

DOMESTIC VIOLENCE, PROPERTY AND FAMILY LAW IN AUSTRALIA

by

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ABSTRACT

In Australia, domestic violence has increasingly been recognized as germane to ancillary proceedings, including parenting and property matters. However, the road to recognition of the relevance of violence has been slow and the search for appropriate responses challenging. Drawing upon an explicitly feminist perspective, this paper outlines the why and how of that relevance by looking at the ways in which family violence may intersect with family law property matters. We explain how a property settlement, both in process and outcome, may be either a manifestation of coercive control and/or affected by the legacy of coercive control. In terms of how this has been addressed to date, we chart the limited Australian responses and suggestions for reform, which have effectively left the judiciary to fashion a response with all the attendant difficulties of non-legislative reform. In conclusion, we maintain that the time is therefore ripe for a reconsideration of legislative – and other - responses to issues of family violence and property.

I. INTRODUCTION

In Australia, violence by a spouse, current or past, has not had any legal relevance to the other spouse's ability to obtain a divorce since the enactment in 1975 of the Family Law Act 1975 (Cth) (FLA).¹ This introduced (FLA, ss 48-49) a single, no-fault ground for divorce following 12 months separation. Making divorce easier was undoubtedly positive for family violence² victims. Nevertheless, past and/or current domestic violence has increasingly been recognized as germane to ancillary proceedings, including parenting and property matters. It is not difficult in 2017 to understand why that is so in the case of parenting proceedings; indeed, the prevalence of violence claims in parenting matters have led to it being described as 'core business' of the court (Brown et al., 1998). Since the 1990s the public,³ academic commentators, judicial officers, and research social scientists working in the field and legislators (Young et al., 2016: [31.]-[3.4]; [9.28]-[9.39]; [14.37]-[14.40]) have each played their part in advancing the discourse about, and responses to, the question of how best to protect and support victims of violence in parenting disputes, both as a matter of law and process.

However, the same cannot be said in respect of property proceedings, where the road to recognition of the relevance of violence has been slow and the search for appropriate responses challenging. In this article we start by outlining the why and how of that relevance by looking at the ways in which family violence may intersect with family law property matters. In considering why family violence should be considered in this context, we explain how a property settlement, both in process and outcome, may be either a manifestation of coercive control and/or affected by the legacy of coercive control. In terms of how this has been addressed to date, we chart the limited Australian responses and suggestions for reform, which have effectively left the judiciary to fashion a response with all the attendant difficulties of non-legislative reform. This brings our focus to how the Family Court in Australia has utilized the '*Kennon* principle' in property proceedings, where the Full Court has tied recognition of violence in a property award to the victim proving, on the balance of probabilities:

'... a *course of violent conduct* by one party towards the other during the marriage *which is demonstrated* to have had a *significant adverse impact* upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions *significantly more arduous* than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions...'.⁴

As part of this article, we have updated the research on *Kennon*, which is important given the small number of cases involved and because it can help to illuminate whether some of the concerns of the past that have been raised in prior research are being addressed. We conducted a search of all Australian family courts using the Australasian Legal Information Institute (AUSTLII) online database with the search terms 'domestic violence AND *Kennon*', and 'family violence AND *Kennon*'.

Nineteen judgments - eighteen first instance and one Full Court - were identified in which a *Kennon* claim was raised by one of the parties during the years 2015 and 2016. We recorded the name and sex of the judicial officer, the registry, outcome and the primary considerations that appeared to affect the decision. In addition, the decisions were read with a view to assessing the court's interpretation and application of the various elements of the test. We conclude that, as a response to the issues raised in property proceedings where domestic violence has been a feature of the relationship, *Kennon* is a poor fit, both in terms of process and law (though of course better than no response).

To date, there has been little governmental appetite for legislative reform in the family law property domain. The same cannot be said in regard to family violence more generally,⁵ which has been something of a hot topic in children's matters since the mid 1990s. However, the federal Attorney General has recently directed the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of family law, with one of the terms of reference being 'the underlying substantive rules and general legal principles in relation to parenting and property' and another being 'family violence and child abuse'.⁶ The time is therefore ripe for a reconsideration of legislative – and other - responses to issues of family violence and property. As this article will show, while the Australian response to date to this issue has its shortcomings, Australia is still at the forefront in family law in recognizing the relevance of family violence to property matters. The ALRC reference provides a unique opportunity for Australian legislators to build on this beginning.

It is important to say from the outset that our analysis is underpinned by a feminist appreciation that each of these intersections of violence, property and family law has to be understood within the broader societal context, which is marked by persistent gender inequality (Fineman, 2011: 1-17; McKinnon, 1989). Therefore, to describe fully and understand the possible relationships between coercive control and family property division processes and outcomes, it is necessary to look at the influence of gender, which we do next. Indeed, we argue these considerations are central to understanding the problems as they exist, and to fashioning any appropriate responses.

II. THE GENDERING OF PROPERTY SETTLEMENT

As Behrens notes:

'gender differences ...have profound implications for 'family law' decisions'. These include decisions about post-separation parenting and about property settlements and financial arrangements between [married/de facto] couples...' (2010: 192).

In this section, we explore two fundamental aspects of gender difference which impact upon financial settlements for women, and which tend to be intensified in cases involving family violence: economic inequality and gendered communication styles.

1. Economic inequity

Women (and, as we discuss below, particularly victims of violence) may succumb to pressure to settle family property disputes in part because of their financial circumstances. Horizontal⁷ and vertical work segregation with women in the lower paying occupations,⁸ plus a persistence in gendered division of labour in the private sphere,⁹ contribute to a gender pay gap and savings gap (not least in superannuation) (Easteal, 2010: 2). Accordingly, employment statistics show that women make up '71.6 per cent of all part-time employees, 36.7 per cent of all full-time employees, and 54.7 per cent of all casual employees' (ABS 2015). Further, the 2017 Australian gender pay gap of 23.1 per cent for full-time total remuneration (Workplace Gender Equality Agency, 2017: 15) reflects a figure that has been fairly constant over the previous three decades.

At the time of relationship dissolution and when family law ancillary matters need to be negotiated, this socioeconomic inequality is increased as a consequence of the feminization of post-separation poverty, which means that women are 'more likely to be financially disadvantaged than men' (Smyth and Weston, 2000:8). From recent data, researchers continue to find that '... in the short term following divorce, women experienced a substantial fall in equivalised household incomes compared to their pre-divorce incomes.' This financial negative effect was 'roughly halved six years after divorce compared to the effect in the year following divorce' (deVaus et al., 2015). However, it is in the first few years post-separation that most family law property divisions take place as married parties have one year after their divorce is finalized to bring an application for a property settlement; de facto partners must apply within two years of the relationship breakdown under the FLA, ss 44(3) and (5).

This very significant short-term drop in finances occurs at a problematic time for women and may mean that pursuing legal matters in the courts becomes more difficult given the costs of quality private representation (Braaf and Meyerling, 2011:20); the need to settle for whatever one can get will be a more common 'reality' for women.

2. Gender communication differences

The ability to effectively negotiate an equitable property settlement may also be compromised by the less powerful 'women-speak' or female genderlect – the latter is a term developed and described by Tannen (2010). Women generally communicate more collaboratively (Wardhaugh, 2010; Holmes, 2006: 9). For example, they are more apt to say 'we' and use conversational 'down-toners', like ending sentences with a question mark by intonation or with a 'tag' question such as, 'Do you think so?' (Eckert and S McConnell-Ginet, 2003:183-184). They tend to use 'hyper-polite circumlocutions' such as, 'It would be really nice if you could please leave me alone', and 'semantically ambiguous adjectives and intensifiers' such as 'I guess it was kind of OK' (White, 1991:406).

