

# Family violence and family law property division: How can the system be improved?

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## Abstract

This article explores how the economic impacts of violence can continue long after a relationship has ended and how the family law system is a generally unhelpful tool for financial recovery from abuse. Hurdles in the legal system such as the unavailability of legal aid and the absence of affordable legal representation, lack of legislative reforms in relation to property division in cases of violence, and difficulties in enforcing orders, compound experiences of violence and entrench poverty. Reforms to improve the family law property system for victims of violence are suggested.

## Keywords

Financial abuse, economic abuse, family law, domestic violence, coercive control, family violence, divorce and separation

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Recent research has concluded that many women experiencing family violence (FV)<sup>1</sup> are faced with the choice of violence or poverty.<sup>2</sup> In cases where assets are available, a family law property settlement should be one crucial tool to avoid poverty following the breakdown of a violent relationship.<sup>3</sup> However, previous research has shown that women are the financial losers from separation, and this is intensified for women experiencing FV.<sup>4</sup> This is of great concern given a recent risk analysis of property

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<sup>1</sup> Many terms are used to describe violence and abuse in personal relationships. This article uses the term 'family violence' because it is the language used in the Australian family law system (*Family Law Act 1975* (Cth) s 4AB) ('FLA'). Gendered language is used in this article, referring to women as victims and men as perpetrators. This recognises that women comprise the vast majority of victims across a range of data sources. The use of gendered language does not mean that men cannot also be victims and women perpetrators of violence in heterosexual or same-sex relationships. It is also recognised that there are high rates of violence perpetrated against trans women and men and those who do not identify with the gender binary. This article also uses the term victim because it focuses on people who are still experiencing violence and engaging with the legal system for a response to that violence.

<sup>2</sup> Anne Summers, *The Choice: Violence or Poverty* (University of Technology Sydney, 2022).

<sup>3</sup> Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Women's Legal Service Victoria, 2015) 31.

<sup>4</sup> Patricia Easteal, Lisa Young and Anna Carline, 'Domestic Violence, Property and Family Law in Australia' (2018) 32(2) *International Journal of Law, Policy and the Family* 204; Grania Sheehan and Bruce Smyth,

matters reveals that 68.4 per cent of property matters in the family law system contain allegations of FV.<sup>5</sup>

Economic abuse is likely to be experienced along with other forms of FV<sup>6</sup> and is particularly likely to impact women's finances, employment and accommodation.<sup>7</sup> Economic abuse may include preventing someone from acquiring or using economic resources, generating debts or other economic costs, interfering with or preventing work, and lack of control or information about family finances.<sup>8</sup> It impedes a victim's capacity to leave an abusive relationship.<sup>9</sup> If she does leave, economic abuse may continue or even commence post-separation. Non-payment of debts or accrual of debts for which the woman is legally responsible, non-payment of child support and financial crippling by legal systems abuse by constantly bringing the woman back to court can all be means of economic abuse after separation.<sup>10</sup>

This article draws upon a study of self-representation and allegations of FV in family law proceedings to explore experiences of violence, including economic abuse, and how those impact upon family law property proceedings. Reforms to make the system a more useful tool for victims of abuse are suggested.

### **The self-representation and allegations of family violence study**

This article draws on a large study of self-represented litigants in family law proceedings involving FV, funded by Australia's National Research Organisation for

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'Spousal Violence and Post-Separation Family Law Outcomes' (2000) 14(2) *Australian Journal of Family Law* 102; Belinda Fehlberg and Christine Millward, 'Family Violence and Financial Outcomes after Parental Separation' in *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (AIFS, 2014) 235; Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30 *Australian Journal of Family Law* 1; Lixia Qu and Ruth Weston, 'Financial Journeys of Australian Parents after Separation – Transitions into and out of Poverty' (2021) 56(1) *Australian Journal of Social Issues* 54.

<sup>5</sup> Deputy Chief Justice Robert McClelland, 'Update from the Federal Circuit and Family Court of Australia' (Conference Paper, The Law Society of NSW Specialist Accreditation Conference, 4 August 2022).

