



Law Council
OF AUSTRALIA

The practice of dowry and the incidence of dowry abuse in Australia

Senate Legal and Constitutional Affairs References Committee

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the contribution of the Family Law Section, together with input from the Law Institute of Victoria and the Law Society of New South Wales to the preparation of this submission.

Introductory remarks

1. The Law Council welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee (**the Committee**) in relation to its inquiry into the practice of dowry and the incidence of dowry abuse in Australia (**the Inquiry**).
2. The Law Council notes from the outset that Australia, as a multicultural society, celebrates its diversity and the rule of law which unites us. Identifying and drawing attention to certain cultural practices by sectors of the Australian community requires thoughtfulness, temperance and a significant degree of sensitivity so as not to single out or discriminate against any particular sector.
3. Different viewpoints exist within the Law Council, and across the legal profession as a whole, about the need and purpose of targeting specific cultural practices. Concern exists where there is a risk that highlighting certain practices may incite cultural vilification and open the gateway for scrutiny of other cultural practices. Caution, in particular, is required in circumstances of media attention possibly overstating the statistical reality of any concern.
4. In the case of the practice of dowry, it is important to acknowledge that the practice is often steeped in the long and rich history of those cultures and is often based on practical considerations aimed at supporting the wife and consequently the newly married couple in their life together. Similarities can be drawn from other contemporary practices, including parents of Anglo-Saxon couples paying for the wedding or making gifts in contemplation of or upon marriage.
5. Nonetheless, it is also relevant to consider the laws of the countries in which these practices have been prevalent both historically and in contemporary times, specifically where such practices have been legislated against, or there are provisions prohibiting the abuse of those practices.
6. However, a distinction needs to be made between positive cultural practices and those that may amount to abuse or human rights violations. Rather than focusing on the elements of the customary practice, the focus needs to be on exposing abusive practices on vulnerable individuals requiring protections under the law.
7. The Law Council understands instances of dowry practice and dowry-related abuse exist in Australia, as in other jurisdictions. Often dowry-related abuse is accompanied by a course of conduct by a person and/or their family towards another who is more vulnerable; resulting in a power imbalance within the relationship and control of a person (and sometimes their family).
8. While the extent of dowry-related abuse is not known, the experience of legal service providers is that it does occur, and those affected are some of the most vulnerable in Australian society. This leads to serious implications for access to justice for those people and their families.
9. Factors to be considered in dowry-related abuse can include:
 - the occurrence among newly or recently arrived migrants with limited English language proficiency, financial means and possibly temporary migration status;
 - low value dowry — typically cash, jewellery and chattels (sometimes possibly real property in their country of origin) — that is disproportionate to the family's income or wealth;

- little or no evidence to demonstrate the existence or contribution of dowry, which has evidentiary implications in later family law proceedings;
 - demand for more dowry with/without threat of or actual violence;
 - retention of dowry upon the breakdown of the marriage;
 - threat of or actual withdrawal of visa sponsorship;
 - forced return to country of origin (including associated persecution on return); or
 - victims impoverished by separation;
10. The Law Council acknowledges that difficulties may exist for some vulnerable sections of the community to:
- understand their rights and remedies under the *Family Law Act 1975* (Cth) (**Family Law Act**) and the onus to demonstrate the existence, value and ownership of dowry;
 - avail themselves of these remedies as they may not be in a position to secure legal representation, be able to navigate the legal system on their own or be in a position to do so because of an inability to remain in the country due to a change in their status under the *Migration Act 1958* (Cth) (**Migration Act**) upon the breakdown of the marriage; and/or
 - secure remedies in their country of origin if a divorce order is made in Australia.
11. This submission focusses on these areas with the view to identifying and improving how Australian law can better protect those that may be vulnerable as a result of dowry-related abuse.

Definition of dowry-related abuse

12. As highlighted above, Australia is a multicultural society and issues around the cultural practice of dowry or bride price may sometimes be recognised and considered in the context of family and domestic violence, family law proceedings, and immigration and visa applications.
13. Dowry and bride-price (*'lobolo'* as referred to by southern African peoples) are cultural practices in some countries in South Asia, the Middle East and Africa. The practice of dowry involves payment by a bride's family to the groom and his family, with the direction of gifts being reversed for bride-price. Dowry payments are more common and could be in gold, jewellery, cash and real and personal property. These payments can be made either overseas or in Australia by the 'giving family'.
14. A group of experts convened by the United Nations Division for the Advancement of Women in 2009 defined dowry-related abuse as 'any act of violence or harassment associated with the giving or receiving of dowry at any time before, during or after the marriage'.¹
15. Dowry-related abuse can be psychological or physical and may involve financial abuse and controlling behaviour. It is understood that in some instances the violence or harassment is perpetuated by the family members of the sponsor/partner. The Law Council is aware of reported cases in Australia where dowry-related abuse

¹ United Nations Division for the Advancement of Women, *Good Practices in Legislation on 'Harmful Practices' Against Women: Report of the Expert Group Meeting*, 29 May 2009, online at <www.un.org/womenwatch/daw/vaw/v-egms-gplahpaw.htm>.

includes threats to withdraw sponsorship unless further money or gifts are provided.² Media reports of serious dowry-related violence and homicide against women and their families have been featured in the mainstream press.³

16. The issue of dowry-related abuse and violence was considered by the Royal Commission into Family Violence that took place in Victoria between 2015 and 2016 (**Royal Commission**). The final report released in 2016 identified that 'in many situations, visa and migration challenges were combined with dowry-related abuse'.⁴
17. The Royal Commission found that dowry-related violence is more likely to be experienced by women from certain culturally and linguistically diverse communities and that it can be aggravated by a woman's visa status. As a response, the Royal Commission recommended that the Victorian Government amend the *Family Violence Protection Act 2008* (Vic) to expand the statutory examples of family violence to include forced marriage and dowry-related abuse.⁵ This recommendation was subsequently incorporated into the Justice Legislation Amendment (Family Violence Protection and Other Matters) Bill 2018, which received assent on 14 August 2018. These reforms, and their potential application are discussed in greater detail later in this submission.
18. The recognition of this type of abuse is an important consideration in family law as it is in migration cases and family violence protection order applications. Members of the profession report instances of cross-over between these three areas where dowry-related abuse is a feature. Dowry-related abuse may impact on a party's safety, arrangements made for children of the marriage, property adjustment and financial support.