This contrasts with a masculine style of speech that tends to be direct and outcome-focused (Coates, 2016) with men more likely to interrupt, challenge, dispute,

ignore and try to control the topic of discussion (Mesthrie et al., 2009). Gender differences in response to verbal aggression have also been identified, with females frequently viewing it as personally directed and negative, and males seeing it as simply a way of organizing a conversation (Salzmann, 2004). There is a very real possibility that these gendered responses may contribute to women settling for less, as they are motivated by the desire for the process to be completed¹⁰ and/or because communication styles adversely affect their ability to negotiate effectively.

III. PROPERTY SETTLEMENT AS A TOOL OF FINANCIAL AND/OR EMOTIONAL ABUSE

A further important issue is the extent to which the property settlement process itself may be used as a form of abuse. Three factors in particular need to be highlighted: financial coercive control, pressure to settle and vexatious litigation.

1. Financial coercive control

Coercive control is defined by domination and intimidation (Kelly and Johnson, 2008), with a tendency for violence to escalate (Neilson, 2004). It manifests in a number of ways - one is economic. For instance, as described for some immigrant women by Eastaale (1996), the perpetrator may take absolute control of the finances and allocate little or no money to his partner:

‘I was never allowed a credit card or bank account. I wasn’t allowed friends or phone calls. I wasn’t allowed to go out. I was put down constantly. ... My problem was that I didn’t see it for what it was. And I was in an extremely violent situation before I realised it’ (Eastaale, 1996: 90).

Financial violence, as with physical, sexual and emotional manifestations of control, often continues and even escalates with separation (Altobelli, 2009: 194). Estrangement may provide the perpetrator with the opportunity to financially control their victim by exerting control in a private settlement between the couple with mediation, and/or by litigating excessively. We examine these further next.

2. Pressured to settle – unequal playing field

Much of family law is conducted ‘in the shadow’ of the law with most matters settling outside of the court. Only a minority of disputes culminate in a hearing,¹¹ and even then some parties may resolve matters with a consent order. However, agreement does not necessarily reflect satisfaction, let alone fairness, especially if either of the parties felt under pressure within the negotiation (Trinder and Kellett, 2007: 329). This may be particularly so in property cases where there are also children (Behrens, 2010: 212). A perceived need to settle quickly can of course apply more pressure where a woman is motivated by the imperative of securing safety for herself and her children.

As we have noted above, research confirms that women are the financial losers from separation; in terms of property division this is intensified in cases involving violence whether the outcome is the result of private ordering or a court determination (Sheehan and Hughes, 2001; Sheehan and Smyth, 2000; Fehlberg and Milward, 2014).

‘...there is no longer any doubt that women experience the heaviest financial losses in the divorce equation. Battered women suffer doubly from this inequity, because economic control is often a facet of the coercive relationship between them and their abusers’ (Lee, 2002: 275).

A woman’s perception of ‘equal’ influence in mediation (as found by Kelly and Johnson, 2008) may be questionable if there is a history of violence (Astor, 1992) given its effects which may include (but are not limited to): feelings of powerlessness, low self-esteem, anxiety, substance abuse, (Hegerty et al., 2013: 274) PTSD (Pico-Alfonso et al 2006: 608), depression (Campbell, 2002: 1333), fear of having any sort of contact with an abusive partner (Crawford et al., 2009: 78), and an impaired capacity for paid employment, which has arisen as a result of these mental and physical health issues (Braaf and Meyerling, 2011:20), or because victims are prevented from working whilst in the relationship and thus lack work experience (Braaf and Meyerling, 2011: 11).

These accompaniments and effects of coercive control contribute to inequality and an unequal ability to be heard. As such, a victim does not enter ‘alternative’ dispute resolution processes as an equal partner (Field, 2010: 29). Many report the negotiating process as distressing (Trinder and Kellett, 2007: 329). Moreover, conciliation is not successful at resolving ‘embedded conflict’ between the parents, such as anger, hurt and distrust, and thus parental conflict may remain (Trinder, 2008).

3. Vexatious litigation

Excessive litigation can facilitate and/or reflect post separation coercive control by abusive ex-partners (Coy et al., 2012; Rendell et al., 2000) with multiple applications made to courts on trivial matters (Paxton, 2003). Indeed, family law litigation has the highest rate of vexatious litigants of any jurisdiction in Australia (Lester and Smith, 2006), with three times as many vexatious litigants as any other superior court combined (Hosiosky, 2014).

It has been asserted that ‘the idea that the litigation system corrects power imbalances is...farcical – if anything it exacerbates it... victims of violence...may be re-victimised in that process’ (Easteal et al., 2015: 22). The adversarial nature of litigation, for example, may serve as a catalyst for further violent behaviour by an abusive ex-partner through (an increased number of) (Robertson and Giddings, 2001) self-represented litigants cross-examining their victim (Laing, 2010: 47).

‘He asked questions I was forced to answer... Having your rapist stand only meters from you asking intimate

and personal questions about your relationships, parenting, social media accounts, every aspect of your personal life - is invasive, disempowering and cruel' (Lynch et al., 2017: 153).

Fitch and Easteal (2017) recently examined the multitude of linkages between coercive control and vexatious litigation, concluding that both the current legislative response and existing family law practitioners' tools and methods to manage and/or prevent vexatious litigation are inadequate. Fortunately, even more recently, the Federal government has recognized the need for better protection of victim witnesses from direct cross-examination where there are allegations of family violence: see the Exposure Draft for the Family Law Amendment (*Family Violence and Cross-examination of Parties*) Bill 2017.¹²

IV. ISSUES CONCERNING THE FAMILY COURTS' RECOGNITION OF DOMESTIC VIOLENCE

The challenges in obtaining appropriate financial relief are further exacerbated by the difficulty of proving family violence in court proceedings. Ubiquitous legal concepts and phrases, such as "reasonable", "just", "necessary" [and] "fair" (Carline and Easteal, 2014: 50) that appear in these contexts and which may seem neutral are in fact embedded in layers of male-dominated stratigraphy. Where such concepts/phrases are applied in the exercise of discretion, the potential for bias to be masked increases. Therefore, it is not difficult to identify ways in which legal gatekeepers' (unconscious and hence invisible) values and beliefs have improperly affected how family violence is treated in family law processes.

A good example is the application of the standard of proof for findings of violence. The evidentiary standard in family law matters is the civil standard of the balance of probabilities, not the criminal standard of beyond reasonable doubt. That is, 'when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found'.² The Family Court has held that when deciding a parenting dispute and whether contact should occur with an alleged perpetrator of violence, the factors that must be considered when making a finding about family violence include the 'seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding'.¹³ A clear example of the way male-centric covert biases operate in the application of this standard is that the questions of 'seriousness' and 'gravity of consequences' are viewed entirely from the alleged perpetrator's perspective. Put simply, the gravity of the consequences of a finding of no sexual abuse, where sexual abuse has occurred, are arguably no less grave (indeed they are arguably far more grave) than a finding of abuse where no abuse has occurred – particularly where proceedings are not criminal but rather about contact (Young et al 2014). Moreover, the terms 'seriousness,' 'inherent unlikelihood,' and 'gravity' are vague, open to interpretation and likely to be affected by the judicial officer's understanding (or not) of things such as the ways that coercive control can be exerted and the frequency of sexual abuse and its consequences.

