 A number of proposals were put forward for consideration, such as amending the Family Law Act to include violence as a factor in sections 79(4) and 75(2), a new matrimonial tort based on injury and suffering arising from violence in the marriage, reform of the common law and cross-vesting scheme, and better access to victims’ compensation schemes.
11.5 With the publication of the Government’s Discussion Paper on property options, it has been necessary for Council to reconsider how issues of violence may be accommodated within any new framework of property reform. Other recent data is also relevant in reconsidering these issues. For example, the Spousal Violence and Post-Separation Financial Outcomes Report\textsuperscript{151} explores the financial circumstances post-separation and divorce of men and women who report having experienced spousal violence. The findings demonstrate the grave post-separation financial circumstances of those, women in particular, who report severe forms of violence. Compared with women who report no physical abuse, women who report severe forms of violence were less likely to be in paid work at the time of interview, were more likely to be ‘poor’ (as defined by the Henderson Poverty Line) and reliant upon social security as their main source of income. By contrast, the experience of spousal violence by men appeared to be unrelated to economic or labour market disadvantage. The authors suggest that one possible reason for this finding is that men’s strong attachment to the labour market (and the rarity of them experiencing severe forms of abuse) may mitigate any possible effects of spousal violence they experience.

11.6 Further, women who report varying levels of spousal violence fare worse in the division of property than women who report no physical abuse. Almost half (49 per cent) of the women who reported severe abuse received less than a 40 per cent share of the property at settlement. This apparent disadvantage in property settlement for women who report severe violence is further exacerbated when their financial circumstances at the time of separation are taken into account. Almost half the women who reported severe abuse were out of work at the time of separation, had spent at least one third of the time they were married out of the work force to care for children, and almost all had primary responsibility for the care of dependent children after separation and divorce. Despite these difficult circumstances at the time of separation, the s. 75(2) factors of the Family Law Act do not appear to have assisted these women at settlement.

11.7 The data also suggest that when violence is defined to include a wide range of conduct involving physical, sexual, emotional abuse and harassment, the vast majority of
women and men who divorce report having experienced some form of spousal violence during the marriage and/or post-separation. However, when the definition of spousal violence is based on the emotional or physical consequences of violence (as opposed to the actual conduct alone), the rate of reporting violence declines and differences between men and women in the prevalence of spousal violence become more pronounced. Given the trend to privatisation of family law matters, it is important that the effects of violence on the vulnerable party in private settlements be taken into account in any option or reform which may be implemented.

11.8 The National Association of Community Legal Centres report\textsuperscript{152} stated that in 71 per cent of community legal centres, violence was an issue which often arose when advising women with respect to property settlement.\textsuperscript{153} The report highlighted the negative effects of the current emphasis on private dispute resolution coupled with limited availability of legal aid funding in property cases. It said that there were few options available to a woman in these circumstances: that a power imbalance already existed between husband and wife, and the wife’s fear of the husband and loss of confidence meant that face to face negotiations were undesirable, and mediation was not an option for the same reasons. However, the report stated that it seemed that some women were being pressured to settle their property matters in these circumstances. Furthermore, the report indicated that violence may have affected the wife’s past contributions and future requirements, and these were factors which tend to be ignored in settled cases, even where there is no violence.

11.9 The report also stated that factors such as violence which are not in the legislation would have no impact on settled cases and cases such as Kennon were not having any effect on the 95 per cent of settled cases. The report cited the Chief Justice as sharing this view.\textsuperscript{154} If this is so, one explanation might be that there is a tendency for solicitors to play down violence to avoid acrimony between the parties.

11.10 It should be noted that reactions to the proposals in Council’s Discussion Paper were divided roughly equally on gender lines in submissions, ie. there was general
support for the reforms from women’s groups and total opposition from men or men’s
groups. The same responses might be expected to any similar proposals to include
violence in the current consideration of property reform. Proposals and submission
responses are discussed below.

SUGGESTIONS FOR DEALING WITH VIOLENCE

A new matrimonial tort

11.11 One approach to deal with violence is the creation of a statutory right of action in
the Family Law Act based on the infliction of family violence, in effect a new
matrimonial tort. One commentator supporting this approach states the matter bluntly:

‘The issue of family violence needs to be addressed without disguising it as being
about contribution or future needs and without creating a problematic basis for
the assessment of quantum. The issue is one of compensation for wrongdoing.’

11.12 The advantages of this approach are that it would allow the Family Court, a
specialist court for determining disputes between spouses, to determine both property
proceedings and damages proceedings when the same parties are involved. The awarding
of damages in the Family Court could be the most economical method of handling a case,
because the financial situation of the parties is already revealed and funds to pay any
damages can be identified.

11.13 Those submissions favouring this approach made a variety of suggestions. Some
said that a statutory right of action should be framed in terms of a course of conduct.
Others noted that it should be framed as damages for pain and suffering like personal
injury or as injury and suffering arising from partnership violence. Suggested methods of
assessment of damages were also varied. Some suggested using common law principles.
Others wanted the use of a prescribed scale. Some also suggested using all heads of
damages in torts.
11.14 Criticisms of a matrimonial tort were: that it would lead to lack of uniformity; it
would discredit the legislation, and it would create complications and delay in
proceedings; and, it would reduce the current effectiveness of the AVO system to protect
both parties.

**Personal injury claims and the cross-vesting scheme**

11.15 Another approach is to say that violence should not be considered in property
distribution at all, but should be dealt with by personal injury claims in the common law.
If that view is taken, the problem of dealing with violence in property adjustment law is
removed, but there are many difficulties with this approach and these were canvassed in
Council’s Discussion Paper.

11.16 Half of the submissions said common law claims were not the appropriate method
of dealing with compensation for domestic violence for reasons similar to those referred
to above, such as lack of legal aid funds and the victim’s fear of the perpetrator.

11.17 An assessment should be made of victims’ compensation schemes to consider
whether they can be improved for victims of family violence, and whether there should be
model State legislation for victims’ compensation. Generally victims compensation
schemes were thought to be better for victims, especially the poor and low asset families.

11.18 The other limitation of this approach is the demise of the cross-vesting legislation.
In a decision of the High Court handed down on 17 June 1999, the court concluded that
the cross-vesting legislation does not validly confer state jurisdiction on federal courts.

**Waiver of time limits**

11.19 One third of submissions supported statutory reform to allow the Family Court a
discretion to waive the time limits in proceedings for property adjustment and/or spousal
maintenance where there has been family violence.
Variation or setting aside of property orders

11.20 Half of the submissions supported an amendment to s. 79A(1)(a) of the Family Law Act to specifically include family violence as relevant to varying or setting orders aside under that subsection.

11.21 Other options for legislative reform included: rewarding the party who minimises or avoids violence (it was suggested that this would prevent a benefit for false allegations of violence); and, damages for children.

Dealing with violence under Option 1

11.22 Under Option 1, it is likely that the basic steps in a property settlement will be: first, identification and valuation of the known property; second, a consideration of the question whether the presumption of equal contributions applies or is rebutted by the circumstances of the case; and third, application of the Adjustment Stage (possibly based on a list of factors like the s. 75 (2) factors). It is at steps two and three that violence could be taken into account in Option 1. For example, at step two, the court could assess contributions to be unequal because of family violence as it may do under the current law. If the court is assessing the parties’ income, property and financial resources, and capacity to earn future income, any reduced capacity caused by family violence could be taken into account.

11.23 It is obvious that under Option 1 violence could be taken into account either in relation to the assessment of contributions or in the Adjustment Stage, or perhaps both. In those respects, there is little if any difference between Option 1 and the present law. The extent to which violence should be taken into account would of course depend on the terms of the legislation. The goal of transparency would be assisted if the question were specifically dealt with in the legislation, rather than being left unspecified (as under the present law).

Dealing with violence under Option 2
Option 2, First Stage, has a starting point of equal sharing of the communal assets of the marriage. The stages involved in a property division under Option 2 would be: first, identify and value the communal property; second, divide that property (or its value) equally; and third, the court would exercise its discretion to depart from equal sharing where a case is made out to do so (the Adjustment Stage). At this point, Option 2 diverges. Option 2A lists a number of factors for the court to consider in departing from equal sharing. Option 2B has as the only ground for departure, the economic consequences of the marriage and its breakdown.