Jurisdictional and international law considerations

19. Although a contemporary and common practice, the giving and receiving of dowry is an area of law that is specifically addressed in other jurisdictions, most notably India, where it has been illegal to give or receive a dowry since 1961⁶ although the giving and receiving of gifts at the time of marriage if they are not demanded is legal.⁷ However, it is acknowledged that while illegal, the practice remains ongoing and thus legislation aimed at dowry 'retrieval' is also in place that make it mandatory for a husband and his family to return the dowry after separation for up to seven years after the new marriage.⁸
20. It is outside of the scope of this inquiry to consider the complex matters of international law and jurisdiction of these matters. However, case law suggests the need for judicial notice to, for example, consider whether a divorce order made in Australia may prejudice a wife or her family's case for dowry retrieval in another jurisdiction, particularly in circumstances where that party fails to establish proper forum⁹ or where a party was compelled to leave the jurisdiction, however a divorce order was applied for and made in Australia.

² Rachel Kleinman, 'Dowry's Dark Shadow' *The Sydney Morning Herald*, 23 May 2014, online at <<https://www.smh.com.au/world/dowrys-dark-shadow-20140522-38ris.html>>.

³ See, eg, Mosiqi Acharya, 'Dowry is 'ruining' lives in Australia', *SBS Radio* 28 December 2016, online at <www.sbs.com.au/yourlanguage/hindi/en/article/2016/04/08/dowry-ruining-lives-australia>.

⁴ Royal Commission into Family Violence (Victoria), *Volume IV Report and Recommendations* (March 2016), Page 101.

⁵ *Ibid*, Recommendation 156.

⁶ The Dowry Prohibition Act, 1961 (India).

⁷ *Ibid*, article 3.

⁸ Section 498A of Indian Penal Code.

⁹ *Russell & Russell* [2014] FCCA 2574.

Dowry and contract law

21. Many cultures engage in the practice of dowry as a foundational precondition for marriage. One notable example is in the Islamic community where marriage is defined as an agreement in the form of a binding contract (*'nikkah'*) with a dower (*'mahr'*) specified, and a breach of the contractual conditions by one party terminates the contract and the marriage.¹⁰
22. The *mahr* is a 'required component of a valid Islamic contract of marriage ... It is a payment designed to provide for a wife when she is no longer required under Sharia law to be financially maintained by her husband, and as such has been an important security net in Muslim societies'.¹¹ Therefore, a *mahr* combines both symbolic and legal meaning.¹²
23. The case of *Mohamed v Mohamed*¹³ demonstrates the court's use of Australian contract law to determine which member of a couple was entitled to the dowry or *mahr*. The marriage contract was treated like any other contract or prenuptial agreement and Australian contract law was applied.¹⁴ Under the agreement, if Mrs Mohamed ended the relationship or the relationship ended through mutual agreement, Mrs Mohamed was not entitled to the \$50,000 dowry her family had provided, however she was entitled if Mr Mohamed divorced her.¹⁵ This agreement reflects the Islamic principle that a wife may lose her entitlement to the *mahr* if she initiates the divorce.¹⁶
24. The court enforced the principle of 'freedom of contract' and did not interfere with an agreement voluntarily entered into by parties, who possessed full legal capacity.¹⁷ The court did not accept Mr Mohamed's argument that the contract was an 'agreement of servitude' with the purpose of forcing him to stay in the marriage against his will, and found there was no accepted principle within the community that an agreement for the payment of dowry is against public policy.¹⁸
25. It is submitted that there are significant issues with assessing the *nikkah* and other similar agreements through a contractual lens, including that many women are unaware of the terms of their contract or their ability to negotiate the terms of what they view as a symbolically important document.¹⁹

Dowry in family law matters

Dowry as part of the property pool and treatment by the courts

26. As dowry or related concepts are not specifically contained within the Family Law Act, case law provides some guidance as to how dowry is treated in property proceedings. If it has not been dissipated amongst family members and can be identified and quantified, a dowry is treated as forming part of matrimonial property.

¹⁰ Ann Black, 'Adaptations of Islamic family law for the Australian context' (2016) 30 *Australian Journal of Family Law* 159, 164-165.

¹¹ *Mohamed v Mohamed* [2012] 47 Fam LR 683, 690.

¹² Ann Black, 'Adaptations of Islamic family law for the Australian context' (2016) 30 *Australian Journal of Family Law*, 168.

¹³ [2012] 47 Fam LR 683.

¹⁴ Hon Justice MJ Beazley AO, 'The Intersection of Australian law and the Islamic faith: a selection of cases' (Speech delivered to the Affinity Intercultural Foundation, Sydney, 27 August 2014), 6.

¹⁵ *Mohamed v Mohamed* [2012] 47 Fam LR 683, 685.

¹⁶ Ann Black, 'Adaptations of Islamic family law for the Australian context' (2016) 30 *Australian Journal of Family Law*, 166.

¹⁷ *Mohamed v Mohamed* [2012] 47 Fam LR 683, 689.

¹⁸ *Ibid*, 693.

¹⁹ Ann Black, 'Adaptations of Islamic family law for the Australian context' (2016) 30 *Australian Journal of Family Law*, 177.