There is compelling evidence that mistaken beliefs about family violence, entrenched views on gender roles and personal prejudices have, and continue to, impact on judicial reasoning and weighting¹⁴ with decision-making affected by beliefs about what behaviours constitute domestic violence and the dynamics and causes of such violence. Take for example the finding of one judicial officer (pre-dating our sample) who described the family violence as ‘situation specific. That is, it was related to the relationship between the husband and the wife...’.³ This ‘finding’ was made in the absence of any expert evidence, and without any detailed discussion of family violence either generally or in this case. The judicial officer further explained why, in a previous decision, he had declined to extend the *Kennon* principle (even if it was good law, which he doubted) ‘to *only* verbal violence’, a position clearly contrary to the law.⁴

Similarly, in a 2012 case, *Hashim v Hashim*, despite the father behaving in a physically and verbally violent and frightening way when removing a child from a classroom and then lying about the incident (as well as allegedly threatening the teacher’s family that it would not be good for her to give evidence),¹⁵ Justice Judith Ryan concluded this was not the father’s ‘usual’ behaviour and appeared to discount its significance as it was only proof of violence occurring during the separation process.¹⁶

Not only might violent men be characterized as having a moment of inappropriate behaviour, we are well used to the notion too that histrionic women may exaggerate.¹⁷ Judicial officers may also minimize the harm a woman suffers. Justice Eric Baker considered that pushing/hitting with an open hand which sometimes resulted in bruising to the victim’s face and body was ‘of a relatively minor nature’ and not *appearing* ‘to be part of any long term strategy on the part of the husband to cause harm to the wife or to the children ...’.¹⁸ Even if in more recent times a judicial officer may not trivialize physical violence so easily, such statements are indicative of the way in which decision makers are so easily able to be influenced by their own particular views on violence. In the absence of evidence and absence of a good appreciation by judicial officers of the nature, extent and consequences of family violence, personal prejudice or simple misunderstanding is very likely to hold sway.

Having said this, as we show below, in considering family violence in *Kennon* adjustment decision-making, some members of the judiciary are increasingly showing an appreciation of the complex dynamic and effects of family violence. As Justice Sharon Johns notes in *Pilch & Pilch*:

‘Society and the law have changed in the 19 years since *Kennon*’s case was decided. Now more than ever, there is a greater understanding within the community as to the damaging impact of controlling behaviour, verbal and physical abuse within relationships’.¹⁹

Further, the recognition by Judge Heather Riley in *Charlton & Charlton* that the husband’s emotional abuse (by criticizing the wife’s intellectual ability) could

adversely impact upon the wife's contribution by undermining her confidence in the work sphere is a case in point.²⁰

1. How victims' speaking out in the family court can be problematic

To state what may seem obvious, evidence of violence can only be considered if it has been given. It is well understood that victim witnesses may not disclose either in Court or to their legal representative. Feelings of intimidation (Victoria Law Reform Commission, 2006: [11.1]), shame (Field, 2010: 199) and victims regarding themselves as lacking credibility (Australian Law Reform Commission, 2010: 18) may all contribute to non-disclosure together with feeling unsafe talking about the abuse in public (as in court) and in the presence of their ex-partner (Laing, 2010: 61).

Hunter (2008: 186-187) reported a family court victim respondent describing how 'she was never allowed to speak about the violence she had experienced, and never felt heard'. Other research has found the same perception by victims of being silenced: '[women] felt that their experiences of family violence had been ignored, minimized or suppressed by lawyers and judges within the legal system' (Bagshaw and Brown, 2010: 135). A further problematic factor for women in family, criminal and other legal processes is that, even if they do disclose and testify about abuse, gender differences in communication discussed above are likely exacerbated when there has been violence (Field, 1998: 276) Victims of violence tend to speak in hesitant, indirect and self-effacing language (Easteal, 2010: 11). They may hedge what they say: 'Well, um. Looks as if probably' (Holmes, 2006: 9). Going a step further, women may even ascribe self-blame as was starkly illustrated by Robin Kina. Arrested for killing her partner, she answered questions concerning her violent partner's assaults, by tagging her responses with statements such as: 'But I probably deserved that'; or, 'I probably caused him to do that by my behaviour' (Easteal and Hopkins, 2010: 112).

V. RECOGNITION OF VIOLENCE IN FAMILY LAW AND PROPERTY DISPUTES IN PARTICULAR

Against this backdrop, we turn now to consider how family violence is addressed in Australian family law property disputes.

The introduction of no-fault divorce in Australia did little to assist with societal and judicial recognition of, and responses to, family violence. As has been well documented (Young et al., 2016: [14.37]), concern about reverting to notions of fault encouraged judicial officers (who might at that time in any event have been less than sensitive to issues of violence) to reject as relevant claims of family violence. An obvious example was the position taken in parenting disputes that violence not directly witnessed by a child was not relevant to a parenting dispute (Young et al., 2016: [9.29]).

Since those early days, the court – and now the legislature – has come a long way in attempting to ensure that both the law and process of parenting disputes better identify, and respond to, family violence.²¹ However, the case for factoring violence

into property settlements has been much harder to make and there remains disagreement about the best way forward. We have identified briefly above ways in which issues of family violence can intersect with family law property matters and factors that inhibit family violence being appropriately addressed.

We would suggest there has been a further, and significant factor, which has made addressing issues of family violence in property disputes problematic. Behrens (2010: 211) has argued that the traditional reluctance of family courts to take violence into consideration in property disputes ‘points to an under-valuing of women’s work.’ Echoing this concern in a more general sense, Young (1997: 268) has argued that the historical failure of judges to value appropriately the contributions of women in ‘big money’ cases exposes an implicit judicial bias that undervalues domestic and caregiving labour in favour of traditional ‘breadwinner’ financial contributions. Where women’s contributions to a marriage are not seen to be directly financial, and not believed to be as valuable as earning money, then it is little wonder that even proven serious violence would not loom large in a judge’s assessment of the parties’ respective contributions in so far as they are relevant to the division of assets.

The introduction of the *Kennon* principle was, therefore, a very significant step in the right direction by trying to formulate a test for the consideration of violence in property settlements. *Kennon* was decided in 1997, shortly following parenting case law that gave much greater recognition to family violence (Young et al 2016: 9.34). In addition, very recently²² the Full Court has reconsidered its treatment of ‘big money’ cases,²³ paving the way for improved judicial appreciation of the value of caregiving and homemaking. The question remains, however, whether these advances will in fact ameliorate the various barriers we have discussed and provide an appropriate response for victims of violence.

Unlike many jurisdictions such as Scotland, many European and US states, which have opted for more ‘rules’, Australia’s family property laws are more akin to the broad discretionary system in England and Wales. The FLA provisions on property settlement require decision makers to take account, broadly, of two constellations of factors, when deciding what property orders it considers ‘appropriate’ and ‘just and equitable’: s 79. The first constellation²⁴ all relate to past contributions, including to the welfare of the family; the second²⁵ relate to future factors that go to the parties’ ability to support themselves. Family violence is not mentioned anywhere, though s 75(2)(o) permits the court to take into account ‘any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account’.