<sup>6</sup> Adrienne E Adams et al, 'Development of the Scale of Economic Abuse' (2008) 14(5) *Violence Against Women* 563.

<sup>7</sup> Amy Warren et al, 'From Economic Abuse to Economic Empowerment: Piloting a Financial Literacy Curriculum With Women Who Have Experienced Domestic and Family Violence' (2019) 34(4) *Affilia* 498, 499.

<sup>8</sup> See the definition of economic abuse in *Family Violence Protection Act 2008* (Vic) s 6. The section provides examples of behaviours that could be economic abuse. See similarly *Domestic and Family Violence Protection Act 2012* (Qld) s 12. Tasmania has criminalised economic abuse: *Family Violence Act 2004* (Tas) s 8.

<sup>9</sup> Sundari Anitha, 'Understanding Economic Abuse Through an Intersectional Lens: Financial Abuse, Control, and Exploitation of Women's Productive and Reproductive Labor' (2019) 25(15) *Violence Against Women* 1854, 1856; Cynthia K Sanders, 'Economic Abuse in the Lives of Women Abused by an Intimate Partner: A Qualitative Study' (2015) 21(1) *Violence Against Women* 3.

<sup>10</sup> Heather Douglas, *Women, Intimate Partner Violence and the Law* (Oxford University Press USA, 2021) 158; Kristin Natalier, 'State Facilitated Economic Abuse: A Structural Analysis of Men Deliberately Withholding Child Support' (2018) 26(2) *Feminist Legal Studies* 121, 129; Ayesha Scott, 'Hidden Hurt: The Impact of Post-Separation Financial Violence in Aotearoa New Zealand' (2020) 33(3) *Australian Journal of Family Law* 282, 288.

Women's Safety (ANROWS).<sup>11</sup> It was designed to explore all the issues that arise when parties are without legal representation in family law proceedings in which FV allegations are made. The insights from the study contribute to the growing, but still limited, body of research mainly in the parenting arena, that looks at the impacts of family violence on women navigating the family law system.<sup>12</sup> The study did not specifically focus on economic abuse or property proceedings. However, interviews undertaken during the study revealed that at least half the female participants had experienced economic abuse, some became self-represented because of economic abuse strategies designed to deplete their funds, many were deterred from commencing property proceedings, and those that proceeded found the family law property system difficult to navigate.

The study had two key components: a general interview sample and an intensive case study.<sup>13</sup> The general interview sample comprised interviews conducted between December 2018 and December 2019 with 35 litigants who were self-represented at some stage in their family law proceedings and/ or faced an SRL (24 female; 11 male); and 68 professionals. The study considered both SRLs and those who faced SRLs due to previous research indicating that perpetrators of FV may choose to self-represent to deliberately abuse or intimidate their former partners.<sup>14</sup> Pseudonyms were given to all participants. The intensive case study involved observation of 512 court events, of which 243 involved at least one SRL, at eight court sites (metropolitan and regional) in three states, interviews with 14 people involved in those observed cases, and examination of 180 court files related to those observed matters.<sup>15</sup> Most of the cases observed in this study involved FV; 82 per cent of SRL matters observed in the intensive case study, in which we were able to examine the court file, involved allegations of FV (n=148/180). This article relies mainly on the data from the interviews with female litigants from the general interview sample.

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<sup>11</sup> Jane Wangmann, Tracey Booth and Miranda Kaye, 'No Straight Lines': *Self-Represented Litigants in Family Law Proceedings Involving Allegations about Family Violence* (Research Report, ANROWS, 2020) <https://www.anrows.org.au/publication/no-straight-lines-self-represented-litigants-in-family-law-proceedings-involving-allegations-about-family-violence/>.

