

3 September 2021

Property Consultation Project Team
Family Law Branch
Attorney-General's Department
By email: propertyconsultation@ag.gov.au

Dear Property Consultation Project Team,

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

Introduction

National Legal Aid (NLA), representing the directors of the eight Australian State and Territory legal aid commissions (LACs), thanks the Commonwealth Attorney-General's Department (AGD) for the opportunity to provide our views in response to the consultation paper, *A new decision-making framework for property matters in family law* (the CP).

About National Legal Aid and legal aid commissions

As AGD is aware, LACs are independent, statutory bodies established under respective State or Territory legislation. They are funded by the Commonwealth and respective State or Territory governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged. Around 2 million legal assistance services are provided to people each year. LACs are the largest providers in the country of family law, family violence and child protection legal services.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

LAC involvement in family law property law matters is limited to the assistance that can be provided from available funding taking account of other competing priorities for legal assistance. To the extent that assistance is provided under a Grant of Legal Aid it is usually in relation to matters also involving children and where the property pool is modest, commonly comprising a mortgaged family home, home contents, a vehicle, and debt.

NLA gratefully acknowledges the funding from the Commonwealth Government for the Lawyer-assisted Family Law Property Mediation Trial (the Mediation Trial), a pilot program. It is our view that the uptake of the Mediation Trial evidences the strong demand for LAC low cost legally-assisted dispute resolution in relation to property and financial matters. It is also our view that the Mediation Trial is successful in supporting the economic security of its participants, particularly women who are in precarious financial situations, and the children whom they care for. NLA considers it cost effective. NLA looks forward to the results of the evaluation of the Mediation Trial and hopes that such matters will continue to be funded into the future.

NLA also gratefully acknowledges the funding for [amica](#), an online dispute resolution system which helps couples reach amicable agreements about property and parenting issues and to record those agreements in plain language on a secure platform.

NLA's previous submissions relevant to the decision-making framework for family law property law:

- [House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into family, domestic and sexual violence \(Aug 2020\)](#)
- [Joint Select Committee on Australia's Family Law System \(Jan 2020\)](#)
- [Australian Law Reform Commission Review of the Family Law System Discussion Paper \(Dec 2018\)](#)
- [Australian Law Reform Commission Review of the Family Law System Issues Paper \(June 2018\)](#)
- [House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into a better family law system to support and protect those affected by family violence \(May 2017\)](#)

Our response to the questions in the CP is set out below.

A revised framework

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

1.1 Yes, more clearly articulating the decision-making steps will better assist parties to understand the approach that would be taken by the court. This could be expected to assist in the resolution of matters by consent.

For parties with limited equity, the cost of conducting proceedings in the family law courts in relation to property often outweighs the benefit in terms of cost, delay and the pressure of litigation. This leaves many people without an effective avenue to resolve disputes following relationship breakdown.

1.2 NLA suggests that the outlined approach would benefit from further consideration by way of limited and targeted 'roundtable' consultation, e.g. a preliminary issue is the

outlined approach in Step 1. In NLA's view the outlined approach currently conceals relevant context, such as the circumstances which constituted the facts in *Stanford v Stanford [2012] HCA 52 (Stanford)*, which would make the outlined approach appropriate as a first step.

The timing of contributions, 'initial contributions', 'contributions during the relationship' and 'contributions post-separation', are aspects of family law property law that LACs discuss with clients, as are the effects of family violence. The effect of post separation gains in relation to future needs is often not as well appreciated as the effects of 'initial' and 'during relationship' contributions. Each of post-separation gains and the impact of family violence may need to be better articulated.

To take things forward, one possibility might be a working group convened by AGD involving representatives with experience in family law property law matters from each of the family law courts, Family Law Section of Law Council of Australia, NLA and other legal assistance providers as appropriate. Alternatively, perhaps Family Law Council, once reconvened, could consider the issues?¹

1.3 The main issue which should be considered as part of the reform process is ensuring the judicial officer retains discretion.

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

Please see 1.2 above.

NLA notes that Government does not agree with recommendation 12 "including a presumption of equal contributions during the relationship". NLA has previously expressed concerns about the introduction of presumptions² and supports the Government's position.

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

Fair or reasonable are terms often used by legal practitioners to give a plain English interpretation for just and equitable. Whilst the plain English is preferable, there are concerns not to disrupt existing understandings of the legislation.