Redistribution of assets upon divorce is one means by which the law could be seen to compensate for the effects family violence can have upon the economic lives of its victims - effects that ‘make a victim’s role, whether as child carer, homemaker or in maintaining a position in the paid workplace, more onerous’ (New South Wales Law Reform Commission, 2006: 221). It could also be argued that financial redistribution of assets may be a ‘socially acceptable’ means by which to hold ‘parties responsible for their culpable behaviour’ (Lee, 2002: 279-280). This may consequently operate as a deterrent as well as ensuring that a victim has the financial means to escape the abuse (Lee, 2002: 295). However, the terms of the relevant FLA sections, and their

interpretation to date, do not permit judicial officers to ‘compensate’ victims,²⁶ or ‘punish’ offenders for their behaviour, whether that behaviour has a financial consequence or not. As Judge Heather Riley recently pointed out:

‘It may be that the laudable concept of no-fault divorce has been inadvertently expanded to create a concept of no-fault property settlement when the preferable course might be to use property settlements as a mechanism to punish, and thus deter, perpetrators of domestic violence. However, that is a matter for others’.²⁷

Notwithstanding *Kennon*, as discussed below, various proposals have been raised over the years as to how the FLA might be amended to incorporate consideration of family violence in property disputes. However, despite this, and despite the current focus on family violence in parenting matters, there has not, as yet, been any legislative reform in this area. The matter has been left to judicial activism and so we have seen the Family Court develop its own principle permitting a history of family violence to be argued as relevant to a property settlement outcome.²⁸ Referred to as the *Kennon* ‘principle’, ‘adjustment’ or ‘factor’, it is felt by many (including notably some judges) to be the epitome of indeterminacy. As we noted at the outset, vague and highly discretionary legal tests, even when developed with the best of intentions, can be the victim of conscious or unconscious judicial bias that perpetuate women’s disadvantage. Not only is the *Kennon* test awash with vague phrases, it also has the unfortunate effect of operating to exclude the consideration of violence in a great many cases. If the circumstances of the violence do not fall within the *Kennon* formulation, then the court is effectively excluded from considering the violence, except to the indirect extent that a victim’s injuries are such that her future self-support needs are increased. Thus, *Kennon* provides a narrow, and vague, window within which violence can be considered.

How then have the terms of operation, and the vagueness, of the *Kennon* ‘principle’ impacted on its effectiveness in recognizing abuse histories in family law property awards? To recap, *Kennon* requires the victim to prove, on the balance of probabilities, that:

- They were the victim of a ‘course of violent conduct’
- During the marriage
- Which can be demonstrated to have had a significant adverse impact on their contributions to the marriage, which means that their contributions were made significantly more arduous than they ought to have been

Then, the judge *may* take this into account in assessing the parties’ respective contributions.²⁹ In addition, however, it was said this principle should only apply to ‘exceptional’ cases and we turn to consider that first.

1. Opening ‘the Floodgates’?

The majority in *Kennon* appeared concerned to limit its application to a ‘narrow band of cases’.³⁰

‘...it is important to consider the “floodgates” argument. That is, these principles, which should only apply to *exceptional* cases, may become common coinage in property cases and *be used inappropriately as tactical weapons* or for personal attacks and so return this court to fault and misconduct in property matters ...’ (emphasis added).³¹

We suggest there are two elements underlying this comment. First, it fits with an historical ‘backlash’ (Faludi, 1991) approach of branding women as inveterate, strategic liars when it comes to violence and family law. This is seen, for example, in family court cases where child sexual abuse is alleged (Young, 1998; Young et al., 2014), and has the convenient result of shifting the gaze away from the most significant and substantiated problem - violence in families - and focusing attention on the much less well substantiated ‘problem’ of false allegations. Second, their Honours wanted to ensure that the principle’s application was connected to the question at hand - contributions. *Kennon* was decided in 1997 – *at this time* the Full Court was clearly of the view that it would be rare for a case of family violence to actually fit the criteria they had established:

‘[i]t is essential to bear in mind the relatively narrow band of cases to which these considerations apply...³²...[I]n our view, s 79 should encompass the exceptional cases which we described...’.³³

It is open to question how ‘exceptional’ such cases were or are; but the test permits *every* case that falls within its terms to benefit from its application. Thus, it is not that the case *itself* must be exceptional, but rather that their Honours were being clear that, in their view, such cases *were*, by their nature, exceptional. In this regard, and contrary to the approach of some judicial officers,³⁴ we would argue the test does not require independent consideration of exceptionality.

As to whether *Kennon* ‘opened the floodgates’ (whether by ‘lying women’ or otherwise) the answer is a resounding ‘No.’ In fact, as we see next, a drought is a more apt metaphor. The possible reasons for this are many including judicial uncertainty about its application in part because of its perceived vagueness, high rates of self-representation and the failure of lawyers to present a *Kennon* argument.³⁵ Indeed, the perceived difficulties of the test led one judicial officer, as mentioned earlier, to refuse even to apply the *Kennon* principle:³⁶

‘I am not bound by the dicta of the Court in *Kennon* and ... I decline to follow it...contributions are to be measured in absolute terms and not weighted by considerations of arduousness, whether caused by domestic violence or otherwise’.³⁷

Further, in Eastal et al (2014: 9) it was found there were multiple cases where judges noted with apparent surprise the failure to raise *Kennon*.

Some judges may also see *Kennon* as a way of inappropriately applying a fault based standard in a no fault regime. In *Maine & Maine*, the Full Court was critical of a trial judge's lack of differentiation between 'fault' and *Kennon*.³⁸ Despite uncontroverted evidence of long-term violence, which the Full Court accepted would have made the wife's contributions more onerous, the trial Judge seemed more preoccupied with not letting fault in by the back door.

2. The Drought - how often and how much?

An analysis of cases in the years immediately following *Kennon* (1997-2001) found 27 first instance matters in which the wife argued for an increased contribution because of violence; *Kennon* adjustments were made in 63 per cent of those cases (Middleton 2001:230). A 2014 study of *Kennon* applications between 2006 and 2012 provided further evidence there are limited claims per year in matters reaching trial (57 cases sought *Kennon* adjustments over seven years); only 42 per cent were successful in this period (Easteal et al., 2014:13). The 'success' rate in our most recent sample of 18 first instance matters decided in 2015 and 2016 is consistent with the 2014 outcomes, as is the frequency of such applications; a *Kennon* adjustment was made in seven cases (39 per cent).

Notably, of these 18 decisions, 11 were heard in the Melbourne or Dandenong registries. This could reflect a number of factors however. We would suggest this is most likely due to the influence of lawyers in those jurisdictions. It would seem unlikely there would be a significant discrepancy in rates of violence, or the nature of violence; it is far more likely lawyers in those areas are more attuned to raising the argument.

The passage in *Kennon* does not contain any words concerning the amount of adjustment to be made or how the judicial officer should approach weighting the adjustment; however, that is typical in family property law and appropriate given the discretionary wording of the legislation. Case law such as *Kennon* does not determine outcomes, rather it indicates what the words of the statute can incorporate in terms of legitimate considerations. In the 2014 sample the mean adjustment was 7.3% (Easteal et al 2014: 12); in the 2001 study, it was 5% (Middleton 2001:231). Note though that in most cases,³⁹ including our sample, the increased percentage attributed to the *Kennon* claim was not specifically articulated. In *Charlton* for example, Judge Heather Riley lists 'the wife's contributions during the relationship being made more arduous by the husband's abusive, controlling and oppressive behaviour' as the last of seven factors leading to her overall equal split of assets.⁴⁰

3. Course of Conduct

The *Kennon* principle does not apply to isolated incidents of violence; there must have been a 'course of conduct'. As the Full Court has said, the conduct:

'...need not be frequent to constitute a course of conduct, although a degree of repetition is required. The wife's evidence does establish periodic behaviour and

its consequences throughout the period of cohabitation'.⁴¹

Proving a 'course' of 'conduct' thus depends on establishing both the nature and frequency of the violence. Even at the lower civil standard of proof, it is hardly surprising this can prove difficult. In *Hunter & Hunter* the wife alleged (supported by some corroborative evidence from her mother and two daughters, aged 27 and 29) that she was isolated, threatened verbally, abused emotionally, sexually and physically.⁴² The wife put this in the context of a description of the husband as violent towards animals. Justice Jenny Hogan found the husband acted cruelly in dragging a tethered cow behind his car,⁴³ but generally accepted the husband's version of events in relation to the various claims made by the mother, including that putting a tea towel around the wife's neck and pinning her to the ground so she could not get up, was done in jest. For various reasons little weight was attached to the wife's corroborative evidence. Clearly one of the parents was not telling the truth,⁴⁴ and in this case the judge found that, in relation to the financial matters, each of the parents was prepared to tailor their evidence to suit their case.⁴⁵ The judge thus concluded the wife had not established this element: while it is unclear whether there was no behaviour of concern or some behaviour of concern to the judge, she was not satisfied there was a 'course' of relevant conduct.