Since Option 2, First Stage does not involve any assessment of contributions, violence would be quite irrelevant. Whether it would be relevant in the Adjustment Stage of Option 2 would depend on the terms of the legislation. If it were limited to the economic consequences of the division of roles within the marriage, then any effects of family violence having economic consequences would presumably be taken into account. If the Adjustment Stage were more open-ended, then family violence might have a greater relevance. The formulation of the Adjustment Stage would be crucial in determining the relevance of violence under Option 2, since it would be completely irrelevant under the First Stage. Where one party's violence had caused much pain and suffering throughout the relationship, but where it could not be shown to have had any demonstrable economic consequences, the violence would be irrelevant unless the terms of the Adjustment Stage were drafted sufficiently widely for it to be taken into account.

CONCLUSION

Council has not been able, at least in the time available, to make a unanimous recommendation about the question to what extent and in what manner the law of matrimonial property should take violence into account. It would however like to draw attention to some important issues in the following brief discussion.

In any law that takes account of contributions, there are arguments both for and against taking violence into account. On one hand, violence may have an obvious and important effect on a party's contributions. To carry out child care or homemaking, or to
maintain a position in the paid workforce, would be more onerous in circumstances of violence. In the case of serious and persistent violence, it could be little short of heroic. To ignore this fact in any system that assesses contributions seems irrational. On the other hand, a similar argument could be made in relation to some other forms of conduct not usually thought of as ‘violent’. For example, a pattern of systematic denigration and humiliation unaccompanied by force or threats of force could also cause a great deal of stress and make it much more difficult for the victim to make contributions. Again, a campaign to publicly humiliate a spouse could in some circumstances undermine that spouse's career, causing financial loss as well as suffering. An example that came to Council's attention was a case in which one spouse spread rumours among patients of the other spouse, who was a medical practitioner, that that spouse suffered from AIDS. In the context of assessing contributions, it is difficult to argue that violence should be taken into account but that all other forms of conduct must be disregarded. But if that were accepted, the law would need to refer to other forms of misconduct as well as violence. The consequence might be that a wide range of perceived hurts and insults during the relationship would have at least a potential relevance to the assessment of contributions. If this were so, while the assessment of contributions could be regarded as more comprehensive and appropriate, in practice, the change could lead to increased bitterness and more protracted litigation, and perhaps more difficulty in settling cases. It is an important and difficult question whether such consequences would ultimately be desirable, and for whom.

11.28 State and territory laws currently deal with violence, which can be the subject of criminal or civil proceedings, protective injunctions or similar orders, and claims under victims' compensation legislation. The relationship between those laws and any provisions in the law of matrimonial property would have to be considered. For example, would it be open to a spouse to sue the other spouse for damages for assault after having violence taken into account in property proceedings? Further, if the relevant state and territory laws are thought to be inadequate, reform efforts should arguably be directed to improve them rather than to create a substitute in the Family Law Act which would be available only to those victims of violence who happened to be married. It would be
relevant to consider in this connection any further legislation that might attempt to create a cross-vesting scheme or some similar scheme that would enable the Family Court to exercise jurisdiction in such proceedings.

11.29 Violence and its consequences can be taken into account in several ways, and if the law is to be transparent, the legislation would need to be clear about this. Apart from its relevance in assessing contributions, some might argue that the law should provide that the court determining the property proceedings should be able in effect to punish the violent person, or to compensate the victim for pain and suffering caused. Under the present law, this does not seem possible.

11.30 Again, it is a separate matter whether the court should take into account the consequences of violence on a spouse's health or fitness for employment. This can be taken into account in the Adjustment Stage in the present law, and could be taken into account in the Adjustment Stage under either of the options. The extreme diversity of views that appeared from the submissions to Council's Discussion Paper makes it fairly clear that any proposals on this subject are likely to be the subject of intense public interest and debate. In Council's view it is therefore of particular importance that there be a clear rationale for whatever decision is taken, and that the opposing arguments be shown to have been properly considered.
CHAPTER 12: THE ROLE OF SPOUSAL MAINTENANCE

12.1 Council has been considering the role of spousal maintenance and the continued relevance of the clean break principle enshrined in s.81 of the Family Law Act. Much of the material contained in this Chapter was generated for that purpose, although Council’s work on this topic has been overtaken by the Discussion Paper and the need to respond to it. However, it may be helpful to set out Council’s preliminary (but by no means concluded) thoughts on this subject. Foremost among these is the suggestion that consideration be given to ‘integrating’ property distribution and spousal maintenance claims, so that they become different ways of meeting the same objectives rather than remaining conceptually distinct, as at present. This has already been touched on in Chapter 6, where the question was raised about the possible role for income transfers in the Adjustment Stage.

12.2 By way of introduction to this chapter, Council briefly sets out the treatment of spousal maintenance under the two options presented in the Discussion Paper. As Council supports a more integrated and coherent approach for spousal maintenance, this chapter contains a detailed discussion of spousal maintenance and some reforms are proposed which could be adopted under either option.

Dealing with spousal maintenance under Options 1 and 2

12.3 Under Option 1, it appears that treatment of spousal maintenance would remain essentially the same as it is under the current law and that the factors to be taken into account would be similar to the list currently found in s. 75(2). The Discussion Paper expresses concern at the possible overcompensation (or perception of overcompensation) entailed in property adjustments and spousal maintenance being made on the basis of the same s. 75(2) factors. Subject to this, Part VIII is likely to be revised with spousal maintenance provisions contained in a separate division of Part VIII. The duty to support, (s. 72), and the clean break principle, (s. 81), would be retained.
12.4 Under Option 2A, spousal maintenance is likely to be treated as in Option 1 and would continue to be based primarily on providing for future needs. Under Option 2B, spousal maintenance would be considered as part of a ‘global assessment’ of the economic consequences of the marriage. The focus would be on the economic consequences of the marriage for (amongst other things) the parties’ earning capacities so that adjustments from a 50/50 split would be available to compensate for those adverse economic consequences. This principle is similar to that advocated in Chapter 6 for the Adjustment Stage. However, the Discussion Paper is unclear about the role of spousal maintenance under Option 2A.

The purpose of spousal maintenance under existing law

12.5 In the legal and philosophical debate as to the purpose of spousal maintenance, there are five major grounds or purposes generally put forward to justify consideration of spousal maintenance as a factor in determination of financial relationships. These are:

- The well entrenched view of marriage giving rise to the responsibility for provision of support to a party with needs. This in turn raises questions regarding the level of need, whether or not a dependent spouse can support himself or herself adequately and of course the paying spouse’s relative capacity to contribute, and issues of other legal and moral obligations and priority between dependants. It will also raise questions as to whether the need is a long term or short term need or an indefinite need.

- Payment of spousal maintenance as a repayment of debt arising from contributions made by the supported spouse to the income stream (or the assets) of the family during the course of the marriage. This will involve consideration of the level of the contribution made and the difficulties of such calculations, the loss of income earning capacity or resources by the dependant spouse because of those contributions and the set-offs which might be made in respect of that spouse’s enjoyment of the assets and incomes during marriage, and prospects of rehabilitation in the workforce, remarriage etc.
• Maintenance paid as a form of damages for matrimonial fault. This has been suggested as relevant in situations where an older spouse finds herself divorced while her husband takes up a new relationship and perhaps new family responsibilities. It involves consideration of the allocation of responsibility for marriage breakdown and the breach of the contractual obligations arising from the formality of the relationship. It is unfashionable at present, cutting as it does across the idea of ‘no fault’ divorce and equality of parties.

• Spousal maintenance for the ‘top up’ of child support. Situations where young children are involved, with the need of a parent to be available most or all of the time to care for them, may give rise to the need for spousal maintenance to support the carer parent at least for the duration of the child’s infancy, independently of the need to provide support specifically to meet the child’s immediate needs. Obvious difficulties arise in drawing a line between child and spouse support.