It is then an asset capable of an order for division within the meaning of section 79 of the Family Law Act.

27. If the dowry payment is agreed, or can be proved, it is treated as a contribution by the 'giving spouse/spouses family' to the marital assets pursuant to paragraph 79(4)(a) as 'a financial contribution made directly or indirectly by or on behalf of a party to the marriage' and is therefore already a relevant consideration when the court is determining an alteration of property interests.²⁰

28. However, if there is doubt about the existence of, or who maintains possession of a dowry, it cannot form part of the property pool and will be excluded. *Sachar & Sachar*²¹ illustrates this point where a dispute arose about who had possession of the agreed dowry. Ultimately, the Court was unable to make a finding of fact about who was in possession of the dowry and so it was excluded from the property pool, although being treated as a contribution from the wife to the matrimonial property pool:

*The parties were not in dispute that a dowry was given. I take judicial notice of the circumstance that the family of an intended Indian bride will pay a dowry to the intended applicant: cf sub-s 144(1)(b) Evidence Act 1995 (Cth). This would be capable of verification by, and available from, the Country Information which is retained by the Department of Foreign Affairs and Trade: cf s 144(2). There was no dispute as to its value or that the dowry had been in the parties' home. Deciding the case on the balance of probabilities, I find that, having regard to those customary traditions, a dowry was provided by the family of the respondent to the applicant as the price of the marriage and that this was a contribution made on behalf of the respondent.*²²

29. The Law Council notes the proposal to consider dowry as a contribution in marital property settlement, to enable the dowry payer to recover the dowry as part of the property settlement, whether or not the payment was made in Australia or overseas.²³ The Law Council further notes that the failure of Australian family law to consider dowry in property settlements when it has been distributed amongst the spouse's family, rather than going directly to the spouse, has been attributed to a lack of understanding about dowry.²⁴

30. The Law Council cautions that any amendment should be very carefully worded, to accommodate the reality that in many cultural practices of dowry, the dowry does not go to the couple but rather is distributed amongst the family of one of the spouses.

²⁰ *Mehra & Bose (No.3)* [2013] FCCA 2273 (23 December 2013), [68] where it was noted although there is 'no specific law in Australia dealing with the return of dowry ... this Court has jurisdiction in respect of property matters as between parties to a marriage. In making property orders that are just and equitable as between the parties, the Court must consider the statutory factors in s.79 of the Act. This would include contributions made to the acquisition of property before, during and following separation.' This position was also taken in *Hashim v Hashim* (2012) FamCA 135 where the court dealt with the dowry as part of the overall available asset pool, subject to the normal formula of a just and equitable property division of the matrimonial assets rather than a debt owed to wife. Similarly, in *Singh & Dala* [2017] FCCA 2945 it was accepted that the wife's family paid a \$100,000 dowry and it was included in the property settlement as a \$100,000 contribution brought to the marriage by the wife.

²¹ *Sachar & Sachar* [2017] FCCA 3116.

²² *Ibid*, [59].

²³ Legal Services Commissioner of New South Wales, *Submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence* (2017) 4.

²⁴ Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) 46.

There are reports of this resulting in women being forced to stay in relationships where there is family violence present because they are unable to repay the dowry.²⁵

31. Australian courts have not entertained orders to specifically retrieve or recover dowry on behalf of the giving family/spouse upon a breakdown of the marriage. Although arguably, there is sufficient power within section 114 of the Family Law Act to restrain one party from taking action to recover dowry from another party, following a property settlement which has taken the issue of the dowry into consideration pursuant to section 79. The Law Institute of Victoria has suggested that it may be worthwhile considering such a specific power within the legislation. The Law Council notes however that there is a concern with identifying and targeting a particular cultural practice rather than strengthening legislative powers to target all abusive practices that may require a similar remedy.
32. In *Sahni & Kamdar*²⁶ the Court made procedural orders to enable a party to seek relief in a foreign jurisdiction related to dowry. Though the wife was enjoined from proceeding with cases she had on foot in India for property and maintenance, she was specifically allowed to prosecute the criminal proceeding also instituted in India, by the wife and her parents against the husband and his parents seeking relief in relation to an alleged dowry-related abuse. The Court found it could not determine a claim for the return of dowry:

*The present application may also be contrasted with a case in which the parties were not identical or in which relief being claimed in India could not be claimed in Australia. As to this, it was common ground that an Australian court has no jurisdiction to determine a claim in the nature of an application for the return of a dowry. However, as the plurality observed in Henry v Henry 185 CLR at 590, even where the issues or parties in the foreign proceeding are not precisely the same, it may nonetheless be appropriate to grant a temporary stay to allow the factual issues to be decided in the foreign proceedings. Those observations are perhaps apposite in relation to the proceeding instituted in August 2017 by the respondent and her parents against the applicant and his parents seeking the return of the parents' alleged dowry. Although the applicant did not seek an anti-suit injunction in relation to the entirety of that proceeding, the claims made respecting the claim for return of a dowry include claims that the respondent be provided with accommodation and paid maintenance on a monthly basis.*²⁷

33. Difficulties arise, as with any property of a marriage, when both parties allege contribution, or the property is in the possession of the other party, or a person who is not a party to proceedings. Where neither party can provide evidence, the risk is that the court will exclude the dowry from the property pool. This can be particularly detrimental to a wife and her family, who may have raised a sizeable dowry which was significantly disproportionate to their income and financial standing. The detriment could be compounded further by the return of the wife to her country of origin, upon the breakdown of the marriage which is likely to carry significant cultural and social stigma. Alternatively, if the wife is able to remain living in Australia, she may experience significant financial disadvantage and isolation from her community because of such stigma.

²⁵ See Australasian Centre for Human Rights and Health, submission no 4 to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those effected by family violence* (2017) 4, 7.