In *Tumlin & Tumlin* Justice Garry Watts equated a 'course of conduct' with 'systemic family violence':

'In relation to the allegations that are earlier set out I concluded that there were incidents of family violence during the marriage. *That history however was not one of systemic family violence*'.⁴⁶

It is not at all clear what this means, given that 'systemic' means in essence something that affects the whole 'system' – in this case the parties' relationship. Yet, the judicial officer found the husband had perpetrated a number of violent incidents and there was evidence the wife had presented to a doctor with bruises consistent with her claims of one incident. The question in this case was evidentiary - most things were not tested (and of course, as is typical, many could not be). While it may have been open to the judicial officer to find a course of violent conduct was not established on the evidence, it is hard to see how his Honour positively concluded there was no such course of conduct (which is presumably what his Honour meant). Moreover, there is no consideration of what the word 'systemic' means generally, or in the context of this relationship, particularly in light of his Honour's finding that the wife was genuinely frightened of the husband.

4. During the Marriage

The meaning of 'during the marriage' was considered by the Full Court in *Baranski & Baranski*.⁴⁷ The Court strongly rejected the argument that post-separation violence could not be a relevant consideration in the assessment of contributions under s 79:

‘Quite apart from the absence of any statutory prohibition upon so doing, it would be illogical and unjust, to find a party’s contributions to have been rendered more arduous by virtue of the violent conduct of the other party to a marriage to the time of separation, but not thereafter, in circumstances where making those contributions continued to be arduous notwithstanding that the violent conduct may have ceased. In this case, the husband committed a serious assault upon the wife almost a year after separation’.⁴⁸

This judgment makes clear that post-separation (and logically, we would suggest, also pre-marriage) violence might be considered in determining whether a *Kennon* adjustment should be made. This fits with the fact that post-separation (pre-trial) contributions are relevant to an Australian property claim (and that violence commencing pre-cohabitation may impact on contributions after cohabitation commences). And yet, in *Owen & Owen*, Judge Heather Riley found ‘the alleged assault was after separation. As such, on the authority of *Kennon & Kennon*, it cannot be taken into account...’.⁴⁹

5. Demonstrating the impact of the violence on contributions

For *Kennon* to apply, the course of violent conduct must be ‘demonstrated’ to have had an adverse impact on contributions of the victim. However, there has been confusion as to whether this impact can be inferred or whether direct evidence and corroboration are required. The question of an inference as to impact being drawn from an established course of violent conduct was considered by the Full Court in *Spagnardi v Spagnardi*. The Full court approved the following statement by the trial Judge in the matter under appeal to the effect that there would be some cases where the proved facts *would* allow an inference of impact to be drawn:

‘...there must be cases where it is obvious or a very likely inference from the facts, that certain kinds of violence must have adversely affected a person’s contributions’.⁵⁰

However, the Full Court confused the matter, by later saying that, following *Kennon*, the victim *must* lead evidence to establish the effect of the violence on her contributions.⁵¹

Consistent with the finding in Easteal et al. (2014: 22ff), some – but not all – judicial officers in our sample accepted it is open to them to draw this inference, even when the victim does not expressly state the same in her evidence, and including in relation to verbal violence. Accordingly, in *Charlton* Riley J, after finding the husband to be ‘controlling, abusive and oppressive’, said simply:

‘I infer that the husband’s behaviour made the wife’s contributions as a homemaker and parent significantly

more arduous than they ought to have been. I also infer that the husband's criticisms of the wife's intellectual ability, by undermining her confidence in the work sphere, made her financial contributions more arduous than they ought to have been'.⁵²

Likewise, Justice Gary Watts readily drew an inference of impact in *Gillard & Gillard and Anor*:

'The husband correctly submits that the wife in her evidence does not directly state that her contributions were made significantly more arduous by the conduct of the husband although the wife does say that she "was unable to function as a normal person"...I am prepared in the context of this case to infer that the proven history of the husband's violence in fact, meant that the unquestionable contributions the wife made in the role of homemaker and parent, were made in circumstances where they were significantly more arduous as a result of the husband's conduct than they would have otherwise been if he'd not behaved in the way that he did'.⁵³

However, Judge Tom Altobelli opined that the *Kennon* decision '... leaves little or no room for inference. The claim can only be established by probative evidence that satisfies the Court on the balance of probabilities.'⁵⁴ In *Scott*, despite Judge Alexandra Harland being satisfied the husband was violent towards the wife throughout the marriage, and finding the wife credible in her portrayal of serious ongoing abuse, she noted the wife had not led any evidence as to the effect of this on her contributions, and she was not entitled to 'assume' the husband's actions made the wife's contribution more arduous.⁵⁵ Her Honour relied on the later passages from *Spagnardi* (see above) in support.⁵⁶ Justice Gary Watts took the same approach in *Tumlin & Tumlin*.⁵⁷

*Maine & Maine*⁵⁸ was the only Full Court matter in our sample and is the lone Full Court decision to consider *Kennon* since the 2014 Eastaest study. The Court allowed an appeal challenging the rejection of a *Kennon* claim. Having found the husband had perpetrated family violence on occasions, and made his daughters fearful, and when intoxicated would both physically and verbally abuse the wife, the trial judge said there was no evidence of how the husband's actions (which were described as 'unfortunate character traits'⁵⁹) had made the wife's contribution more arduous. The Full Court disagreed, saying this finding:

'... ignores...direct evidence given by the wife in her affidavit not challenged substantively in cross-examination and not the subject of any adverse finding by his Honour. The wife gave direct evidence that family violence had made the household tasks and care

of the children “more difficult.” In addition, given the wife’s detailed evidence of the history of the husband’s drunken violence and abuse over a period of about 20 years; the fact that no finding contrary to that evidence was made; and his Honour’s findings...above *we are...unable to understand how it was not, in any event, an inescapable inference that the wife’s contributions – in particular her s 79(4)(c) contributions at the very least – were made “more onerous” ...*.⁶⁰

Maine was decided in late December 2016; until that point it was clear some first instance judges believed an inference is permissible depending on the evidence of violence, while others believed it impermissible in all situations with direct causal proof being required. *Maine* will hopefully settle the point, reinforcing the statement in *Spagniard* about the ability to draw an inference in this regard.