• The privatisation of family support and the protection of the public purse. If a family has generated or will generate enough wealth to maintain its own members appropriately, should this be taken into account to ensure that that support is provided by the family rather than the community?

**Categories of spousal maintenance**

12.6 Practical and conceptual issues regarding spousal maintenance have been reviewed in a number of discussion papers and reports over the last 10 years. These studies indicate that there are five typical fact situations which give rise to spousal maintenance awards (however infrequent they may be in the overall statistical picture of matrimonial property settlements). These five situations are:

• Awards made on an urgent or interim basis particularly in comfortable to wealthy marriages;

• Awards made to wives who are older, and after a long marriage are without marketable skills;
• Awards made to ‘unemployable’ wives ie, wives who have suffered physical or emotional disabilities whether they arose because of, or independently of, the marriage;
• Parents who have primary responsibility for the care of young children;
• Awards in the form of a proportion of a property transfer designated under s. 77A.

12.7 Within these categories of spousal maintenance, the types of orders made may be:

• short term orders (tapered or fixed) with a cut-off period. These are usually transitional orders which enable a time of adjustment or re-organisation for the payee, or to enable the payee to engage in a specific retraining course;
• periodic payments to compensate for lost earning capacity ‘caused by’ or ‘arising out of’ the marriage eg. illness, depression, injury, unemployability;
• lump sum payments which, after Vautin (see discussion at paragraph 12.23) may be made in appropriate cases, for example, to meet non-periodic expenditure.

The legislative framework

12.8 The statutory provisions governing spousal maintenance are contained in Part VIII of the Family Law Act. The obligation of one spouse to pay maintenance to another is established in s. 72. The court’s power to make orders enforcing that obligation is conferred by s. 74, and the criteria governing both the existence of the liability and the exercise of the court’s powers are contained in s. 75(2). The range of orders available to the court are set out in s. 80, and the effects of death and remarriage on the recipient of spousal maintenance orders are dealt with in s. 82. The power to vary orders for spousal maintenance is contained in s. 83.

Outline of significant case law

12.9 Although research evidence suggests that spousal maintenance is a rare phenomenon, there are signs of a recent trend towards an increased use of spousal maintenance. One manifestation of this is a more generous judicial interpretation of the conditions necessary to establish a spousal maintenance claim.
12.10 *Best and Best*\(^{160}\) was a case where the family had a small net asset pool, the husband had a very substantial earning capacity and the wife did not, and the wife had the additional ongoing care of the parties’ dependent children. Other matters of interest in the case are: the court clearly questions the inflexible application of the clean break principle; the court states that the future earning capacity of one spouse is significant where the other spouse had a diminished capacity; and the court said that periodic maintenance and lump sum maintenance, together with a property settlement, was an acceptable solution.

12.11 In view of the quite meagre property, the Full Court in *Best and Best* had little difficulty in concluding that ‘the only legitimate exercise’ of the discretion available under S. 79 was so far as practicable to transfer the whole of the available net property to the wife. It did so while adverting to the fact that it is somewhat unusual to make a 100 per cent allocation to one party but such an allocation was justified in this case. In addition the wife was to receive ongoing spousal maintenance. In fact the spousal and child maintenance paid by the husband was substantial.

12.12 The Full Court considered this case to be ‘a particularly striking example of the “feminisation of poverty”’ and cited a number of papers and reports on the subject.

12.13 *Mitchell and Mitchell*\(^{161}\) is significant because the Full Court referred to the Canadian case of *Moge*\(^{162}\) with approval in the context of taking judicial notice of the ‘feminisation of poverty’. The court gave a strong statement of the advantages to the court in doing this.

12.14 In *Mitchell*, the court highlighted the need to recognise, and to give ‘realistic effect’ to the circumstance that the husband acquired his professional skills and his high earning capacity during the marriage while at the same time the wife sacrificed her professional skills for the care of the family.\(^{163}\)
12.15 The discussion in *Mitchell* particularly reflects a willingness to consider the contributions made during the marriage to the income earning capacity of the earning spouse with a consequential disadvantage to the contributing spouse as relevant to the issue of spousal maintenance.

12.16 The court confirmed that the adequacy of self support is not to be determined on a subsistence level, nor by any fixed or absolute standard but is to be related to the family’s standard of living during marriage, the husband's standard of living after marriage and such other matters as are relevant arising from s. 72(2).

12.17 *Clauson and Clauson*[^164] discussed the relevance of capital introduced at the commencement of the marriage. It also considered the approach to adopt in relation to consideration of s. 75(2) factors. The wife had sought lump sum spousal maintenance but the Full Court rejected her appeal on the grounds that having regard to the dimensions of the property order it was not legitimate to make an order for spousal maintenance (whether periodic or lump sum) as she would not be able to demonstrate that she was unable to support herself adequately with the capital she received from the property settlement. It is important to note the comments made about the case of *Clauson* in the subsequent High Court appeal of *Tyson*.

12.18 In *Tyson v Tyson*[^165], the High Court rejected an application for leave to appeal. The argument before the High Court was that the Full Court's comments, based on the decision in *Clauson*, expressed two general propositions: the first, that a lump sum order should only be made where there is concern as to the capacity or willingness of the liable party to pay and the second, that a lump sum is no more than the future capitalisation of the periodic order (meaning that ‘lump sum maintenance’ is not a ‘separate entity’ or separate concept or separate form of relief). The High Court was critical of the Full Court’s view that lump sum maintenance is not a ‘separate entity’ and Justice Gaudron in particular was critical of the Full Court’s narrow view of the limited circumstances in which spousal maintenance should be paid. The High Court did not appear to support the
decision in *Clauson* on which the husband relied to avoid making a lump sum spousal maintenance payment.

12.19 *Vautin and Vautin* is a significant new decision on the capitalising of spousal maintenance. The husband had substantial assets and the wife was unable to work due to ill health. They had been married for almost 20 years and had 4 children. On separation, the wife had been awarded the matrimonial home and was receiving periodic maintenance. She later sought an increase in the periodic maintenance and a lump sum maintenance payment. The Full Court adverted to the fact that caution is appropriate when ordering payment of lump sum maintenance because of the finality of lump sum orders and the difficulties in making predictions into the future. However, it was appropriate in particular cases, for example:

‘to meet non-periodic expenditure for the maintenance of that person where there is an established need and a capacity to pay. It is not confined to cases of the capitalisation of periodic maintenance and/or where periodic maintenance is unlikely to be paid because of concerns about the capacity or willingness of the liable parent to pay (as passages in the judgment in *Clauson and Clauson* may suggest) or to cases where the need for or the capacity to pay periodic maintenance is demonstrated.’

12.20 The judgment also made clear that in exercising the power under s. 72, the trial judge is not confined to only one of the categories of order referred to in s. 80(1). In this case, a combination of periodic and lump sum orders were appropriate to meet the wife’s reasonable needs and to do justice. The case was very unusual and called for the appeal court to re-exercise the discretion of the trial judge and uphold the wife’s appeal.

**Brief outline of developments in Canada and USA**

12.21 Simultaneously with developments in Australia, American and Canadian jurisprudence has been developing an increased level of awareness of the real financial effect of divorce and separation on individuals.
12.22 The Divorce Act 1985 (Canada) requires the court, in making an order for the support of a spouse, to consider the conditions, means, needs and any other circumstance of the spouse or any child of the marriage. Further, it has as its objectives for the making of spousal support orders, a recognition of the economic consequences of marriage breakdown, apportionment between parents of the cost of child rearing, relief from economic hardship of a spouse arising from the marriage, and promotion of economic self-sufficiency. It has been said that the goal of self-sufficiency was being promoted at the expense of other goals, and that self sufficiency was the overriding policy objective advanced by Parliament, resulting in denial of support for some wives when courts refused to make a causal connection between the wife’s lack of self-sufficiency and the marriage.

12.23 The decision of the Supreme Court of Canada in *Moge* effectively rejected the clean break notion as a governing theory of spousal support.