²⁶ *Sahni & Kamdar* [2018] FCCA 937.

²⁷ *Ibid*, [136]

Definition of 'family violence' in the Family Law Act

34. The adequacy of the family law system to deal with issues of dowry-related abuse may be hampered by a lack of clear signposting that dowry-related abuse is a form of family violence.
35. Dowry-related abuse is a kind of economic abuse that encompasses coercive demands of a spouse or spouse's family for money, property, or substantial gifts, where the value of the gifts is not commensurate with the income of the families, from the other spouse or their family, before and after marriage.²⁸ The practice also includes a refusal to allow a spouse access to the dowry funds, and can manifest in threats, domination, intimidation, psychological abuse and physical violence.²⁹
36. On 7 May 2018, the Law Council produced a submission the Australian Law Reform Commission (**ALRC**) in relation to its 'Review of the Family Law System'.³⁰ Within that submission, the Law Council gave consideration to the adequacy of the definition of 'family violence' under the Family Law Act. In those submissions to the ALRC Family Law Review, the Law Council recommended:

*The LCA notes the experience of family violence by different sectors in the community may be broader than the examples contained in the definition in s 4AB. For example, specific types of behaviours experienced in Aboriginal and Torres Strait Islander, culturally and linguistically diverse and LGBTIQ communities. The LCA invites consideration of the definition, or inclusion of examples in the definition, to include specific types of behaviour that is experienced by mainly one section or sections of the community as referenced in the National Domestic Violence Benchbook to recognise and make these forms of family violence visible.*³¹

37. The National Domestic and Family Violence Benchbook includes a context statement in relation to 'cultural and spiritual abuse' which includes dowry-related abuse as a specific example in the following terms:

*... asserting his entitlement to a dowry from the victim's family, or punishing the victim or her family for what he claims to be an insufficient dowry.*³²

38. Of relevance is the pattern of behaviour intended to intimidate, coerce, control and cause the person to become fearful which amounts to the abuse, as distinct from the cultural practice of dowry *per se*. The National Domestic and Family Violence Benchbook is a positive start, however, it should be supported by sector training to raise awareness of the types, dynamics and consequences of family violence.
39. Although dowry-related abuse may arguably fall within the meaning of 'family violence' in section 4AB of the Family Law Act as a form of financial abuse or behaviour intended to coerce, control or cause a person or their family member to become fearful, there is some uncertainty about how this is understood by stakeholders.³³ As such, while the definitions of domestic and family violence could be harmonised nationally, making family violence more visible through information,

²⁸ Victorian Royal Commission into Family Violence, *Final Report* (2016) vol 5, 113

²⁹ *Ibid.*

³⁰ Law Council of Australia, *Submission to the Australian Law Reform Commission's Review of the Family Law System – Issues Paper 48* (7 May 2018), available at <www.lawcouncil.asn.au/resources/submissions/review-of-the-family-law-system-issues-paper-48>.

³¹ *Ibid.*, [177].

³² National Domestic and Family Violence Bench Book, at 3.1.5.

³³ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those effected by family violence* (2017) 245 [7.59].

education and funding services to support victims of the family violence and provide them with protections under the law are key.

40. Additionally, increased funding for community legal education to raise greater awareness of rights, obligations and remedies under the Family Law Act including access to the family law system generally, would be apposite.

Recommendation:

- **That the definition of ‘family violence’ in section 4AB of the Family Law Act be reviewed, with consideration given to the inclusion of examples in the definition to include specific types of behaviour as referenced in the National Domestic and Family Violence Benchbook.**

41. The Law Council notes some of its members, including the Law Institute of Victoria, have recommend an approach in line with the following measures adopted in Victoria:

- (a) That the examples of family violence provided in subsection 4AB(2) of the Family Law Act be expanded to include specific types of behaviour as referenced in the National Domestic and Family Violence Benchbook to recognise and make these certain forms of family violence visible.

The Law Institute of Victoria has suggested the inclusion of dowry-related abuse should be in similar terms to recent amendments to the *Family Violence Protection Act 2008* (Vic) which inserts ‘using coercion, threats, physical abuse or emotional or psychological abuse to demand or receive dowry, either before or after a marriage’ into the list of examples of behaviour that may constitute family violence.

- (b) That consideration should be given to harmonising state and territory family violence legislation to that introduced in Victoria, to enable victims to more easily apply for family violence protection orders.
- (c) That training be delivered to inform judicial officers about the difficulties and complexities that they can experience in deciding matters involving dowry-related abuse.

Dowry-related abuse and property proceedings

42. While a large proportion of family law matters settle outside of court, the cases that continue on to a hearing are often resolved by a consent order.³⁴ Research highlights that women who have experienced family violence, such as dowry-related abuse, experience worse financial outcomes post-separation than women who have not experienced family violence, with both groups experiencing significantly worse post separation financial outcomes than men.³⁵

43. The Law Council is aware of reports of property division processes which can potentially be exploited to perpetuate financial abuse by providing the alleged perpetrator with the opportunity to exert control over the victim in private settlement, through the mediation process or through excessive litigation.³⁶ Vexatious litigation

³⁴ Patricia Eastreal, Lisa Young and Anna Carline, ‘Domestic Violence, Property and Family Law in Australia’ (2018) 32 *International Journal of Law, Policy and the Family* 204, 208.