4. If clearer articulation of the decision-making steps is pursued, what is the appropriate order of the steps? For example, should consideration about whether it is appropriate to

¹ Noting that it is understood that in 1999 Family Law Council, as then constituted, supported a presumption of equality of contributions. See *Family Law for the Future – An Inquiry into the Family Law System*, Australian Law Reform Commission March 2019 at 7.24 p. 223.

² E.g. NLA submission to Attorney-General's Department Issues Paper, *The Family Law Property Regime*, 23/10/15.

adjust the property interests at all be the preliminary step? Should contributions be considered by the court before it considers the future needs of the parties?

There is thought to be general confusion about whether the just and equitable consideration is a preliminary step, a final step or both. In almost all cases, the answer is 'yes', it is just and equitable to proceed, as the preliminary step takes account of less usual situations such as the facts in *Stanford*.

Contributions should be considered before future needs. The nature of the contribution may have informed the future need, e.g. person out of the work force for many years due to fulfilling caregiver responsibilities who may be less likely to find work as a result.

A chronology of contributions provided to the court sets out the relevant factors relating to the composition of the asset pool over the term of the relationship. This assists the conceptualisation of how parties formed their current asset pool and can help to inform the determination of future needs.

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

It is unlikely that all the potential contributions and needs factors could ever be exhaustively expressed, and 'catch-all' sections (such as 4. e. in the CP about future needs) are important to support discretion and justice in the circumstances of the individual case. Examples, stating that they are not exhaustive, may need to be provided in notes.

Other receipts/benefits that could potentially be canvassed include:

- Redundancy payments
- Compensation payments
- Living with one party's family rent free
- Care contributions by one party's family
- Carer for one party due to health and/or disability
- Support for one party to complete study
- Supporting one party to relocate for work with consequential impacts on the other party's income and earning capacity
- Family members of one party as loan guarantor.

Other examples of needs that could potentially be canvassed include:

- Additional child care costs if one party is unable to relocate to be close to family
- Needs of migrants who may have no family, limited English, limited employment prospects
- Special needs associated with caring for a child with disability
- Costs of living in remote areas.

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

The imperatives of retaining discretion and confining complexity suggest factors should not be weighted.

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

Discretion should be retained. NLA considers 3(c) exemplifies the value of the contribution rather than quantifying it. The mischief to be addressed is that a party may not recognise their non-financial contributions as of value. This could also be addressed by way of community legal education.

NLA's Community Legal Education Network and Family Law Working Group would be pleased to assist in the development of property framework materials on the basis that appropriate funding was provided for the purpose.

Spousal Maintenance

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

NLA understands this question to be referable to s. 75(2).

Family and domestic violence should be identified as a factor in the 75(2) factors.

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

Yes. However, some further consideration should be given to short term spousal maintenance applications.

Case management reforms at the family law courts should assist in relation to those matters which require urgent/interim orders pending property division and/or final spousal maintenance orders.

The reasons suggested to be behind low numbers of spousal maintenance are noted below.

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

Spousal maintenance rests on proving the applicant's 'need' and then the respondent's 'capacity to pay'.

Low numbers of applications are thought to be associated with the following:

- Limited awareness of the ability to seek spousal maintenance including on an interim basis.
- A lack of knowledge in relation to the other party's income and/or assets, notably where there has been family violence and/or a party from a CALD background has moved to marry. Complexity and expense of proceedings, particularly where it is perceived that the maintenance is only likely to be required for a short interim period and/or the party's property and financial resources are limited.
- New relationships and re-partnering being a reason for separation.
- Future needs factoring into property division.
- A wish to not prolong the ongoing financial relationship between the parties.
- The limited availability of a Grant of Legal Aid, due to limited funding, means, merits, and matter type guideline tests, in the context of competing priorities for limited funding.

There is some experience of applications being dismissed if the party seeking maintenance has funds identified in their financial statements (even if a nominal amount). There is also experience of difficulty demonstrating need if the applicant has reduced their expenses since separation. In the Legal Aid context, lack of capacity to pay is not uncommon.

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

It is considered that additional guidance material would be very helpful. Materials should also address process requirements, including disclosure.

The relevance of community legal education is noted.

Child support

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

NLA notes that the Joint Select Committee on Australia's Family Law System is to present its final report of the Committee's views and recommendations of the child support system and its interaction with the family law system on 29/10/21.