This statement by the Full Court in *Maine* also suggests that the nature of the violence, and the victim’s uncorroborated claim that the violence made their contributions more arduous, can suffice. In the 2014 study it was found that an important variable correlating with a *Kennon* adjustment being made was corroboration of the victim’s claims about the impact of the violence (Easteal et al., 2014: 19). Unsurprisingly, corroboration on this point was a feature of several of the seven successful 2015-2016 matters. For instance, Judge Joe Harman in *Proctor* accepted the wife’s argument that her contributions were, as a consequence of Mr Proctor’s behaviour towards her, ‘*more onerous... as Ms Proctor has, at times, been significantly disadvantaged in her enjoyment of life and her capacity to engage in employment or operate within the home. Ms Proctor’s medical records lend some support to this.*’⁶¹

In *Sharp & Moon*, Judge Maurice Phipps had evidence of police arrest, a hospital visit and an intervention order and it was accepted the husband’s ‘serious and persistent’ violence, including rape, ‘had a significant effect on the wife in her contribution as homemaker’ which role she maintained despite the violence.⁶² The wife in *Gillard & Gillard and Anor* also had extensive evidence of destructive and controlling alcohol-fuelled behaviour. Justice Gary Watts determined that contributions could be made more arduous by a husband/father’s violent behaviour to his children:

‘The wife’s claim that contributions were made significantly more arduous by the husband’s systemic conduct include contributions that she made in the role of parent. Dr EF’s evidence would indicate that the children were all affected by the husband’s conduct that was directed at each of them. I am prepared to infer that the effect of the husband’s conduct on the children made the wife’s contributions as the primary carer of those children significantly more arduous’.⁶³

Notably, Watts J did not accept that the following actions by the wife indicated she was *not* suffering from the effects of victimisation: her on-going employment, her assistance in his work, her being primary carer of the children, moving with the husband overseas and being involved in the husband's business dealings.⁶⁴

In a more obvious example, Judge Maurice Phipps awarded the de facto wife⁶⁵ in *Bamford & Bank* a *Kennon* adjustment finding the husband's behaviour over many years had contributed to the wife's state of ill-health and significantly affected her ability to work, as well as making her homemaker contributions more onerous.⁶⁶ However, most of the *Kennon* claims that succeeded in our sample did not require judicial inference. In five of the seven in the current sample with a *Kennon* adjustment, an inference was not made. For example, in *Holder and Little* Judge Judith Small determined that the husband 'was for the most part responsible...for the toxic atmosphere of conflict which existed in the marriage and the home' and balanced his more substantial financial contribution with, inter alia, 'the wife's greater homemaker and parent contributions, [and]...the impact of family violence upon her over many years'.⁶⁷

Of course, an inference will not be drawn where the judicial officer considers the evidence tends against that conclusion, as in *Pilch & Pilch*:

'I am satisfied that the husband has acted in a controlling and coercive manner during the marriage; that at times he has demeaned the wife by his words and actions. Further I am satisfied that the wife was physically assaulted by the husband on one occasion. However, there is no established evidentiary link between that conduct and the assertion that the wife's contributions were made more difficult as a result; indeed when pressed, the wife readily conceded that she performed her roles within the marriage freely and without inhibition'.⁶⁸

Because the recognition of violence in property disputes via *Kennon* is tied to assessing a victim's contributions, it may have the somewhat ironic outcome as in *Pilch*, that those best able to bear the violence and 'function normally' are unlikely to be recognised for their efforts. It might be argued these women deserve greater recognition for their efforts in the circumstances.

VI. A BETTER WAY OF ADDRESSING VIOLENCE AND PROPERTY – THE NEED FOR SOCIAL AND LEGAL REFORM

The evidence is clear that family violence intersects with family property settlements and there is a degree of both judicial and academic support for the proposition that this should be reflected in the way courts decide property matters. There has been little legislative appetite for significant family property law reform in recent decades and so the judiciary have stepped in to fill the vacuum with *Kennon*. However, we have seen

overt judicial discomfort, and confusion, with the way *Kennon* addresses violence. Easteal et al's (2014) analysis concluded that the *Kennon* principle:

- Is ill-defined
- Has thus been the subject of conflicting interpretations, and
- Is rarely raised and often not raised even when the facts might suggest it should be, suggesting lawyers are either not familiar with it, or not comfortable raising it

Our analysis of the relevant 2015-2016 case law reinforces these concerns.

While it is not beyond the judiciary to develop sophisticated legal tests, such decision-making does not take place in a vacuum; it certainly does not take place in a space of gender equality. The gender inequalities we have identified as operating when property intersects with violence in the family law system are a reflection of the same societal imbalances between men and women seen more broadly in society. As long as such imbalances exist in society, they will inevitably be mirrored in the legal system (Tolmie et al., 2010: 302).

The reality then is that men and women are on unequal ground by the time they enter the family law system as exemplified by women's relative impoverishment following a relationship breakup. For that reason and numerous others already discussed, many women are keen to settle family law disputes, which makes the ground even less level yet. Settlement may be further skewed by women's problematic negotiation of a male dominated legal system.

When family violence victimization is added to the equation, these inequities are magnified and likely worsened at key points in the family law processes (Daw, 1995). As it is axiomatic that male dominated legal processes and substantive law favour those with resources and those who can best play its 'games,' women, particularly victims of violence, are less able to either harness or 'work' the legal system. This was illustrated above as we have shown how women's (relative) inability to afford legal representation coupled with vexatious litigation may affect how they fare in hearings. And we have also seen how the relationship between gender, communication, violence and power contribute to an uneven playing field in alternative forms of dispute resolution.

So, and perhaps not surprisingly, we would argue the system must be re-designed, legislation reformed and the people involved in the practice of family law educated in such a way as to counter the imbalances described and the likelihood of any adverse or unjust outcomes. It is important that anachronistic norms are replaced with new information and approaches, and legal professionals are educated as to the realities of domestic violence, and the needs of victims.

In relation to legislative reform, since ambiguity in substantive laws produces 'a sieve through which the dominants' values penetrate' (Easteal, 2001: 233), any legal provisions will need to be carefully drafted. The experience with drafting problems of the 2006 shared parenting reforms (O'Brien, 2010) suggests great attention needs to

be paid to the precise wording used. However, it is key that – as with those parenting reforms – a comprehensive approach, that also addresses process, is adopted rather than just amending the key substantive provisions. For example:

- The Family Law Rules 2004 (Cth) regarding property could provide the same notifiers of violence that exist in relation to parenting matters. Currently, in parenting matters the Rules require the filing of a specified notice under Rule 2.04 where a parent alleges there has been, or there is a risk of, family violence, by one of the parties.
- Rule 10.15A, which requires lawyers to ensure that consent orders address how any concerns of violence are addressed by the orders sought, could be extended so that where, during a hearing, a property order is sought by consent, and there have been allegations of violence, there is an obligation on the alleged victim's lawyer to address the court as to the impact on their client's consent, if any, of the alleged violence.
- Changes in case management processes could be adopted which ensure property cases with alleged violence are identifiable so that pre-trial processes minimize unwanted contact.
- The operation of the Family Violence Best Practice Principles – which presently only apply to parenting matters⁶⁹ – could be adapted to cover financial disputes.
- The family violence 'benchbook'⁷⁰ could have its modest section on family violence and property expanded to deal in more depth with the particular issues relevant to property.
- The role of mediation (currently 'family dispute resolution' in Australia) could be reconsidered as there is evidence that appropriately structured mediation can provide benefits where family violence is an issue (Kaspiew et al., 2012).