12.24 The Supreme Court's decision was noteworthy for a number of other reasons. The court found that there must be an equitable sharing of the economic consequences of marriage and its breakdown, that is both the advantages and disadvantages, and sought to overcome the economic disadvantage accruing to a spouse who worked in the home during the marriage rather than developing an income earning capacity. The court emphasised that self sufficiency is not of paramount significance as an objective in determining settlement between spouses and that it had been over emphasised given the social and financial realities of the community and economy. It therefore held that judicial notice may be taken of social facts and the court took judicial notice of the research demonstrating feminisation of poverty after divorce.

12.25 The court preferred the theory of compensatory spousal support (rather than the self-sufficiency model) as the one which best promoted the doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown, which it said:
‘...seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under the deemed self-sufficiency model, to a substantive imperative.’

12.26 The lengthy judgment in *Moge* has been variously cited in argument and determination in the Family Court of Australia without having been discredited or disapproved.

**USA**

12.27 The ALI *Draft’s* principles provide for what are termed ‘compensatory payments’ out of income, to adjust for certain defined post-dissolution disparities arising from the marriage. The *Draft’s* principles aim to achieve an equitable sharing of the losses from dissolution of the family relationship by building on current developments in the law intended to distribute the economic losses of family dissolution more fairly. The relevant aspects of the *Draft* have been discussed in Chapter 5.

**Research and survey findings in Australia**

**Family Law Council survey**

12.28 In 1997-98, a survey was conducted by the Family Law Council, with the assistance of the Law Council of Australia, amongst practitioners throughout Australia to gauge their attitudes to and experiences of spousal maintenance and the clean break principle. In addition, the Family Law Council was assisted by the Family Court to conduct a survey of Judges and Registrars to obtain their views on the same matters.

12.29 It is apparent from the Family Law Council survey that the vast majority of practitioners and their clients want a clean break, usually to minimise contact between parties in conflict, rather than for the statutory reason of bringing an end to litigation. However, in most cases, comments from practitioners also recognised that a clean break was not always appropriate or possible and often detrimental to their clients. Some
practitioners considered that spousal maintenance was only a realistic option when the asset pool was large enough.

12.30 The figures for final spousal maintenance orders made by consent showed that 70 per cent of lawyers with male applicants and 26 per cent with female applicants never experience final consent orders.

12.31 In response to the question ‘How often is agreement reached for payment of spousal maintenance without a court order’, 74 per cent of both male and female lawyers said ‘never’ for male applicants in conjunction with a property settlement. Where the male applicant has a dependent child, 21 per cent of lawyers sometimes reach agreement, but where the applicant is female this percentage is 64 per cent.

Judges and Registrars responses

12.32 Judges said they rarely or never dealt with spousal maintenance applications as they were usually heard by registrars. Hence the judges’ views on trends were often based on actual court statistics showing an increase, or on their previous experience in private practice.

12.33 An increase in interim applications was attributed to lengthy delays between applications and final hearings for property matters. The delay may arise either through court delays or where ‘negotiations on an overall property matter have “bogged down” and it appears that it will be some time before the matter is judicially determined’.

12.34 Other reasons given for the increase in applications were employment uncertainty, difficulties faced by older women with no employment skills or prospects, and a desire to maintain the lifestyle enjoyed during the marriage. One registrar said the latter cases rarely involved PAYE taxpayers and income tracing was often an issue. In summary:

- 57 per cent of respondents (16/28) said there had been an increase in spousal maintenance applications. Of these, three said the increase had been in interim
applications and two specified there had been increases in applications for final orders;

- 29 per cent (8/28) said they had not observed any trend; and
- two respondents said there had been a decrease in applications and two were unable to comment.

12.35 Describing situations in which spousal maintenance is appropriate (judges) or is being awarded (registrars), half of the respondents referred to the threshold test in s. 72. One quarter referred to situations where the payer had a high income, and where there were interim proceedings prior to property settlement. A smaller group referred to situations where there was income but no assets or where the wife had not worked, had no job skills and had been in a long marriage. Other reasons given by smaller numbers of respondents were: to allow retraining of the payee; where a future resource was available; where complicated financial affairs prevented an ‘all in’ settlement; and where there were no children.

12.36 Some respondents differentiated between situations where interim or final orders may be made. A significant factor in the growing number of interim awards was the likely delay before a final property hearing. One Registrar who had pointed to the increase in interim applications said interim maintenance was often awarded simply on the basis of need and ability to pay. Need usually involved a spouse who was not working, with commitments which could not be met. Situations relevant to the award of spousal maintenance include court delays, poor employment prospects, length of the marriage, and desire to maintain the lifestyle enjoyed during the marriage. In summary:

- 50 per cent (14) referred to the threshold test in s. 72;
- 25 per cent (7) referred to situations where the payer had a high income;
- 25 per cent (7) referred to interim proceedings prior to property settlement; and
- 18 per cent (5) referred to situations where there was income but no assets or where the wife had not worked, had no job skills and had been in a long marriage.
• Other reasons were: to allow retraining of the payee; where a future resource was available; where complicated financial affairs prevented an ‘all in’ settlement; where there were no children.

12.37 On the question of the clean break principle:

• 82 per cent (23) said a clean break was desirable, but 99 per cent had to qualify that comment or had a negative view. Of that 99 per cent, 64 per cent said it was sometimes unjust or impossible to achieve, or that it should be an objective but not an imperative while 14 per cent (4) said it was unrealistic.

• Others said a clean break was inconsistent with other parts of the Family Law Act or with child support legislation which mitigated against a clean break.

12.38 The views of judges and registrars may be summed up in the following comment from a Melbourne judge:

‘There is nothing wrong with the statement of the clean break principle which is what s. 81 is about. However, it was introduced in times which were quite different from the present time and has been, at least until recently, too heavily emphasised to the detriment of a number of spouses whose financial positions justified continuing spousal maintenance.

‘The social, economic and employment setting in the mid seventies was quite different from what it is and has been over the last decade. At that time there was ample employment and there was an emphasis upon and expectation about the reality of wives being able to obtain employment and support themselves. Even in those times I think those expectations were unrealistic but they have certainly ceased to be so in recent years.

‘However, that established an ethos which gave s. 81 a much stronger emphasis than its wording would suggest. S. 81 only talks about the clean break principle where it is ‘practicable’ and this has been frequently overlooked: see Mitchell (1995) FLC 92-601. I think that both practitioners and the court gave, particularly in the early years, undue emphasis to a more absolute interpretation of s. 81 which actively encouraged a final property outcome (which may have included often minimal calculations for future spousal maintenance) and an end of future spousal claims.

‘Where that is practicable, no doubt that is a desirable outcome, but in many cases that is not because the female partner will often have been out of the work-force for a number of years and have a responsibility for young children and have great difficulty obtaining at least financially rewarding employment and in that latter context to meet the heavy responsibility of child care, and the property adjustment does not realistically cater for that.
‘The other factor which I think has had an influence in recent years is the child support scheme and its emphasis on child support assessments. In most cases where there are children of a broken marriage this has meant that the payer no longer has any financial capacity to meet additional periodic payments which would be involved in spousal maintenance. This is also largely a pragmatic matter, at least from the point of view of the payee, because to her the essential question is the amount of income coming into the household rather than its characterisation. But it has meant that spousal maintenance claims are not worth pursuing in addition or are often not made because there is just no additional capacity to meet any additional order.’

12.39 Another point, often overlooked, was made in the following comment from a Brisbane registrar:

‘Where possible and equitable, finality and a clean break are desirable. Lengthy litigation over a number of years because there has not been finality is very damaging for families, particularly where there are children in respect of whom the parents should be cooperating in terms of parenting arrangements.

‘However, it is also the case that there are some matters in which by virtue of the financial situation of the parties, a clean break is not appropriate. An example is where parties have accumulated little in the way of realisable property at the time of the hearing but there is a substantial resource which will become available in the future.’