³⁵ *Ibid.*

³⁶ *Ibid* 207-8.

can potentially be used to continue patterns of coercive control in family law property settlement matters, with three times as many vexatious litigants in family law litigation than in any other superior court combined.³⁷ However, the Law Council notes the Family Court's new powers under section 45A of the Family Law Act to summarily dismiss proceedings that are deemed frivolous, vexatious or an abuse of process, which has the potential to address these concerns into the future.³⁸

Treatment of family violence in financial matters

44. Although family violence is a relevant factor under Part VII of the Family Law Act with respect to disputes about children, there are no provisions in the Family Law Act dealing specifically with the relevance of family violence in property and/or financial disputes under Parts VIII, VIIIA and VIIIB.
45. In the absence of legislative guidance, the Family Court has developed a principle allowing a history of a course of conduct (in that case family violence) to be considered relevant to property settlement outcomes. Since *Kennon v Kennon*³⁹ Australian courts can take the financial consequences of family violence (or other behaviours like alcohol abuse) into account when determining whether property settlements are 'appropriate' and 'just and equitable' by considering the past contribution factors outlined in subsection 79(4) and the future factors outlined in subsection 75(2) of the Family Law Act (incorporated by paragraph 79(4)(e)).
46. The law as it is applied is discretionary and the scope of its application defined. In order to satisfy the *Kennon* test, the party must prove:
- they were subject to a violent course of conduct during the marriage; and
 - the conduct had a significant adverse impact upon the party's contribution; or
 - the conduct made those contributions significantly more arduous.
47. The onus is on the victim of the family violence to prove family violence occurred, and the causal connection between the family violence and the financial impact.
48. The Law Council notes some members and the Law Institute of Victoria consider that the *Kennon* test sets a high threshold and may not always adequately address the relevance of family violence to the subsection 75(2) prospective factors.⁴⁰ The Law Institute of Victoria has suggested that the test may be construed to operate to exclude the consideration of violence that does not fall exactly within the formulation of the test.⁴¹ Accordingly, it is argued that this and the vague and uncertain application of the test has led to its underutilisation. Recent research tracking judgments in 2016-17, identified 19 judgments where a party raised a *Kennon* claim, with a *Kennon* adjustment being made in 7 of those cases.⁴² This, as noted by the Law Institute of Victoria, is consistent with earlier research.⁴³

³⁷ Ibid 208.

³⁸ As introduced by the Family Law Amendment (Family Violence and Other Measures) Bill 2018.

³⁹ (1997) FLC 92-757.

⁴⁰ National Domestic and Family Violence Benchbook, [10.8].

⁴¹ Patricia Eastaerl AM, Catherine Warden and Lisa Young, 'The *Kennon* 'factor': Issues of indeterminacy and floodgates' (2014) 28(1) *Australian Journal of Family Law* 1, 10; Patricia Eastaerl, Lisa Young and Anna Carline, 'Domestic Violence, Property and Family Law in Australia' (2018) 32 *International Journal of Law* 204, 208, 213.

⁴² Ibid, 215.

⁴³ Ibid 10-11, 13; Eastaerl, Young and Carline, above n 37, 215, over a seven-year period, 57 judgments where a *Kennon* claim was raised, with an adjustment being made in just 42% of cases, even though the judicial officer accepted the violence claimed had occurred in 72% of the matters.⁴³ In addition, the adjustments, when specified, were minor.

49. However, the Law Council repeats the arguments for and against suggested codification of Kennon as detailed in the Law Council's submissions to the 2017 *Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence*⁴⁴ and queries why (if it were to be pursued) inclusion of amendments in respect of family violence would be restricted only to property settlement matters, rather than also being considered in the context of spouse maintenance and child support issues as well.
50. In particular, attention is drawn to the following considerations raised in the Law Council's earlier submissions:

The Kennon decision is oft spoken of as being based on family violence issues, but in fact the Full Court decision was not limited to that area alone. It also looked at circumstances where contributions by a party were made arduous where for example the abuse of alcohol was a factor. Endeavours to codify Kennon into statute may unintentionally restrict the law that has developed, if an amendment to the Act speaks only to circumstances of family violence.

The Family Court has already by Kennon (and leaving to one side arguments about whether what the Full Court said was ratio or obiter) provided for recognition of family violence and other matters within the existing statutory framework. The court should be permitted to continue, on a case by case basis, to develop the application of and availability of Kennon style claims.

If the motivation for codification is to address the limited reported use of Kennon claims, then it needs to be understood that codification will not circumvent the need for evidence that is particularised and relevant. Many Kennon style claims currently fail not because clients and lawyers are not cognisant of the relevance of family violence, but rather for reason of lack of admissible evidence and the inability to adduce evidence that establishes that there is a causal link between the acts of family violence and the nature and extent of and circumstances in which a party has made their contributions. The mere amendment of subsections 79(4) and/or 75(2) (and their de facto relationship equivalents) in the Act will not address that problem, so the risk then becomes that any amendments to the Act do not resolve the Evidence Act issues.

The Act and Kennon claims do not 'cover the field' in this area, such that litigants can still bring personal injury damages claims in the courts of the states and the territories in addition to claims for property alteration, or can ask that any such tortious claim be dealt with in the family courts together with the Act property claim under the accrued or associated jurisdiction of the courts.

If the Act were to be amended to make family violence a factor required by statute to be considered in property claims, the existence of that additional consideration will likely have the effect of making settlement of cases more difficult and hence increase the number of cases being both filed in the family courts, and which go to final trial and determination in the family courts. This may have a very significant financial impact on both the courts and the legal aid services and cause major revenue implications for the Federal Government.⁴⁵

51. Although financial abuse is included as an example of family violence within the definition of family violence under the Family Law Act, this is not well understood and

⁴⁴ Parliament of Australia, 'Parliamentary inquiry into a better family law system to support and protect those affected by family violence (2017)', submission no. 85.