<sup>12</sup> For example: Lesley Laing, 'Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System' (2017) 23(11) *Violence Against Women* 1314; Rae Kaspiew et al, *Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report* (ANROWS, 2017); Leanne Francia, Prudence Millear and Rachael Sharman, 'Addressing Family Violence Post Separation – Mothers and Fathers' Experiences from Australia' (2019) 16(3) *Journal of Child Custody* 211; Donna Roberts, Peter Chamberlain and Paul Delfabbro, 'Women's Experiences of the Processes Associated with the Family Court of Australia in the Context of Domestic Violence: A Thematic Analysis' (2015) 22(4) *Psychiatry, Psychology & Law* 599.

<sup>13</sup> Ethics approval to conduct this research was obtained through the University of Technology Sydney Human Research Ethics Committee (Reference Number: ETH18-2698). Informed consent was obtained from participants and all information was de-identified.

<sup>14</sup> Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology & Criminal Justice* 84; Kaspiew et al (n 12).

<sup>15</sup> For the full methodology for the research, see Wangmann et al (n 11) ch 3. For details of the SRLs in the study, see ch 4.

### *Economic abuse: experiences of participants*

Half of the women (n=12/24) in the general interview sample reported experiencing economic abuse during their relationship. This is likely to be an under-representation because participants were not specifically asked about the types of violence experienced and participants may not have mentioned all forms of abuse they experienced.<sup>16</sup>

Economic abuse included the perpetrator controlling household funds, making decisions about spending, and demanding that the victim account for their spending. For example, Fiona was not paid for her work in the family business and only had limited access to joint finances. Her partner became violent towards Fiona when she was pregnant with their first child, but the economic abuse and other forms of violence which included rape, emotional abuse and physical violence increased as the business began to fail. Karen reported not being allowed money for basics such as food and medication. Megan's partner had been deceptive about his financial position during the relationship, telling her that his business was failing so that she paid the rent. When she applied for child support, she found out that 'he was actually earning \$200,000–\$300,000'.

The financial abuse continued, and sometimes intensified or commenced, post-separation. Post-separation financial abuse for Fiona, Jenny, Joanne and Robyn concerned deliberately withholding child support and, for Carol, it was her ex-partner limiting his child support payments by under-declaring his income. Immediately after separation, Fiona's partner withdrew \$15,000 from their joint bank account that he then closed so she 'had absolutely no access to any money at all'. He also accumulated very large debts in her name. She had acute housing needs after separation and, not being an Australian citizen, was ineligible for most social security payments. She was unable to live with her teenage son in a women's refuge and the closest safe house was more than 2.5 hours' drive from his school. Fiona and her children lived in a car until her son finished high school. For Jenny, Megan and Robyn, non-payment of rent or mortgage repayments put their housing security at risk. For Katherine, post-separation financial abuse included refusal to sign a rental bond refund form while Fiona, Megan and Jenny experienced the deliberate destruction of property and/or failure to upkeep property to maintain its value. The financial sabotage may persist well beyond the end of the relationship. Kate reported that her former partner put her in a position where she became bankrupt to try 'to force me and the children back to him'. Two years out of bankruptcy she described herself as 'a leper to any banking institution'.

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<sup>16</sup> Wangmann et al (n 11) 53–4.

### *The emotional, mental and safety costs of pursuing property proceedings*

The study was conducted prior to the merger of the Family Court and the Federal Circuit Court in 2021. However, there are still barriers to accessing the family law system as an SRL. New Practice Directions outline the pre-action procedures required before filing applications.<sup>17</sup> In theory, these more onerous requirements than previously should assist with full and frank disclosure, reduce delays, and have potential costs orders and real consequences for non-compliance. However, it remains to be seen whether the extra demands required, including the requirement to file a Genuine Steps Certificate outlining attempts taken to settle the matter, with any application will be an extra barrier to filing, particularly for SRLs.