**The 1988 Kay survey**

12.40 The survey conducted by Justice Kay in 1988 for the Family Law Council was confined to Chief Magistrates and Family Court Judges. In summary, the survey revealed that:

In the Family Court -

- over 90 per cent of spousal maintenance orders were made by consent;
- that two thirds of such consent orders were for lump sum amounts or property transfer and were so designated under s. 77A;
- in 25 per cent of cases where spousal maintenance was ordered, there were no dependent children;
- in two thirds of cases, parties preferred a clean break, whereas in the Magistrates Court, two thirds opted for periodic orders.
In the Magistrates Court -

- about 65 per cent of spousal maintenance orders were made by consent on the first return date;
- about 30 per cent of applications went to a defended hearing, 3 times more than in the Family Court;
- Periodic spousal maintenance orders were made in 65 per cent of cases and were much more common than in the Family Court.

12.41 The survey also revealed that the stereotypical case of the older woman who had devoted her life to raising children and caring for her family made up only 20 per cent of cases. The average age of the recipient was 34 and the average length of the marriage was 10 years. There were also a high number of spousal maintenance orders made under s. 77A but without evidence of any additional benefit to the payee. This suggested that s. 77A was being used by lawyers as an estoppel device to prevent future claims for spousal maintenance.

12.42 The 1988 Committee was drawn to the conclusion that the high number of consent orders indicated by the survey as being made in both courts suggested that it was the legal profession rather than the bench which was directing the nature and type of orders being made, and the amount of the settlement.

Australian Divorce Transition Project

12.43 In 1997, the Australian Institute of Family Studies conducted a ‘snapshot’ study of the economic and social consequences of divorce. A number of questions from the ADTP interview schedule sought to assess the incidence, duration and quantum of ‘spousal support’ (the term adopted in the survey). Analysis of the data shows that spousal maintenance is rare, minimal and brief.\(^{179}\)

12.44 The findings indicated that:

- over half (54 per cent) of the respondents considered that spousal maintenance should be paid, with more women (62 per cent) than men (43 per cent) holding this
view. The reverse of this is that a large minority believes that spousal maintenance should never be paid;

- only a small percentage (7 per cent) had ever actually paid or received periodic spousal maintenance, while an additional 10 per cent reported paying or receiving a larger share of the assets as spousal maintenance;

- the results above reveal a marked discrepancy between divorced men and women’s attitudes to spousal maintenance and their actual behaviour. One possible explanation is a mismatch between capacity to pay and willingness to do so;

- the results above (in the first 2 dot points) also reveal a marked incongruence between attitudes to and incidence of spousal maintenance and the provisions of the legislation providing entitlement to support in some circumstances;

- the reported median duration of periodic spousal maintenance was 2 years, with a median quantum of $6,640 per annum;

- the profile of survey respondents was that the vast majority of ‘payers’ were male and the vast majority of ‘receivers’ were female, and there were expected gender differences in child-rearing, work continuity and earning capacity. Shared characteristics of respondents were that they had been in relatively long-term marriages of at least 10 years duration, and they used formal legal processes to settle property matters; and

- two worrying findings are that women who have experienced violence in a relationship and women who have spent a considerable time out of the workforce were also less inclined to seek spousal maintenance.

12.45 Behrens and Smyth make the observation that spousal maintenance issues are fundamentally gender issues. The payment of spousal maintenance is ‘one limited mechanism through which to address women’s economic disadvantage on marriage breakdown. If as this study finds, such obligations are created only rarely, then
addressing that disadvantage depends upon changing those patterns of payment and/or looking to other broader strategies (including social security and taxation reform).180

**How property and spousal maintenance might be integrated**

12.46 When viewed in an international context, a distinctive feature of Part VIII of the Family Law Act is the way in which the grounds for making spousal maintenance orders are distinct from those for making orders for property distribution. While spousal maintenance is available on proof of the need of one and the ability of the other to pay, property distribution orders are made primarily on the basis of past contributions. The s. 75(2) factors play a role in s. 79 cases, but there is no need to prove an applicant’s need before those factors come into play. These differences in the grounds on which the orders are available have arguably had an inhibiting effect on the Family Court’s jurisprudence in this area. While the Full Court has been developing a jurisprudence of ‘cost sharing’ in its application of the s. 75(2) factors in property claims,181 the fact that spousal maintenance claims have to be seen through the lens of ‘need’ has prevented any similar reconceptualisation of spousal maintenance, even though spousal maintenance could be an important means, in some cases, of redressing those unevenly spread costs (eg, where the asset pool is small). Other important differences between spousal maintenance and property orders relate to the variation of orders,182 the effect of one order on the other,183 and the effects of death.184 Similarities between spousal maintenance and property relate to: the powers of the court to make orders under Part VIII (these are listed in s. 80 and there is no distinction between sections 74 and 79); the requirement for a ‘clean break’; and, a sharing of the s. 75(2) factors.

12.47 Other jurisdictions frequently draw no distinction between the two types of order in terms of the grounds on which they may be made. In this respect, those overseas regimes may be termed ‘integrated’, to draw out the contrast with Australia’s ‘unintegrated’ regime. This distinctiveness is underlined by the fact that it is established law in Australia that the issue of spousal maintenance is only considered once a court has decided on the distribution of property.185 One incidental effect of this may be that, because of the growing emphasis being placed on the s. 75(2) factors in property
matters,186 the potential role for spousal maintenance will be reduced, because an applicant’s need to support himself or herself may be met out of capital.187

12.48 Another noteworthy feature of the law of spousal maintenance in Australia is that it is not based on any clear set of statutory principles. Although it is possible to discern a number of different policies at work in the legislation, the primary ones being relief of need and relieving the burden on the public purse, there is no clear guiding statement of legislative principles or objectives. Those policies or principles that are discernible may be in conflict with each other (for example, the emphasis on self-sufficiency and the clean break188 may be incompatible with the protection to be given to parents wishing to continue their role as parent189). This has led one commentator to suggest that the current law is ‘incoherent’190.

Conclusion

12.49 Council wishes to raise for consideration the question whether there should be a closer integration of the principles underlying property transfers and spousal maintenance. The case for closer integration rests on the fact that the current requirement that spousal maintenance be available only on proof of need may unduly limit the role played by spousal maintenance in a reformed property regime. In Chapter 6, for example, it has been suggested that spousal maintenance (or ‘income transfers’) could play an important role in effecting adjustments to an equal sharing of property, based on principles of compensation for marriage-induced need. This change would be difficult to implement so long as spousal maintenance remains tied to the concept of need. Chapter 6 considers some further questions that would arise from a reformulation of spousal maintenance along these lines.
CHAPTER 13: CONCLUSIONS

Objectives of the law

13.1 The Discussion Paper does not discuss what objectives the law should have and whether, and in what form, they might be legislatively expressed. However, the formulation of objectives has been adopted as a legislative strategy in relation to Part VII, and in the child support legislation. In any case, it is important to attempt to identify what the objectives of the law are, and whether or not those objectives are to be stated in the legislation. For these reasons, the topic requires at least brief discussion.

13.2 The present Australian law, and most other laws so far as Council is aware, do not identify a single governing objective other than in such general terms as that the law should achieve a result that is "just and equitable", or "fair". Such general statements provide limited specific guidance on what should be the outcome in particular situations. Underlying such general terms are a number of competing principles and interests. They include, for example, the ideas that there should be a "clean break", that the parties' respective contributions should be taken into account, that the interests of children should be safeguarded, and that some adjustment should be made to offset inequalities stemming from the division of roles within marriage, or inequalities however arising.

13.3 Where the law requires a wide range of matters to be taken into account, and does not specify objectives other than in general terms, it is necessary for the decision-maker to balance these often competing principles in the particular circumstances of each case. Such a system may be defended on the basis that to impose any particular specific objective would produce results that would not be consistent with justice, and would therefore be unacceptable.

13.4 It is important to ask whether it is desirable for the law to identify one or more objectives more specific than, say, "just and equitable". To the extent that it does so, important questions arise. Is there to be one single objective? If there are to be more than one, is there to be some guidance as to the relative importance of each? Should such
objectives be drafted as part of the substantive provisions, or separately, as in an "objects" provision?