⁴⁵ Ibid, [95]-[99].

proving such an intangible form of violence, and such a connection to adverse financial consequences as to justify an adjustment, may be prohibitively difficult.⁴⁶

52. The Law Council notes that the Law Institute of Victoria has, in light of existing case law which found post-relationship family violence was also a relevant consideration in adjusting property,⁴⁷ recommended amendments to the Act to:

- (a) explicitly include reference to the relevance of family violence as a factor to be considered when deciding a spousal maintenance order or a property settlement order under subsection 75(2) of the Family Law Act without reference to whether the violence occurred during the marriage or de facto relationship; and
- (b) amend subsection 79(4) and section 90SM of the Family Law Act to include family violence as a relevant factor to be taken into account when the court is considering an appropriate property order without reference to whether the violence occurred during the marriage or de facto relationship.

53. The Law Institute of Victoria has also endorsed the approach advocated for by Easteal, Young and Carline, to amend the *Family Law Rules 2004* (Cth) to:

- (a) provide the same notifiers of violence as those required in relation to parenting matters under Rule 2.04;
- (b) extend Rule 10.15A so that where a property order is sought by consent, and allegations of violence have been made, the alleged victim's lawyer is obliged to address the court as to the impact on their client's consent, if any, of the alleged violence (noting however that such reforms must comply with existing rules in relation to solicitor/client privilege);
- (c) change the case management process outlined in Chapter 2 to ensure property cases with alleged violence are identifiable, and pre-trial processes minimise unwanted contact; and
- (d) adapt the Family Violence Best Practice Principles to apply to cover financial disputes, rather than just parenting matters.

Nullity or Divorce

54. The question of whether nullity or divorce is granted under Australian law may impact on some members of the communities that engage in the practice of dowry and/or dowry-related abuse. Under Islamic law for example, the equivalent of an annulment ('*faskh*') when fault occurs on the part of the husband, entitles the wife to the *mahr* (dowry).

55. Furthermore, annulment may be a more attractive option than divorce for women from culturally and linguistically diverse communities because of strongly held religious convictions on the indissolubility of marriage and the cultural stigma of divorce.

⁴⁶ Women's Legal Service Australia, submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those effected by family violence* (2017), 35.

⁴⁷ See, *Baranski & Baranski* [2012] FamCAFC 18, [259], where the court accepted post-separation violence could be a relevant consideration when assessing contributions under section 79, and by implication pre-marriage violence could also be considered.

56. Under subsection 23B(1) of the *Marriage Act 1961* (Cth) (**Marriage Act**), courts may issue a declaration of nullity in the case of bigamy or close relations, or where a party's consent was obtained by duress or fraud, mistake or mental incapacity, or where a party is not of marriageable age.
57. There is no legislative provision explicitly directing the courts to have regard of the parties' cultural norms or background in determining nullity. Despite the increasing numbers of applications for nullity brought before the Family Court by members of culturally and linguistically diverse communities, some incongruity arises between the prescribed grounds and the values and beliefs of those communities which may be different to the western secular concept of marriage.
58. The case of *Sikander & Vashti*⁴⁸ demonstrates the difficulty faced by members of culturally and linguistically diverse communities attempting to obtain a declaration of nullity. In this case, the trial judge was unpersuaded the 'culturally arranged' marriage was obtained through the fraud or duress of the bride's parents, notwithstanding evidence of the context of the marriage raising considerable concern⁴⁹ and subsequent finding by the appeal court's finding that the wife's mental incapacity was proved upon new unequivocal evidence of incapacity from a treating psychiatrist.
59. The Law Council suggests that there may be scope to review the need to amend the Marriage Act to include a note to the definition of duress, containing an example of the kind of coercion culturally and linguistically diverse women are subjected to, including coercion related to dowry.
60. Given the review of the Family Law System currently being undertaken by the ALRC which includes a consideration of the property settlement regime and the adequacy of the definition of family violence, consideration ought to be given to these issues by the ALRC as part of its review.

Dowry in migration law matters

The extent to which spouse or family visas enable or prevent dowry-related abuse

61. Currently there is no specific mechanism to enable or prevent dowry-related abuse within the migration law framework. The only way a woman can address the issue of dowry-related abuse is if the marriage ends and she has been the victim of family violence, the violence was perpetrated by her sponsor husband and she can prove the violence.⁵⁰ By then it is too late to address the impact of dowry on the marriage, and this process carries some issues as described below.
62. Furthermore, practitioners have reported that their experience of clients from cultures where dowry-related abuse may exist, is that such clients find it very difficult to speak out against their husband and/or husband's family.
63. The Law Council has been made aware of practitioner concerns that Department of Home Affairs case officers, when assessing the genuineness of a relationship, may misunderstand dowry as a kind of payment for a visa because a sponsor spouse may be demanding money from the applicant spouse and threatening to withdraw sponsorship if dowry is not paid. This is particularly concerning because should the

⁴⁸ *Sikander & Vashti* [2018] FamCAFC 111 (20 June 2018).

⁴⁹ No prior encounter by the couple, wife's reluctance to speak to the groom or ability to engage in the ceremony, her sedation and fragile mental health, including a diagnosis of psychosis.

⁵⁰ *Migration Regulations 1994* (Cth), Part 1 Div 1.5.

Department deem the relationship as not genuine, any family violence claims becomes irrelevant, leaving the victim with no grounds for a permanent visa, and making them liable for detention and removal.⁵¹

64. It is submitted that this may be able to be addressed through both changes to the definition of family violence to include dowry-related abuse under the *Migration Regulations 1994 (Cth)* (**Migration Regulations**) as well as adequate training for case officers to better understand dowry and how it should be assessed when considering genuineness of relationships under the Migration Regulations.
65. Consideration for family violence provisions under the Migration Regulations to extend to cover those who arrive in Australia on a 309 Visa who have experienced dowry-related abuse which is often coupled with family violence prior to arrival in Australia. There have been a number of cases where the visa holder arrives in Australia only not to be met at the airport by her husband because the dowry is still owing or a request for more has not been paid or the relationship breaks down shortly after arrival due to such abuse.