As we indicated at the outset, the time is ripe for the ALRC to consider this issue. If minded to reform property law, the ALRC may recommend wholesale reform or simply consider amendments to the existing framework. In either case, as far as the treatment of family violence goes, it is questionable whether there is much to be gained from looking to other jurisdictions. Like Australia, England and Wales has a highly discretionary model. The key criteria are set down in Matrimonial Causes Act 1973 s25, which includes eight non-hierarchical factors a court is to take into account, one being 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'.⁷¹ To some extent this factor reflects the residual influence of fault in that jurisdiction, but in addition to other matters it does allow violence to be considered. The question then becomes whether the violence was 'inequitable to disregard'; case law indicates that only exceptionally severe forms of domestic abuse will qualify—for example, attempted murder, wounding and attempted rape.⁷² Disconcertingly, 'lesser' forms of violence will be disregarded. Hence, in *S v S (Non-Matrimonial Property: Conduct)*,⁷³ despite convictions for assault occasioning actual bodily harm, the conduct was not construed as being sufficiently grave to be inequitable to disregard. Thus, 'it is only in the gravest of cases - generally those in which the life of one party has been placed in jeopardy - that the courts have accepted that such conduct should influence the outcome of an application' (Inglis, 2003: 185). This problematically limits the application of the 'conduct' factor

and in doing so the courts ‘have failed to reflect society’s increasing condemnation of such behaviour’ (Inglis, 2003: 185). Indeed, arguably it normalizes a certain amount of violence in a relationship. It is unlikely the Australian legislature would want to walk down that road.

In Scotland, where there is more direction on how property matters should be decided, the sole opening for consideration of violence is s11(7) of the Family Law (Scotland) Act 1985. This only permits conduct to be considered if it has ‘adversely affected the financial resources which are relevant to the decision’ or ‘it would be manifestly inequitable to leave the conduct out of account’. The first of those provisions would have limited applicability given its direct tie to the value of the assets and the second is akin to the UK fault provision. Fault is also the only basis for considering violence in property matters in the US⁷⁴ and civil law jurisdictions rely on tort law and do not see family violence as a property issue, though violence might be relevant to some of the ancillary remedies. Similarly, in Canada, it is only the consequences of violence that can be factored in, through recognition of the impact of violence on a spouse’s future employability (Kelly, 2009).

Thus, if the ALRC recommends legislative reform directly addressing violence and family property, whether in the context of wholesale, or more modest property reforms, it will be in new territory. We suggest this requires novel ways of thinking about these intertwined issues. If the current framework remains, there is no reason a provision requiring the court to take violence into account cannot specify a range of relevant considerations. Existing considerations such as future needs impacts and impact on contributions could be included. But a specific provision could also identify family violence as a ‘negative’ contribution,⁷⁵ in the context of contributions to both family wealth and the welfare of the family. While the Australian Full Court has been wary about accepting compensation as a general goal of property proceedings,⁷⁶ this does not mean a principle of compensation cannot be explicitly imported in respect of violence. At one level this could be to recognize an assault to save separate expensive civil proceedings, but that would not need to be the limit of recognition of compensation.

If the ALRC recommends more fundamental reform of property, then this provides an opportunity to reconsider, and make explicit, the principles underpinning family property law, in the same way that Part VII dealing with parenting disputes does. While the FLA does not specifically state that its ‘future needs’ component of a property settlement has the purpose of compensating relationship generated economic disadvantage, this is precisely what it does, and what it is intended to do.⁷⁷ One option might be an underlying principle of compensating relationship generated disadvantage (not solely economic, as for example in Scotland⁷⁸), which could inform any specific provision on family violence (as well as provisions dealing with more directly financial matters) allowing for a broader consideration of the harms victims of violence suffer. Of course, this would not have to be in place of any direct provisions allowing for victims of violence to claim some compensatory payment as part of a property settlement. As noted above, there could be a variety of ways family violence is considered, just as is the case in the Australian provisions on parenting disputes.

There may understandably be some caution about reverting to what seems a fault-based paradigm. However, careful drafting can allay this concern, because the issue at hand is neither what caused the relationship breakdown nor some notion of punishment. Family property law is, at its heart, remedial. It seeks to avoid the inequities that would arise in certain interpersonal relationships if the normal rules of property prevailed. Those financial inequities arise out of the same dynamics and power imbalances that make women so vulnerable to violence within their family; they are not distinct, but rather intertwined issues. Any provisions would thus simply provide statutory recognition of, and recompense for, this.

Whatever legislative route is taken, the issue of proof of violence remains problematic. And while law reform and professional training are required for change, they are not sufficient. Changing the *Family Law Act*, even if accompanied by increased understanding of the manifestations, dynamics and effects of domestic violence, does not address the underlying systemic inequities facing victims of violence in property matters. The existence of unwritten gendered subtexts limits the ability of effectuating change simply through rewording substantive law. However, these are not reasons for not providing the best possible solutions available for victims of violence – they are simply caveats.

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NOTES

¹ The FLA applies nationally, except in Western Australia, however, the laws in that state mirror the national legislation.

² While the term 'family violence' is adopted in the FLA (see s 4AB), in other contexts the term 'domestic violence' is also routinely used. We use the terms interchangeably in this paper.

³ See for example the work of activist, and 2015 Australian of the Year, Rosie Batty: <http://www.neveralone.com.au/> (accessed 31 October 2017).

⁴ *In the Marriage of Kennon* (1997) 22 Fam LR 1, 24 (Fogarty and Lindenmayer JJ) (emphasis added). In addition, in considering FLA s 75(2) factors (the spousal maintenance factors also relevant

to property settlement), the court can look at any disability resulting from the violence as a party's capacity to work and physical and mental health are relevant factors. The italicized phrases highlight the vague and indeterminate nature of this section.

⁵ See Young et al., (2016: [9.29]ff) where a series of legislative reforms starting in 1996 are set out.

⁶ See <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/ThirdQuarter/First-comprehensive-review-of-the-family-law-act-27-September-2017.aspx> (accessed 21 October 2017).

⁷ According to the Workplace Gender Equality Agency (2016) in 2016, women only comprised 16.3% of CEOs.

⁸ Women are concentrated in health, education and retail occupations, which 'is one contributing factor to the overall gender pay gap, with female-dominated industries traditionally offering lower pay than male-dominated industries': Workplace Gender Equality Agency (2016: 5).

⁹ Australian Bureau of Statistics (2017) 'the "typical" male spends fewer than five hours a week on domestic work, compared with between five and 14 hours a week by women:' <<http://www.abs.gov.au/websitedbs/D3310114.nsf/home/2016+Census+National>>

¹⁰ See Field (2010) for a discussion both of possible concerns for women in facilitative mediation and also the polarity of perspectives in the literature with one study finding that women felt that they had equal influence over the terms of the agreements reached. Also see Kelly (1995).

¹¹ For example, in the 16-17 year in the Family Court of Australia, 85% of the matters (both parenting and property) where an application was actually filed did not proceed to a final trial: Family Court of Australia, *16:17 Annual Report*, 29.

¹² See <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx> (accessed 14 September 2017).

¹³ This is known as the 'Briginshaw' test from the case *Briginshaw v Briginshaw* [1938] HCA at 361-362. This test is now reflected in s 140(2) of the Evidence Act 1995 (Cth).

¹⁴ On these issues generally, see the seminal work of Graycar and Morgan (2002) and Katzen (2000).

¹⁵ This last matter was not tested fully as the statements were allegedly made to the teacher's father who was not able to be called as a witness: at [203]ff.

¹⁶ *Hashim v Hashim* [2012] FamCA 135; BC201250172 at [212], [206], [226]. The Judge accepted the teacher was a truthful witness, but as the claims were hearsay and the father was not recalled to give evidence about this, no finding was made. See also *In the Marriage of Blanch* (1998) 148 FLR 156.