13.5 This fundamental issue was not the subject of discussion in the Discussion Paper. Council's present view is that it is not possible to identify a single specific objective which would lead to just results. It would however be possible to identify a number of relevant objectives somewhat more expressly than the Act now does. It is arguable that to do so would be desirable, because it would make those objectives, currently to be found in the case law, more accessible to those who read the Act. To that extent, such a change could make the law more transparent.

13.6 Such an approach may however have unwanted consequences. The expression of the objectives in legislation might alter the respective weight given to various factors and objectives in way that are not necessarily predicted or desired. Further, the new formulation might lead to uncertainty which would take some years to resolve by judicial decision.

13.7 Any advantages that might stem from the legislative formulation of objectives would have to be assessed along with any disadvantages or problems that might be entailed. It is a difficult task to attempt to predict the outcomes of such a change, and to assess whether on balance the likely consequences would be beneficial or harmful. It is not possible to make such an assessment in the absence of the draft legislation. A number of possible objectives or principles are discussed in this Submission. Council will be available to give further consideration to this issue in the light of any draft legislation.

**Clarification**

13.8 The existing law could usefully be clarified, in particular by re-drafting the provisions so that the Adjustment Stage (presently in s 75(2)) is set out separately from the matters to be taken into account for spousal maintenance. In Council's view, unless there is to be an integration of property and spousal maintenance law, this would be a
useful re-drafting, and would remove what has been a persistent source of misunderstanding and difficulty from time to time.

13.9 The legislation could also be made more transparent by inserting into the legislation the steps to be taken in property cases, as contained in case law. The technique of spelling out the steps to be taken has been used in other legislation. It would make the court's approach more transparent in the sense of being available to those who read the relevant provisions of the Act.

13.10 Next, it would be possible for the applicable principles to be specified in the legislation to a greater extent than they presently are. This matter is discussed above.

13.11 In Council's view such legislation has the potential to improve the law. The final merits of any such changes could not be considered until the legislation is drafted.

**Contributions**

13.12 The present Australian law has been said to be unusual in its express reliance on the assessment of contributions.\(^{198}\) It is often pointed out that the provisions require the court to assess "contributions" of various kinds, and that it is misleading to assume that this can be done in an intellectually satisfying way. How can one compare, and attach weight to, the respective contributions of, say a spouse who is a full-time mother and housekeeper with one who is in part-time employment and places the children in child care for part of the time? Or in turn, compare a spouse who sacrifices promotion opportunities to spend more time with the family with one who advances in his or her career, thus increasing the household income, but at the price of spending less time at home?

13.13 Despite this real limitation, there seems to be a connection between contributions and a 'just' property outcome. Whilst there is no empirical evidence that an assessment of contributions necessarily produces a fairer result, it appears that it accords with public perceptions of fairness. It seems that the idea of contributions stems from case law in
which equitable principles were used. Thus a spouse who contributed financially, even
indirectly (say, by paying living expenses), might in some circumstances acquire an
interest in the home. But to consider financial contributions alone seemed clearly unfair
where the parties' arrangements were such that one was the main breadwinner and the
other did most of the child care and homemaker work. Thus these non-financial
contributions needed to be considered.

13.14 To ignore any particular category of contribution, or to give it excessive weight,
seemed unfair. Similarly, to ignore the fact that one party's contributions are clearly
greater than those of the other party (difficult though this may be to articulate or
demonstrate with precision) seems unjust. This body of case law, the details of which do
not need to be given, presumably developed because of the courts' sense of justice and
fairness.

13.15 It does not seem sensible, therefore to argue that because of its origins in equitable
principles the idea of contributions should be seen as somehow inappropriate. It is
significant, too, that in developing property legislation relating to relationships outside
marriage, State and Territory legislators have considered that contributions should be the
basis of the adjustment.

13.16 For these reasons, while conscious of the difficulties involved in the concept of
assessing contributions, Council is not persuaded that contributions should be abandoned
as an important factor in determining property distribution. That is, it is not persuaded
that some other approach is demonstrably preferable.

Presumption of equal contributions

13.17 As foreshadowed in Chapter 6, the legislation might usefully contain a rebuttable
presumption of equal contributions, along the lines of a modified version of Option 1.
This would, as shown in Chapter 6, in effect involve a legislative expression of something
like the principles developed prior to the High Court's decision in Mallet, and would also
reflect the common practice of the courts.
13.18 Such a presumption would have to be drafted with some care. In Council's view, it should be stated in a way that indicated that it would be rebutted by evidence which showed that the contributions were not in fact equal. It might be useful for the provisions to spell out examples of circumstances which would normally lead to the conclusion that contributions were unequal. Council has not attempted to draft the provision itself, but something along the following lines would reflect its thinking:

_The contributions of the parties as set out in [the section that lists them, now 79(4)] will be assumed to be equal unless the court is satisfied that they are in fact unequal. Examples of the kind of circumstances likely to lead to the conclusion that the contributions are in fact unequal are:_

- _One party owns substantial assets at the beginning of the cohabitation, or inherits assets, while the other has minimal assets;_
- _Important contributions are made by the relatives of one party, as where one party's parents provide significant financial gifts, or provide accommodation for the parties, or care of children, or assistance with house renovations;_
- _There has been a pattern of violence by one party against the other, making the second party's contributions greater, or more difficult to carry out;_
- _Between separation and trial, where this is a period of some years, one party has the care of the children (and thus continues to make a contribution as a parent) and the other makes no financial or other contribution to the children; or_
- _Between separation and trial, where this is a period of some years, one party has the sole use of property, such as the home to live in or a family business, and the other party has no such benefit._

13.19 Such a provision would have little impact on cases that are finally determined by the court, because it reflects the present law, and because it would always be arguable that particular circumstances rebutted the presumption. However it might assist in reducing legal costs and delays, and some inflammatory evidence, in cases where the presumption
most easily applies. It might also be of considerable assistance to parties in settlement negotiations, particularly where they are unrepresented.

**No presumption of equal sharing**

13.20 Council does not support a rebuttable presumption that the property should be divided equally, and to that extent does not support Option 1. Such a presumption would be likely to undermine the importance of the Adjustment Stage, especially in the minds of those without legal representation. It would add little to the degree of certainty that might flow from a mere presumption of equal contributions, because there would frequently be room for argument that the circumstances of particular cases rebutted the presumption.

**The Adjustment Stage: policy issues**

13.21 In Council’s view, an Adjustment Stage, under which a Court could depart from the results produced by a presumption of equality of contribution in accordance with clearly defined principles, is an essential component of a just and equitable regime of matrimonial property. This submission has attempted to set out some of the policy issues involved, and has suggested possible principles of adjustment. In particular, it is an important question of policy whether the Adjustment Stage should continue, as at present, to be based on a list of matters to be taken into account to produce a result that is “just and equitable” (or some similar phrase) or instead should be based on one or more specific objectives or set of objectives. In addition, there are arguments both for and against the view that the Adjustment Stage should be based on the view that property adjustment should compensate as far as possible for inequalities caused by the circumstances of the marriage.

13.22 The relevance of particular matters at an Adjustment Stage, such as domestic violence, would depend on the purpose of the Adjustment Stage.
13.23 This issue arises whatever the nature of the First Stage relating to equal contributions or equal sharing, whether of all property as in Option 1, or only community property, as in Option 2.

**Deferred community of property: Option 2 not supported**

13.24 Council does not support Option 2, and in particular does not support the substitution of a deferred community of property for the present system of separate property.

13.25 The precise consequences of Option 2 cannot be identified because of lack of detail in the proposal. But as shown in Chapter 10, Council’s present view is that the First Stage, the rule of community sharing in Option 2 would often entail unjust and arbitrary results, and that in many commonly-occurring cases the most important questions would arise in the course of applying the Adjustment Stage.

13.26 Further, unlike the present law and Option 1, the First Stage of Option 2 requires items of property to be identified as either community property or separate property, and requires valuations of items of property at various times. The determination of these issues, even in cases where the assets were not substantial, would often be complex and technical, and obtaining the necessary valuations would often be expensive and difficult. There would be much room for dispute about all these issues.