Recommendations:

- **That the definition of family violence in the Migration Regulations be reviewed to ensure it includes dowry-related abuse.**
- **That there be adequate training provided to Department of Home Affairs case officers to better understand dowry and how it should be assessed when considering genuineness of relationships under the Migration Regulations.**

Vulnerabilities due to temporary migration status

66. Research has shown that migration status, particularly temporary migration status, is a 'significant risk factor' for family violence.⁵² Temporary migration status makes women vulnerable to family violence due to the fear and threat of deportation, separation from family or return to country of origin, with potential associated shame, violence and ostracism.⁵³
67. Furthermore, abusive partners or their family members can use the significant power imbalance, created when they are citizens or have permanent residency and their partner has uncertain visa status, to threaten or control the applicant spouse.⁵⁴ It is submitted that the vulnerability of culturally and linguistically diverse women without permanent residency may be aggravated by the limited access to Centrelink benefits, crisis accommodation and health and education services.⁵⁵
68. The Law Council has been made aware of practitioner reports that many women are unaware of their right to access family violence protections under the law, or that they have the ability to obtain a permanent visa if they have applied for a partner visa or hold a provisional partner visa.
69. The fact that victims can only access family violence protections and pathways to a permanent visa once the marriage has ended is a barrier to such access because

⁵¹ Marie Segrave and Cathrine Burnett-Wake, *Contemporary Comment: Addressing Family Violence through Visa Sponsor Checks: A Step in the right Direction?* (2017) 29(2) *Current Issues in Criminal Justice* 118, 158.

⁵² Jude McCulloch, Jane Maree Maher, Kate Fitz-Gibbon, Marie Segrave and James Roffee, *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF): Final Report*, (2016) 55, 84.

⁵³ *Ibid*; Victorian Royal Commission into Family Violence, *Final Report* (2016) vol 5, 107.

⁵⁴ Victorian Royal Commission into Family Violence, *Final Report* (2016) vol 5, 109.

⁵⁵ *Ibid*, 110.

they are often victims of economic abuse, and/or are totally on their husbands for financial support and cannot afford to leave the marriage or even to seek help legally in secret from their husbands as they do not have the financial means to do so.

70. The Law Council suggests that consideration should be given to the provision of specific funding for a scheme to assist women who are the victims of dowry-related abuse to obtain legal assistance. It is noted that while community legal centres are available to women in this predicament, they may lack specialist knowledge on migration law, and those with such expertise may not have the resources to respond to the demand.
71. Further the Law Council recommends the provision of education as part of the sponsorship approval in the partner visa space for applicants and sponsors about the impact of dowry-related abuse practices on victims, and the supports and services available should any form of family violence occur. In this regard, the Law Institute of Victoria has pointed to the then Department of Immigration's successful education program in Thailand, which informed potential visa applicants of what is and is not acceptable, and suggests this program be duplicated and incorporate information around abusive behaviours such as control of bank accounts and domestic servitude.
72. The Law Council agrees with the ALRC's assertion in its 2011 report into Family Violence and Commonwealth Laws that, rather than instituting a separate criterion for sponsorship, the safety of victims of family violence can be promoted through targeted education and information dissemination.⁵⁶ The Law Council consequently also endorses the ALRC's recommendation that the Australian Government collaborate with migration service providers, community legal centres, and industry bodies to ensure that information about legal rights and the family violence exception are provided to visa applicants prior to and on arrival in Australia. Such information should be provided in a culturally appropriate and sensitive manner.⁵⁷
73. The Law Council also endorses the ALRC recommendation that the Australian Government collaborate with relevant migration service providers, community legal centres, and industry bodies to ensure targeted education and training on family violence issues for visa decision makers, competent persons, migration agents and independent experts.⁵⁸ In particular, the Law Council recommends cultural competency training for case officers around the practice of dowry and how it should be considered when assessing the genuineness of a relationship.

Recommendations:

- **That consideration be given to the provision of specific funding for a legal assistance program to assist women who are the victims of dowry-related abuse to obtain legal advice.**
- **That the Government collaborate with migration service providers, community legal centres and industry bodies to ensure that information about legal rights and the family violence exception are provided to visa applicants. Such information should be provided in a timely, culturally appropriate and sensitive manner.**

⁵⁶ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011) 508 [20.79].

⁵⁷ *Ibid* 512, Recommendation 20-6.

⁵⁸ *Ibid*, Recommendation 4-5.

Family violence provisions in migration law

74. While there are some protections under Australian migration law for victims of dowry-related abuse, it is submitted that there is scope for improvement. The family violence provisions found in Division 1.5 of the Migration Regulations determine whether, under Australian migration law, family violence is taken to have occurred. If it is deemed to have occurred, certain visa applicants may continue to be able to obtain a permanent visa, even where the relationship with their partner/sponsor has ceased. These provisions exist to ensure that visa applicants do not feel compelled to remain in an abusive relationship in order to maintain their visa status.
75. In light of the increasing numbers of applicants accessing the family violence provisions, and the object of ensuring people are not trapped in situations of family violence due to visa requirements, the Law Council recommends changes to the Migration Regulations.
76. Currently, the definition of 'relevant family violence' is set out under Regulation 1.21 of the Migration Regulations to mean conduct, whether actual or threatened, towards:
- (a) *the alleged victim; or*
 - (b) *a member of the family unit of the alleged victim; or*
 - (c) *a member of the family unit of the alleged perpetrator; or*
 - (d) *the property of the alleged victim; or*
 - (e) *the property of a member of the family unit of the alleged victim; or*
 - (f) *the property of a member of the family unit of the alleged perpetrator;*
- that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.*
77. While dowry-related abuse may fall within the current definition of 'relevant family violence' (depending on the nature and severity), the Law Council recommends that 'financial abuse and 'controlling behaviour' be included in the definition to ensure this type of abuse is captured. One option put forward by the Law Institute of Victoria is that the definition could be made consistent with the *Family Violence Protection Act 2008* (Vic), to ensure people seeking to escape violence are entitled to crisis payments, regardless of their visa status.⁵⁹
78. The Law Council further supports the ALRC recommendation that the Australian Government repeal the provisions of the Migration Regulations that require that the family violence occurs while the marital or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.⁶⁰ It is submitted that violence occurring before the relationship meets the de facto criteria or before the marriage, during the separation and after the marriage should be taken into account.
79. Another inadequacy of the family violence provisions is the requirement that family violence needs to have been perpetrated by the sponsoring partner and that violence from members of the sponsor's family will generally not be sufficient to engage the