¹⁷ In *T v S* (2001) 28 Fam LR 342, the Full Court upheld the woman's appeal and ordered a new trial.

¹⁸ Stated by Baker J in first instance hearing, as reported in the appellate judgment, *In the Marriage of A* (1998) 22 Fam LR 756, 759.

¹⁹ *Pilch & Pilch* [2016] FamCA 740 at [143].

²⁰ *Charlton & Charlton* [2016] FCCA 1846 at [290]. See also *Graf-Salzman and Graf* [2015] FCWA 68 at [366] and [369] where a *Kennon* adjustment was made recognising, inter alia, the serious consequences to the wife's confidence and self-esteem caused by the husband's physical violence.

²¹ Which is not to say that there does not remain much work to be done in this area as reflected in the terms of reference given to the Australian Law Reform Commission inquiry into family law (see <https://www.alrc.gov.au/news-media/alrc-news/review-family-law-system-terms-reference-and-commissioners>).

²² Though there had been judicial doubt cast on the 'special skills' rule for some years, most notably in *Figgins & Figgins* [2002] FamCA 688.

²³ *Fields & Smith* [2015] FamCAFC 57; *Hoffman & Hoffman* [2014] FamCAFC 92.

²⁴ FLA, s 79(4).

²⁵ FLA, s 75(2) incorporated by s 79(4)(e).

²⁶ *CCD & AGMD* [2006] FamCA 1291 at [43].

²⁷ *Owen & Owen* [2015] FCCA 2823 at [39].

²⁸ First *In the Marriage of Doherty* (1995) 20 Fam LR 137 and then *Marriage of Kennon* (1997) 22 Fam LR 1, 24.

²⁹ *In the Marriage of Kennon* (1997) 22 Fam LR 1, 24 (Fogarty and Lindenmayer JJ) (emphasis added). In addition, in considering FLA s 75(2) factors (the spousal maintenance factors also relevant to property settlement) the court can look at any disability resulting from the violence as a party's capacity to work and physical and mental health are relevant factors. The italicized phrases highlight the vague and indeterminate nature of this section.

³⁰ (1997) 22 FamLR 1 at 24.

³¹ At 24.

³² At 24.

³³ Ibid.

³⁴ However, as P Eastal et al. have shown, some judges still apply a test of ‘exceptionality’, at (2014: 13-14). Note the comment of Carmody J in *Moore & Moore* [2008] FamCA 32 at [284] to the effect that there is doubt as to the requirement of exceptionality.

³⁵ See New South Wales Law Reform Commission (2006: 219) for a discussion of *Kennon* and how it has been applied, or not, in de facto property matters in New South Wales. See also Eastal et al., (2014: 9, 12, 18).

³⁶ Brewster FM outlined his reasons in detail in *Palmer v Palmer* (2010) 244 FLR 121, 131-136 and as an addendum in *Brandow v Brandow* [2010] FMCAfam 1026, [27]. In *Palmer v Palmer* (2010) 244 FLR 121 at [134-135], his Honour suggested that, if violence is to be relevant to contributions, perhaps a more appropriate consideration would be to reduce the contributions of the perpetrator to the welfare of the family, rather than to increase the weight of the victim’s contributions.

³⁷ *Palmer v Palmer* (2010) 244 FLR 121 at 135.

³⁸ *Maine & Maine* [2016] FamCAFC 270 at 52.

³⁹ Only one out of the 17 successful matters in the 2001 sample identified the specific percentage increase (5%): Middleton (2001: 231).

⁴⁰ *Charlton & Charlton* [2016] FCCA 1846 at [314].

⁴¹ *Stevens v Stevens* (2005) FLC 93-246 at [65].

⁴² *Hunter & Hunter* [2015] FamCA 1075 at [235].

⁴³ At [238].

⁴⁴ *Hunter & Hunter* [2015] FamCA 1075 at [239].

⁴⁵ At [16].

⁴⁶ *Tumlin & Tumlin* [2016] FamCA 944 at [236] (emphasis added).

⁴⁷ (2012) 259 FLR 122; [2012] FamCAFC 18 per Diana Bryant CJ, Ian Coleman and Ann Ainslie-Wallace JJ.

⁴⁸ *Baranski & Baranski* (2012) 259 FLR 122; [2012] FamCAFC 18 at [259].

⁴⁹ *Owen & Owen* [2015] FCCA 2823 at [40], [43] and [48].

⁵⁰ *Spagnardi & Spagnardi*, cited as *S & S* [2003] FamCA 905 at [45].

⁵¹ Ibid at [47].

⁵² *Charlton & Charlton* [2016] FCCA 1846 at [290].

⁵³ *Gillard & Gillard and Anor* [2016] FamCA 841 at [214].

⁵⁴ *Prasad & Shan* [2015] FCCA 2801 at 181 (emphasis added).

⁵⁵ At [95]. The same judge reiterated this view in *Sedgley & Irvine* [2016] FCCA 2902.

⁵⁶ *Scott & Scott* [2015] FCCA at 95; *S & S* [2003] FamCA 905.

⁵⁷ *Tumlin & Tumlin* [2016] FamCA 944 at 236.

⁵⁸ *Maine & Maine* [2016] FamCAFC 270 hearing appeal of *Maine & Maine* [2015] FCCA 1753.

⁵⁹ At [47].

⁶⁰ *Maine & Maine* [2016] FamCAFC 270 at [49] and [50].

⁶¹ *Proctor & Proctor* [2016] FCCA 613 (23 March 2016) at [998].

⁶² *Sharp & Moon* [2016] FCCA 2141 at 40.

⁶³ *Gillard & Gillard and Anor* [2016] FamCA 841 at 212.

⁶⁴ *Gillard & Gillard and Anor* [2016] FamCA 841 at 205.

⁶⁵ Property laws apply both to married couples and de facto couples.

⁶⁶ *Bamford & Bank* [2016] FCCA 958 at 47, 56.

⁶⁷ *Holder & Little* [2015] FCCA 1164 at [279]-[281].

⁶⁸ *Pilch & Pilch* [2016] FamCA 740 at 147 per Justice Sharon Johns.

⁶⁹ In fact these principles are worded so as to apply to ‘all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the FLA’; from the way they are structured and worded it is clear they are intended only to operate in parenting matters.

⁷⁰ Available at <http://dfvbenchbook.aija.org.au> (accessed 12 November 2017).

⁷¹ Matrimonial Causes Act 1973 (England and Wales), s 25(2)(g).

⁷² Ibid; *H v H (Financial Provision: Conduct)* [1994] 2 FLR 801.

⁷³ [2007] 1 FLR 1496.

⁷⁴ A good proportion of US states permit fault to be considered in property matters and so bad behaviour can be factored in. For example, *SAV v KGV* 708 S. W. 2d 651 (Mo. 1986) for Missouri and *Young v Young* 609 S. W. 2d 758 (Tex. 1980) for Texas.

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- ⁷⁵ The Family Court has generally eschewed the notion of negative contributions (*Antmann & Antmann* (1980) 6 Fam LR 560 at [32]), though in reality some principles seem to operate that way (such as the way the court treats wasting of assets as in *Marriage of Kowaliw* (1981) FLC 91-092).
- ⁷⁶ *CCD & AGMD* [2006] FamCA 1291 at [46]ff per Warnick J. See Carmody J's response in *Moore & Moore* [2008] FamCA 32 at [376]ff.
- ⁷⁷ *Moore & Moore*, *ibid*.
- ⁷⁸ Family Law (Scotland) Act 1985, s 9(1)(b).