13.27 It seems likely, therefore that litigants who were not represented by specialist family lawyers would be particularly vulnerable under Option 2. It might often be a complex and difficult task to identify what outcome would flow from the First Stage. This could complicate settlement negotiations. Where the issues were contested, it would seem that the technical and valuation issues required to be determined under this Option would often lead to cases becoming more complex, expensive and protracted than under the present law or Option 1. Ironically, perhaps, as shown in chapter 10, in the more straightforward cases the result of the First Stage would often be the same as under the present law.
13.28 To the extent that the results of the rule of equal sharing of community property would have to be adjusted by reference to an Adjustment Stage, the system would be subject to the uncertainties inherent in any discretionary system.

13.29 For these reasons, Option 2 would appear to be considerably less satisfactory than the present law or Option 1. In short, the First Stage entails complex determinations and expensive valuations, and the Adjustment Stage, which would continue to play a large role, is no less discretionary than the present law. Thus in many cases Option 2 seems unlikely to bring any advantages in terms of certainty of outcome, and likely to raise significant disadvantages.

**Domestic violence**

13.30 It is an important question whether, and to what extent, domestic violence should be relevant to property adjustment law. Under the present law, family violence will be relevant if it affects the assessment of contributions. This is the result of recent decisions. In relation to the Adjustment Stage, while it is not the court's task to punish a person for family violence, any harmful consequences of family violence may well be relevant. For example, if a person is injured by an assault and, as a result, cannot obtain employment, the Adjustment Stage would take into account those financial consequences.

13.31 The present law of property adjustment does not compensate for the pain and suffering caused by violence, nor does it permit the court to punish the perpetrator. However it would seem that the property adjustment regime under the Family Law Act would not deprive the victim of his or her rights under the State or Territory laws relating to criminal and tortious liability (though it may perhaps affect the quantum of damages that would be received in a civil claim under State or Territory law).

13.32 The results of Council's work on this subject indicate the complexity and seriousness of the problem. It may well be fruitful to keep this issue under consideration, especially as the case law develops. It may be relevant that the High Court has held that the cross-vesting legislation is invalid, so that it will not be possible for the Family Court
to hear claims for damages under state or territory law in conjunction with property proceedings.

13.33 Having considered the matter, however, Council is not persuaded that any other approach to family violence is shown to be preferable to the present law. The extent to which violence is taken into account under the present law seems consistent with general principles. At this point, therefore, Council does not recommend any change in the law relating to family violence and property matters.

**Spousal maintenance and income transfers**

13.34 Finally, Council has raised for consideration the question of whether the role of spousal maintenance should be reconsidered as part of a review of matrimonial property. In particular, Chapter 10 canvasses the possibility of moving away from ‘need’ as the basis for spousal maintenance towards considering spousal maintenance, or income transfers, as one of the techniques for giving effect to the principles applicable at the Adjustment Stage.
ENDNOTES

1 Council’s letter of advice to the Attorney-General, 12 March 1999
5 Until the Family Law Act 1975 (Cwlth), the relevant legislation merely provided that the child's welfare was to be regarded as the paramount consideration, or in some versions the "first and paramount" consideration. In its original form, the Family Law Act provided no guidelines or factors to be considered other than that the court should not make an order contrary to the wishes of a child over 14 years unless there were special circumstances: s. 64(1)(b). Later amendments added a list of matters to be considered. The "paramount consideration" principle is now contained in s. 65E.
6 Family Law Act, s. 79(2).
7 See eg: Child Support (Assessment) Act 1989 (Cwlth), sections 3, 4 & 114.
8 Family Law Act s. 66B.
9 Family Law Act, s. 68F.
10 See eg: Family Law Act s. 75(2).
11 See also Chapter 7.
13 See the Discussion Paper at the Executive Summary, paragraph 5.
17 Australian Institute of Family Studies, op. cit., passim.
18 See especially Chapters 9 and 10.
19 Australian Institute of Family Studies, op. cit., passim.
20 McDonald, op. cit., passim., and Funder, Harrison, & Weston, op. cit., passim.
22 The Family Court of Australia, Annual Report 1997-98 shows that there were 65,104 files opened (ie. applications filed) in that 12 month period, while 326 complaints were received by the court (0.5% of total files). In the Family Law Branch of the Commonwealth Attorney-General’s Department, there were approximately 800 letters received in the 12 month period 1997-98, but not all of these were complaints about the family law system.
25 The latest research by the AIFS is part of the Australian Divorce Transition Project (ADTP): Australian Institute of Family Studies, What is a fair property settlement? Preliminary findings of the Australian Divorce Transition Project, presented at the 6th AIFS conference, Melbourne, November 1998.
26 In Best and Best (1993) FLC 92-418; (1993) 16 Fam LR 937, the parties had met when the husband was at university as a law student and the wife was training as a nurse. During the early years of marriage the wife had actually supported the husband to the completion of his degree and contributed financially some time thereafter. Her family had also assisted them in their needs during these early years. Gradually the husband built up his qualifications and experience until in the years 1989 to 1991 his income from his partnership practice ranged between $443,000.00 and $494,000.00. In 1992 his income had dropped to $309,000.00. In the meantime the wife had ceased outside employment, had cared for the four children of the marriage and devoted herself to the
household and the support of her husband's career. Despite the husband's very high income, the net assets were about $108,000. This was awarded to the wife.

In *Mitchell and Mitchell* (1995) 19 Fam LR 44; (1995) FLC 92-601, the husband (as in *Best*, a lawyer) had a substantial entitlement in a superannuation fund that was treated as a financial resource. The parties had married before the husband had qualified, the wife was a nurse and she continued as the major breadwinner in the early years of their relationship. She had two children during the course of the marriage, ceased outside employment although continued with some secretarial work for her husband, and devoted herself to the family during the course of the marriage. After their separation the husband's income was substantial and hers was quite modest. The wife had applied for spousal maintenance as well as appealing against the property orders. The trial judge had actually awarded 90% of the parties' modest property to the wife.


28 For example, the impact of predictability may apply differently to people who are more or less "risk-averse". Again, there may be distinctions to be drawn about whether a precise result is predictable, or a result within a range: it may be that in one system the precise outcome can be predicted in a proportion of cases, while in another the precise outcome can never be predicted, but it might confidently be predicted that the result will fall within a range, as where one party might be expected to receive between 60% and 65% of the assets.


31 ibid., p. 217.


33 The *Family Law Reform Act 1995* (Cwlth) implemented those recommendations accepted by the Government in relation to children (Part VII) and mediation and counselling.

34 Australian Law Reform Commission, sup.

35 McDonald, op.cit., p.2.

36 ibid., p. 309.

37 ibid., p. 310.

38 ibid., p. 311.

39 ibid.

40 ibid.


42 McDonald, op.cit., passim.

43 Sheehan & Hughes, op.cit.

44 McDonald, op.cit., p. 311.


46 Dewar, Sheehan & Hughes, loc. cit.

47 id.

48 Sheehan & Smyth, op. cit., p. 54 - 55.

49 Funder, *Settling Up*, sup.


51 Financial living standards were defined according to the Henderson Poverty lines. These lines were derived from the June Quarter 1997 Estimates published by the Institute of Applied Economic and Social Research.

52 Sheehan & Smyth, loc.cit.

53 Dewar, Sheehan and Hughes, loc. cit.


55 ibid.

56 ibid., see Table 5, p. 271.

Matrimonial Causes Act 1973 (UK) at sections 25(1) and (2). The factors include the income, earning capacity and property of the parties, their financial needs and obligations, the marital standard of living, the parties' ages, the parties' contributions to the welfare of the family, and their 'conduct.'

Matrimonial Causes Act s.25(1).
Matrimonial Causes Act s.25A(1).
Matrimonial Causes Act s.25A(2).
Matrimonial Causes Act s.25A(3).
Matrimonial Causes Act s.28(2).