⁵⁹ Victorian Royal Commission into Family Violence, *Final Report* (2016), recommendation 162.

⁶⁰ Regulations 1.23(3), (5), (7), (12) and (14).

definition.⁶¹ It is therefore recommended that there be amendments to the Migration Regulations to extend the definition beyond intimate partner violence. This will allow women who are being coerced, treated as subservient or abused by in-laws within the context of dowry-related abuse to also have access to the family violence provisions.

80. Further, the Law Council recommends the family violence protections be extended by removing the requirement in Schedule 2 of the Migration Regulations⁶² that the relationship between the applicant on a subclass 309 (Partner (Provisional)) visa and the sponsoring partner has ceased. This will enable Part 1 Division 1.5 of the Migration Regulations to cover women without the means to support themselves outside of their partner or spouse. In particular, practitioners have reported it is common for a partner to arrive in Australia on a Subclass 309 (Partner (Provisional)) and not be met at the airport or accepted by the spouse because the sponsoring partner considers dowry is still owing.
81. A final identified inadequacy of the family violence provisions is that they only apply to certain visa subclasses and not to other family visas such as carer visas, aged dependent relative visas, remaining relative visas, New Zealand citizen family relationship visas or parent visas.⁶³ It is submitted that there is scope to extend the family violence provisions to other relevant visa categories, and the Law Council endorses the ALRC recommendations that address the inconsistent and differential application of the family violence provisions regarding different visa subclasses.⁶⁴
82. The Law Council considers that there is no sound policy reason behind affording protection to only those who hold certain visas and such inconsistency and differential applications threaten the safety of victims of family violence.

Recommendations:

- **That consideration be given to extending the requirement for family violence to have occurred while the marital or de facto relationship existed, allowing violence occurring before the marital or de facto relationship began, as well as during separation and after the marriage to be taken into account.**
- **That the requirement for family violence to have been perpetrated by the sponsoring partner be reviewed with the view to extending the definition beyond intimate partner violence.**
- **That family violence protections be extended by removing the requirement that the relationship between the applicant on a subclass 309 (Partner (Provisional)) visa and the sponsoring partner has ceased.**
- **That the inconsistent and differential application of the family violence provisions regarding different visa subclasses be addressed in line with the recommendations of the ALRC.**

⁶¹ See, *Bhalla v Minister for Immigration and Border Protection* [2016] FCA 395.

⁶² Regulation 100.221(4).

⁶³ Department of Home Affairs, *Fact Sheet: Family Violence Provisions*, online at <www.homeaffairs.gov.au/about/corporate/information/fact-sheets/38domestic>.

⁶⁴ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011), 496-499, recommendations 20-1 and 20-2.

Evidence to support an application under family violence provisions

83. The Law Council is concerned the 'onerous and proscriptive' evidentiary requirements to prove a claim of family violence are preventing victims of dowry-related abuse from accessing the family violence protections.⁶⁵
84. The Law Council is supportive of the ALRC's recommendation that the Migration Regulations be amended to provide that an applicant can submit any form of evidence to support a non-judicially determined claim of family violence.⁶⁶
85. The current complex and specific requirements in IMMI 12/116 mandate that the victim obtain a document from a specified professional, such as a doctor, a nurse, a police officer or a child protection worker.⁶⁷ The Law Council is concerned that the current requirements present practical barriers for culturally and linguistically diverse women who may lack independent financial resources to access such services, or the English language or literacy skills to be properly understood if they can gain access.⁶⁸
86. Furthermore, it is submitted that the requirement for many of the professionals to identify the alleged perpetrator in their report is too onerous, as they may only be able to do so through what they were told by the alleged victim.⁶⁹ If such identification is necessary, it would be preferable to allow evidence to be adduced by people who would actually have the opportunity to witness the violence being perpetrated, such as family, friends or community members.
87. Similarly, the requirement that such professionals state that in their opinion the victim has suffered violence, without having witnessed the violence first-hand, is submitted as being overly onerous.⁷⁰ The Law Council submits that professionals should be able to say that the evidence they have, including bruising or behaviour patterns, is indicative in their professional opinion of the violence alleged.

Recommendations:

- **That the Migration Regulations be amended to provide that an applicant can submit any form of evidence to support a non-judicially determined claim of family violence, in line with the recommendations of the ALRC.**

⁶⁵ Lauren Gray, Patricia Easteal and Lorana Bartels, 'Immigrant women and family violence: will the new exceptions help or hinder victims?' (2014) 39(3) *Alternative Law Journal*, 168.

⁶⁶ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011), 534, recommendations 21-3 and 21-4.

⁶⁷ *Migration Regulations 1994 – Specification of Evidentiary Requirements - IMMI 12/116*, Schedule 1.

⁶⁸ Lauren Gray, Patricia Easteal and Lorana Bartels, 'Immigrant women and family violence: will the new exceptions help or hinder victims?' (2014) 39(3) *Alternative Law Journal*, 168.

⁶⁹ *Ibid.*, 170.

⁷⁰ *Ibid.*