Any extra barriers to women making property applications are concerning. Many women who have experienced abuse already decide to prioritise their emotional and physical safety and give up their legal rights to family finances.<sup>18</sup> Women may be prepared to make compromises in relation to their rights to property, including abandoning all claims, which they would not make in relation to parenting matters. For Joanne this was due to fear:

*The whole fear of being killed by him was about finances, always. That's why I never went for property settlement. I never sought anything. I walked out with the kids and I think I'd upgraded the fridge and it's pretty much all I came out with.*

Megan recognised the emotional toll that would be involved in applying for property orders:

*I haven't done financials because I just couldn't face. ... I've been homeless.... I haven't got any property. ... But I have to watch my sanity levels, there's only so much you can stick your neck out.*

Fiona had pursued property and maintenance applications as an SRL. She had thought about giving up but said, 'I can't ... Because I need the money... [I] have to put up with the abuse that continues'. However, she did say that fear meant that in her negotiations, she went 'really, really low', commenting, 'I didn't want to make him too angry for a start ... which is pretty much near-impossible to do.'

### *Lack of affordable legal representation*

The law and process governing property disputes are technical, and particularly complex where FV is involved.<sup>19</sup> Research has shown that FV victims achieve less

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<sup>17</sup> 'Central Practice Direction: Family Law Case Management', *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fcfcga.gov.au/fl/pd/fam-cpd#cpd4preaction>.

<sup>18</sup> Fehlberg and Millward (n 4); Sheehan and Smyth (n 4).

<sup>19</sup> Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (No Report No 135, ALRC, 2019) 42–3; Jill Howieson et al, *Family Property Disputes Involving Family Violence: A Pilot Research Project* (Report for Law Society of WA Public Purpose Trust, 2018) 24.

satisfactory financial outcomes in family law matters when they do not have legal advice.<sup>20</sup> Women's Legal Service of Victoria (WLSV) have stated, 'Without legal representation it is difficult to obtain a property settlement in the family law system'.<sup>21</sup> Legal representation may also increase safety by providing a 'buffer' between the victim and perpetrator.<sup>22</sup>

Despite the importance of being legally represented, FV victims have limited access to legal advice.<sup>23</sup> The main reasons that study participants were self-represented were ineligibility for legal aid and not being able to afford private legal representation.

Australian legal aid is, per capita, lower than that of other nations with similar legal systems.<sup>24</sup> A significant proportion of legal aid funds serious criminal law matters leading to a gender bias in legal aid funding grants. Women receive half as many publicly funded legal aid grants as men overall, although women receive approximately 1.6 times as many grants in family law matters as men.<sup>25</sup> Legal aid for representation in family property proceedings is even more limited in Australia than for parenting proceedings, and property settlement matters are generally outside the funding guidelines for legal aid ongoing advice. Fiona was 'told on many occasions' that 'anything to do with finances or anything, splitting of property, we were unable to get Legal Aid'. In the rare case that legal aid is granted for property matters, it is generally limited and would not usually cover ongoing representation including a trial.<sup>26</sup> Community Legal Centres provide free advice as do duty lawyers if available. However, these services are stretched, not all provide property advice and they rarely provide ongoing legal advice. Jenny commented that she 'saw the duty lawyer to try and help me do things, but because the children weren't involved, they were limited to the amount of assistance they could give me because it was property only.'

Private legal fees may be very large. The Australian Law Reform Commission found that legal costs incurred by parties in final parenting and property hearings, particularly in major Australian cities, 'routinely exceed \$300,000 for each party and sometimes

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<sup>20</sup> Fehlberg and Millward (n 4); Sheehan and Smyth (n 4); Lixia Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years* (Attorney-General's Department, 2014).

<sup>21</sup> WLSV, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (March 2018) 6.

<sup>22</sup> Howieson et al (n 19) 30; Wangmann et al (n 11) 111.

<sup>23</sup> WLSV (n 21) 6.

<sup>24</sup> Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 734 .

<sup>25</sup> Thanks to Professor Simon Rice of University of Sydney for analysis of these statistics: NSW Legal Aid Commission, 'National Legal Aid Statistics' (2021) <https://nla.legalaid.nsw.gov.au/nlareports/>. See also: Angela Lynch, 'The Justice Gap for Women: The Impact on Victims of Partner Violence' (2022) 170 (May) *Precedent* 20–25.