But see White v. White (1998) 2 FLR 310, where a married couple who had also been business partners were awarded amounts similar to what they would have received if the partnership had been dissolved, on the basis of contributions. The case has been appealed to the House of Lords.

eg, F v F (1996) FLR 833 (Duxbury Calculation: Rate of return).


eg: the ‘Mesher order’ and the ‘Martin order’: see Cretney and Masson, op.cit., pp.482-490.


Welfare Reform and Pensions Bill (UK).


See, eg: Conran v Conran (1997) 2 FLR 615, where the wife received assets of 10.4m pounds out of a total pool of about 85million pounds, following a thirty year marriage in which the wife had looked after the parties’ three children and the husband’s two step-children, and had made very significant contributions to the husband’s business.


ibid., paras. 4.20-3.
ibid., paras. 4.44-9.


Matrimonial Property Act 1976 (New Zealand) s.8.

There are some circumstances where inherited property will be included as matrimonial property:

Matrimonial Property Act s.10
Matrimonial Property Act s.9
Matrimonial Property Act s.13
Matrimonial Property Act s.14. There is also an exception for ‘homesteads’: s.12. There is also provison for making adjustments where both spouses owned a home before the marriage, each of which was capable of being the matrimonial home, but where only one was used as the home: s.15.

This term is defined extensively in Matrimonial Property Act s.18.


Family Proceedings Act 1980 (New Zealand) s.64 .

Eekelaar, Financial and property adjustment, op.cit., p.20.

Bridge, loc. cit.

Subsequently published as P.McDonald (ed) Settling Up sup.

ALRC Report No 39, op. cit. This summarises para.345.

ibid., Ch9. This summarises para.350.

ibid., Ch9. This summarises paras.353-385.

ibid., para.375.

99 This could be important in ensuring that any starting point did not also become an ‘end point’ in the minds of the general public.


102 ibid., Chapter 4, ‘Division of property upon dissolution’

103 In this discussion of the Draft, ‘marital’ is used as opposed to ‘matrimonial’, to reflect the Draft’s language.

104 ibid., 4.15. Separate property is returned to its owner: 4.17.

105 ibid., See pp.197-9 for discussion.

106 ibid., See 4.16.

107 For rules governing property received in exchange for a mixture of marital and separate property, see 4.06. The same paragraph deals with property acquired on credit during a marriage, or with a mixture of credit and separate property (of particular relevance to cars or homes acquired with a mortgage).

108 ibid., 4.03.

109 On which see ibid., 4.05. This gives expression to the principle that the fruits of spousal labour belong to the marital community. Thus, a businessman who has worked during the marriage to build up the value of a separately held asset (eg, a shareholding) must share the increase in the value of that asset attributable to the period of the marriage. [Contrast the current position in Australian law under the notion of ‘special skill’]. The same principle applies where the increase is attributable to the labour of the non-owning spouse. Separate property that appreciates in value without labour on the part of either spouse would remain separately held.

110 ibid., 4.04.

111 ibid., 4.07.

112 ibid., 4.07.

113 ibid., 4.08.


116 ibid.

117 ibid., p.259.

118 ibid., 5.04.

119 ibid., 5.06.

120 ibid., 5.09.

121 ibid., 5.11.

122 ibid., 5.07.

123 Waters and Jurek (1995) FLC 92-635; per Fogarty J at 20 Fam LR 190, 199-200


126 PASTRIKOS and PASTRIKOS (1980) FLC 90-897; (1979) 6 Fam LR 479


128 The only exception seems to be s 75(2)(l), a provision which appears to have little if any practical impact.


130 For example where one party is spectacularly indolent while the other does most of the income earning and also makes the major contribution as homemaker and parent; or where one party loses significant assets by gambling or drinking activities not shared or accepted by the other.


132 Family Law Act, s 75(2)(o).
Emphasis added.

See Part VII, and particularly s 65E (child’s best interests to be regarded as the paramount consideration).

See in particular s 75(2)(c), (d)(i), (l).

See chapters 8 and 9 and Conclusion of this Submission.


See chapters 8-10 of this Submission.


Discussion Paper at 5.11.


(1977) 25 ALR 217 at 219; (1979) FLC 90-629 78,273; 5 Fam LR 146 at 148.

(1978) FLC 90-466 at 77,385; (1979) 5 Fam LR 889 at 894.

(1979) 25 ALR 82 at 86-7; (1979) FLC 90-647 at 78,410–1; 5 Fam LR 106 at 109–110.


A reading that would be consistent with the proposal to require reasons to be given for a non-equal split: see para 7.9.


Sheehan & Smyth; op.cit., passim.


ibid., p. 15.

ibid., p. 17.

Women’s group submissions applauded the proposed reforms which would facilitate women victims’ access to some compensation for their suffering while minimising the trauma and cost of instituting separate proceedings against the violent spouse. The men’s groups on the other hand invariably pointed to alleged feminist bias in the paper, supposedly evidenced: by the gender imbalance on the committee; frequent references to victims as ‘she’; only passing reference to men as victims; the content of the bibliography. The men’s submissions often focussed on the nature and frequency of domestic violence while ignoring the financial remedies aspects.


*Re Wakim Ex parte McNally; Re Wakim Ex parte Duvall; Re Brown Ex parte Amann; Spinks v Prentice [1999] HCA 27 27/6/99. (hereinafter ‘Wakim’)*


Behrens & Smyth, op. cit., p. 9.


*Moge and Moge* (1992) 3 SCR 813; (1992) 43 RFL (3d) 345 (Supreme Court of Canada)(*Moge* *Mitchell* op.cit., at 81-998.


ibid, pp. 85,423-85,424.

s. 15(5).

ibid., s. 15(7). Compare these objectives to the threshold ‘means’ and ‘needs’ test for spousal maintenance in s. 72 and the list of factors to be taken into account in section 75(2)(a)-(o) of the Australian Family Law Act. The Canadian Act is a move away from the narrow perspective of a ‘needs’ and ‘capacity to pay’ approach as embodied in its previous legislation.


ibid., p. 852-3.
See also McDonald (ed) Settling Up, op.cit; Funder, Harrison & Weston, Settling Down op.cit; and Funder (1992), op. cit.

Moge, op cit., p. 864.
See Best and Best op. cit; Mitchell and Mitchell op.cit.
American Law Institute, op.cit.
ibid.
Behrens and Smyth, op. cit.
ibid. p. 22.

While the former are variable in the light of a change in the circumstances of either payer or payee, the latter are, in principle, final (although they may be overturned in the very limited circumstances set out in s. 79A).

When making an order for spousal maintenance, a Court must have regard to any order made or proposed under s. 79 (see s. 79(2)(n)). There is no reverse provision stating that a Court must have regard to a proposed spousal maintenance order when considering what property order to make under s. 79. This may reflect or reinforce the Court’s view that property orders must be considered first, before the question of spousal maintenance is addressed. In addition, it illustrates the extent to which spousal maintenance is based primarily on proven need, while property orders are based primarily in entitlement founded on past contributions.

Orders for spousal maintenance terminate on the death of the payer or payee; while orders for property, once made, are irreversible, and proceedings begun for property orders continue after the death of either applicant or respondent.

See eg, Waters and Jurek op.cit; Clauson and Clauson op.cit.

For cases where the property order has impacted on the need for maintenance see Pastrikos and Pastrikos (1980) FLC 90-897; (1979) 6 Fam LR 479; Anast and Anastopoulos (1982) FLC 91-201; (1981) 7 Fam LR 728; Morris v Morris (1982) 1 NSWLR 61(1982) 8 Fam LR 740; (1982) FLC 91-271; Clauson and Clauson op.cit; Georgeson and Georgeson (1995) FLC 92-618. For an example where a reduction in the wife’s property award on appeal was found to revive a need for spousal maintenance, see Rosati and Rosati (1998) FLC 92-804.

Family Law Act s. 81.
Family Law Act s. 75(2)(l)

Family Law Act s. 79(2).
Family Law Act s. 81.
Family Law Act s. 79(4).
Opening words of s. 79.
See eg s. 75(2).
See eg s. 75(2).
See Chapter 3.
see the discussion at Chapter 6