Depending on content of the Joint Select Committee report, it is suggested that this is an area which could benefit from a round-table consultation as suggested at 1.2 above.

No issue with child support being retained as an express factor is perceived. Retention of child support as an express contribution and/or needs factor should address potential concerns that ongoing child support responsibilities are not being appropriately taken account of.

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

An administrative assessment of child support is readily available for most children of separating parents; the assessment will usually be based on reasonably accurate information about the parents' past and current financial circumstances and can be adjusted as those circumstances change; and the Child Support Registrar has legislated authority to register and collect the amounts payable. These features mean that in many, if not most cases, the usual operation of the child support scheme will ensure that parents fairly share in the costs of providing for their children after separation, according to their means.

A property settlement is a final 'point in time' exercise, whereas child support is an ongoing and responsive obligation. However, given the intention that there be a final adjustment of the parties property interests, we consider that it would be beneficial if the court were able to address whether there is a suitable arrangement for child support – either by way of an administrative assessment or a limited or binding child support agreement, and that there are no outstanding child support arrears that need to be considered in the adjustment of property interests. This is likely to be particular benefit in cases where a parent has persistently failed to comply with their child support obligations, or where the parent with care of the children has elected not to apply or been exempt from seeking child support because of a fear of domestic violence.

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

See 12 above.

Debt

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

Debt is a negative contribution, however, this concept may not be readily recognised. The identification of common contribution factors such as debt will improve understanding of the legislation and could be expected to help people to more effectively engage in the property settlement process.

Boom/bust economies and related property cycles, particularly in some jurisdictions, are considered to relate to the increase some LACs are seeing in property matters which involve only debt and superannuation. Grants of Legal Aid are generally not available to assist and parties are usually given advice and discrete task assistance to the extent possible.

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

NLA is of the view that this is an aspect of the proposed reforms that could be the subject of the suggested roundtable consultation.

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

No.

Gifts/windfalls/inheritorances/dowry

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

NLA is of the view that this is an aspect of possible reforms that could be the subject of the suggested roundtable consultation. It could also be addressed as part of community legal education with relation to family law property law.

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

The Dowry Inquiry reflects that a range of payment practices may be considered dowry payments. If the payments constitute a contribution under s. 79(a) [or less likely s. 79(b)] then they will be caught by the FLA. NLA considers that discretion must be retained. It would appear that improved community understanding is required in relation to dowry as it is in relation to other family law property matters. Community legal education may need to be targeted to particular communities, including to take account of respective cultural practices where appropriate.

Family violence

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

Yes.

Issues associated with such an approach are:

- Where parties are not eligible for assistance from the Family Violence Cross-examination Scheme there are significant on-going concerns for some self-representing victims who may not be best able to advocate for themselves.
- Relaxing LAC means tests as recommended by the Australian Government Productivity Commission would enable LACs to assist more people so that appropriate outcomes are achieved.³

³ Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements*, 739.

- Reports may be more likely to be needed to establish the family violence will have an impact on future needs. There is a question of who will fund these reports. If the victim's future needs have been increased as a result of family violence, they are probably even less likely to be able to afford the cost of expert reports.
- If the court were to provide court funded reports, potential issues are resourcing and the time for preparation of a report. Similarly, the LACs would require increased resourcing if the LAC were to be required to fund the report wherever a party was in receipt of legal aid.
- It may generally make the resolution of family law property matters more involved and therefore expensive.

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

It is relevant to both. Please see the response to Question 20.

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

Please see the response to Questions 20 and 21.

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

Yes. Please see the response to Question 10.

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

NLA considers the above suggested approaches are appropriate.

Other

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

Legislation, supported by easily accessible explanations and examples and comprehensive community legal education, should assist.

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

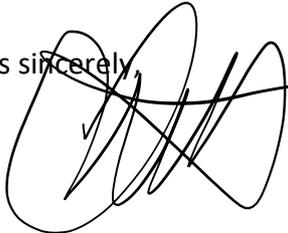
The suggested roundtable consultation may assist in identifying options (please see 1.2 above).

Conclusion

Thank you for the opportunity to provide a submission to this consultation.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or nla@legalaid.tas.gov.au

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line across the middle.

Vincenzo Caltabiano
Acting Chair