<sup>26</sup> WLSV (n 21) 39. There was some Commonwealth funding under a two-year pilot for Legal Aid Commissions to provide lawyer-assisted mediation which commenced in 2020 to help in the division of small property pools after separation. If agreement could not be reached, it was possible, in some states and in some circumstances, that the legal aid lawyer would assist in any court proceedings. In some states the pilot has now been paused pending evaluation by AIFS:

[https://lsc.sa.gov.au/cb\\_pages/lawyer\\_assisted\\_fdr\\_small\\_property\\_cases\\_pilot.php](https://lsc.sa.gov.au/cb_pages/lawyer_assisted_fdr_small_property_cases_pilot.php).

exceed \$1million'.<sup>27</sup> The negative impact of violence on their economic well-being can mean that victims of violence lack resources to pay for private representation.<sup>28</sup> Private lawyers may provide ongoing representation on a deferred fee basis but given the complexity of matters involving allegations of FV, will not be interested where the asset pool is not substantial.<sup>29</sup> Costs are exacerbated where ex-partners prolong litigation and engage in legal systems abuse. Heather Douglas has found that where women paid for private representation for family law matters, 'misuse of the legal system operated to heighten economic abuse, often trapping women ever more deeply in poverty and debt'.<sup>30</sup> In our study, female interviewees who had been legally represented identified economic abuse strategies used by their former partners to deplete their funds and force self-representation. Strategies used by Alison, Katherine and Kate's partners included excessive correspondence or documents that the women's lawyers would respond to, while Fiona's partner failed to attend court and forced adjournments on the court occasions in which she instructed a barrister 'because he knew that was my last piece of money.' The prospect of mounting costs and impending self-representation may add to pressures to settle for unfair outcomes.<sup>31</sup>

### *The law*

Property division in the family law system is highly discretionary. This means that there is very little certainty of outcome for prospective litigants faced with complex legislation.<sup>32</sup> This uncertainty and complexity is a particular 'barrier to access to justice' for SRLs.<sup>33</sup> Where there are allegations of violence, unlike in parenting matters, there is no legislative recognition of the relevance of violence to property division. As such, SRLs are unlikely to be aware of whether and how FV might be relevant to property division. If SRLs do access case law, they find themselves struggling with formulating an argument for an adjustment in their favour based on a 'vague' and 'relatively strict' judicial test, known as the *Kennon*<sup>34</sup> test.<sup>35</sup> The requirements of the test have the effect of operating to exclude the consideration of violence in many cases and very few *Kennon* claims are made, even where victims are represented.<sup>36</sup> Until very recently, successful *Kennon* claims have generally required serious physical assaults as

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<sup>27</sup> Australian Law Reform Commission (n 19) 332.

<sup>28</sup> Sanders (n 9); Howieson et al (n 19) 24.

<sup>29</sup> Howieson et al (n 19) 31.

<sup>30</sup> Heather Douglas, 'Family Violence, Lawyers and Debt' (2020) 33(3) *Australian Journal of Family Law* 264, 273.

<sup>31</sup> Miranda Kaye, Tracey Booth and Jane Wangmann, 'Compromised "Consent" in Australian Family Law Proceedings' (2021) 35(1) *International Journal of Law, Policy and the Family* ebab033.

<sup>32</sup> Belinda Fehlberg and Lisa Sarmas, 'Australian Family Property Law: "Just and Equitable" Outcomes?' (2018) 32(1) *Australian Journal of Family Law* 81, 82.

<sup>33</sup> ALRC (n 19) 14.1.

<sup>34</sup> From *In the Marriage of Kennon* (1997) 22 Fam LR 1.

<sup>35</sup> Easteal, Young and Carline (n 4) 213.

<sup>36</sup> Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28(1) *Australian Journal of Family Law* 1; Easteal, Young and Carline (n 4).

opposed to coercive controlling behaviour.<sup>37</sup> Many claims made by lawyers are unsuccessful because they are not supported by admissible evidence.<sup>38</sup> Given that SRLs struggle to provide and document probative evidence of violence,<sup>39</sup> they are even less likely than lawyers to make successful claims.

### *Legal systems abuse by perpetrators*

Property proceedings are peculiarly ripe for legal systems abuse: refusing to negotiate, or drawing out settlements, forcing adjournments, appealing decisions, non-compliance with interim orders and failure to provide full and frank disclosure can all financially damage and emotionally harm a victim of systems abuse.<sup>40</sup> For Fiona, this included legal systems abuse by her ex-partner at all stages of the proceedings in the form of purposely increasing and depleting her representation costs, delaying at all stages, not participating in negotiations for settlement and not complying with court directions and orders. Jenny commented that her property matter was ‘torture’ and was ‘dragged over years and years’ as ‘he knew how to manipulate the court systems’:

*[W]e went to trial [over the property] because he pushed everything, always. Always adjourned it, always pushed it, said no, oh, well, I can't do this. The judge had threatened him on a number of occasions, that she was going to lock him up if he didn't bring ... you know, if he doesn't come equipped to the hearings or the mentions or the trials with the appropriate documents, then she would put him in jail or she would fine him. However, nothing ever happened. It was all just air. ... He didn't have to give any information about his financials ... nothing. ... I think out of the whole time, I received, I don't know, a few bits of paper.*

If the matter reaches trial, then failure to comply with the obligation to disclose can lead to the court applying penalties or exercising its discretion adversely when making a settlement. However, research has found that prior to trial there are very few effective disincentives for parties for non-disclosure.<sup>41</sup> Proof of non-disclosure of assets is a challenge, particularly for victims of financial abuse who may not have had access to the family finances. Women who have been subject to violence may be unable or unwilling to use court processes to obtain relevant information.<sup>42</sup> Kate commenced property division proceedings, but she discontinued them ‘for my own

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<sup>37</sup> Anna Carline and Patricia Easteal, *Shades of Grey: Domestic and Family Violence Against Women* (Routledge, 2014) 127. Recently a small number of cases appear to have recognised coercive control as the basis of a Kennon claim: see *Jacoda & Mancie* [2019] FCCA 3279; *Jacot & Jacot* [2021] FamCA 272; *Sweet & Sweet* [2022] FedCFamC2F 676.

<sup>38</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 166.

<sup>39</sup> Wangmann et al (n 11) 72–83.

<sup>40</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs (n 38) 5.

<sup>41</sup> WLSV (n 21) 5

<sup>42</sup> Hugh P K Kopsen and Robyn Carroll, ‘The Importance of Full and Frank Disclosure in Family Law Financial Proceedings and the Many Consequences of Non-Disclosure’ (2017) 45(1) *Federal Law Review* 97, 98.



mental health' and 'will walk away with nothing'. Her ex-partner had 'set themselves up to look like they've got nothing despite having quite to the contrary' and she risked having costs awarded against her if she failed to show the true position and 'could risk being bankrupt again'. A Women's Legal Service lawyer interviewed for the study commented how lack of disclosure by alleged perpetrators of FV is a form of legal systems abuse which women often cannot address:

*So, they don't do any disclosure, ... and they obfuscate, and they adjourn. So it's just this never-ending cycle. If that client had paid me in private practice, we'd be up to \$150,000 easily in fees, just for her property matter. So, she wouldn't have had any assistance at all with respect to the property matter because she wouldn't have been eligible for legal aid, because there's too much in the pool. And then no [lawyer] is going to spec the matter [ie take on the matter on a speculative basis], because of the nature of the domestic violence. And also the fact that the property pool consisted of his business, .... If he decided to close it, which he ended up doing. They were just bankrupt essentially.*

### *Enforcement*

Litigants face disappointment when they discover that court orders are not self-executing but that they must enforce the orders the other side does not comply.<sup>43</sup> There are possible sanctions for failure to comply with financial orders, but they must be applied for and the family courts 'are generally reluctant to punish people who breach *FLA* orders'.<sup>44</sup> After four years in the courts, Jenny's ex-partner did not comply with the property order and she had to bring enforcement proceedings as an SRL. Fiona had obtained a consent order negotiated through her ex-partner's lawyers. However, he then became self-represented and refused to comply with the order. Fiona commented, 'I didn't realise that someone could just break a court order and they'd walk away with a fine. ... I just thought it was something that he had to do.' Non-payment of spousal maintenance has meant that Fiona struggled to pay rent and found herself 'quite nearly homeless again on many occasions'. Fiona described her ex-partner's non-compliance with orders as 'systemic abuse ... where he still has delayed and delayed everything that he can'. With the onus of enforcement of orders on individual litigants, a recalcitrant perpetrator is afforded some discretion in relation to payment, while victims of financial abuse experience a secondary victimisation.

Enforcement proceedings are complex. Fiona had to issue subpoenas, at her own expense, to determine her ex-partner's new address to prove service of the enforcement application for maintenance. She also applied for an enforcement

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<sup>43</sup> Bridgette Toy-Cronin, 'Keeping up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person' (PhD Thesis, University of Otago, 2015) 218.

<sup>44</sup> Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2015) 546; Smallwood (n 3) 45.

warrant without notice to seize and sell his property to fulfil the property order. Applying for the warrant was ‘extremely complex and a nightmare, absolute nightmare’. Her first enforcement application was rejected because she did not attach the original orders. She had to amend the application ‘about six times’ before the order was made. Her ex-partner learned of the warrant before the Sheriff had enforced it. Fiona was convinced that he would destroy or hide all relevant property before the warrant was enforced. After the last hearing, a brick was thrown through Fiona’s window. Another adjournment was granted for him to respond to the enforcement application. She commented, ‘once again ... it’s all up in the air again. Do I get my money or do I not?’ The subpoenas and warrant applications had cost her around AUD3000. No costs orders had been made against her ex-partner despite his blatant non-compliance and delaying of the enforcement proceedings.

### **Suggested reforms**

Given these difficulties for victims of FV in achieving an equitable outcome in property division proceedings, this article provides an outline of suggested reforms, many of which are not new, and some of which are currently being trialled.

#### *Increased access to legal advice for assistance with family law property matters*

The study found that there is a definite need to increase access to legal aid, duty lawyers and ongoing affordable legal representation. However, the study concluded that only ongoing legal assistance which encompasses advice, negotiation, document drafting, assistance in mediation and representation in court, ‘levels the playing field’ and provides a buffer from perpetrators.<sup>45</sup> SRLs do not just need more lawyers, but ‘skilled lawyers’ who have an understanding of FV.<sup>46</sup>

Legal Aid New South Wales (NSW) recently made available grants of aid for family law property matters for those experiencing or at risk of FV, subject to means and merit tests.<sup>47</sup> However, legal aid is generally not available in Australia for property matters. There should be uniform legal aid policies across Australia which, at a minimum, match the Legal Aid NSW position.

#### *Improved case management and disclosure*

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<sup>45</sup> Wangmann et al (n 11) 160–161; Howieson et al (n 19) 31

<sup>46</sup> Wangmann et al (n 11) 160.

<sup>47</sup> Legal Aid NSW, Policy Bulletin 2020/8 Family Law Policy: Property Matters (20 July 2020)

<https://www.legalaid.nsw.gov.au/for-lawyers/news/news-for-lawyers/policy-bulletin-2020-8-family-law-policy-property-matters>.

Early risk assessment and identification of FV has been introduced in three registries for parenting matters through the Lighthouse Project.<sup>48</sup> This project screens for risk, and triages matters, identifying those which require additional support and safety measures and provides appropriate case management relevant to risk. Similar initiatives should be considered in property matters involving violence. Increased government funding will enable the Lighthouse Project to be expanded to 15 registries and, importantly, it can be expanded to cases involving both parenting and property matters.<sup>49</sup> Given that high levels of allegations of violence are present in property matters,<sup>50</sup> it is time to recognise that FV is prevalent in all types of family law proceedings and the distinction between parenting and property matters in respect of the presence of violence is false. Intensive case management should be introduced for all family law proceedings which screen as high risk.

A pilot for small claim cases (under AUD500,000) is currently operating in four court registries (PPP500).<sup>51</sup> The PPP500's purpose is to provide greater monitoring of compliance with interim orders, reduced delays, reduced costs and greater opportunities to settle. The focus is case management to ensure the economic security of at-risk women and children by making the court process easier, cheaper, and quicker to navigate. The pilot is due to expire on 30 June 2023 but is currently being evaluated by the Australian Institute of Family Studies.<sup>52</sup> If evaluated positively, the government will hopefully roll it out across Australia.

Recent legislation allowing the Australian Taxation Office (ATO) to share superannuation information with family courts is welcome.<sup>53</sup> Legislation to allow courts to obtain other financial information beyond superannuation, from sources such as the ATO, would also improve the fairness of property settlements for victims of financial abuse.<sup>54</sup> The *FLA* should be amended to encourage discretion to make adverse adjustments for non-disclosure.

### *Express reference to violence in the FLA property division provisions*

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<sup>48</sup> 'Family Violence: Lighthouse Project, *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fccoa.gov.au/fl/fv/lighthouse>.

<sup>49</sup> 'Lighthouse Project: Update to the Profession April 2022', *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fccoa.gov.au/lhp/update-april-2022>

<sup>50</sup> McClelland (n 5).

<sup>51</sup> 'Family Law: Information about Priority Property Pools under \$500,000 cases', *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fccoa.gov.au/fl/ppp500>.

<sup>52</sup> 'Family Law and Family Separation', *Australian Institute of Family Studies* (Web Page) <https://aifs.gov.au/projects/family-law-and-family-separation>.

<sup>53</sup> *Family Law Act 1975* (Cth) s 90XZJ.

<sup>54</sup> WLSV (n 21) 5.

Various models for law reform to better recognise FV have been suggested over many years.<sup>55</sup> A government response to consultation on property matters, including how to account for FV, is awaited.<sup>56</sup> Any reform should be referenced within the provisions of the *FLA* so that SRLs would be more likely to be aware of the possible relevance of FV to property division.<sup>57</sup>

### *Simplification and strengthening of the enforcement process*

The Federal Circuit and Family Court of Australia website describes as ‘complicated’ the law and process for applying to enforce orders.<sup>58</sup> Enforcement applications must be made simpler. It remains to be seen if the recent National Contravention List will reduce delays in enforcing orders and increase ramifications for non-compliance.<sup>59</sup>

### **Conclusion**

While there have been some changes to assist FV victims in family law property matters, such as the ‘small claim’ property pools pilot, increased access to forms of legally assisted dispute resolution and changes to Legal Aid NSW guidelines, more reforms are required. Implementation of the suggested reforms would go some way to removing the hurdles for FV victims in accessing the family law property system, and might be one small step in helping them avoid poverty.

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<sup>55</sup> ALRC, *Equality before the Law: Justice for Women* (No Report 69 Part 1, 1994); Eastal, Warden and Young (n 36) 24–28; House of Representatives Standing Committee on Social Policy and Legal Affairs (n 38); ALRC (n 19) 241–244.

<sup>56</sup> Attorney-General’s Department, *A New Decision-Making Framework for Property Matters in Family Law: Consultation Paper* (2021) 13–14.

<sup>57</sup> ALRC (n 19) 1.39.

<sup>58</sup> ‘Family Law: Finances and Property: Compliance and enforcement’, *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fcfcoa.gov.au/fl/fp/compliance-enforcement>.

<sup>59</sup> ‘Family Law: National Contravention List’, *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fcfcoa.gov.au/fl/national-contravention-list>.