13th July 2018

The Chairman
Senate Standing Committee on Legal and Constitutional Affairs
Canberra

By Email

Dear Senator MacDonald,

FLA (Family Violence and Cross-examination of Parties) Bill 2018

We detest litigation in family law matters. We welcome this statutory recognition that litigation is violent – even if this Bill only ever relates to 0.09% of FVOs issued per annum.

We support the intent of this legislation to reduce one of several poor characteristics of family law litigation.

Nonetheless, this Bill ignores a few problems that may generate ***unintended consequences*** of significant magnitude. The problems - *which can be solved with careful amendment to the Bill* - are best illustrated by an example of a theoretical family who vote for you, The Joneses.

Catherine Jones: nurse: has a husband who sent their assets to Switzerland – no cross examination

Catherine's husband Tom announces their divorce to her a night after sending $5m of their wealth to Zurich Bank AG. She gets an FVO. Cath gets very angry and screams a bit. Tom's cousin, a lawyer, tactically seeks and gets a retaliatory FVO against her, claiming Tom is "apprehensive". (The reason for her anger – the blatant theft – is irrelevant, says the FVO law.) Each is given the average "hearing" – 150 seconds on FVOs before Magistrate Graeme.

Cath has no assets, only family in Wales, so when her case commences in the Family Court she applies to Judge Judy ***for release of uncontested cash***. But Judge Judy refuses to release cash because financial rationality "is not the family law way". Catherine cries herself senseless and has no strength to self-represent against the final FVO. As she is ***asset rich but cashflow poor*** she is denied legal aid in her Family Court case. Cath cannot cross-examine Tom, so his evidence of no assets in Switzerland is unchallenged in Family Court. Unjust, but not confronting for Tom at all.

Grace Jones: mum, former tax lawyer: self represents in burgeoning queues in Magistrates Courts

Grace has an FVO application against her for yelling and she self-represents in the Magistrates Court. However, so do 6,000 others - because since the passage of this Bill, it is now rational to fight an FVO unless you are happy not to cross-examine your spouse in your family law case. Whereas to date only ~6% of FVO applications were contested, thousands now do so because the community has learned that failing to do so bars them from cross-examining their spouses in Family Court. Consequently, Magistrates Courts collapse and states correctly identify the cause and push for compensation from the Federal Treasury.

So ***instead of waiting 9 months, Grace is now waiting 22 months for a final FVO hearing.*** It's beyond chaotic. Magistrate Graeme has his own overload problems and gets the final hearing dates wrong. A Final Order is thus automatically issued. Grace now can't cross-examine David in Family

Court at the interim stage because her FVO is final, so she gets even more angry. Judge Judy gives David greater access time with their children than any other dad. More inane litigation lotto.

Indiana Jones: archaeologist – dying of testicular cancer

After reading an AFR article on what family lawyers recommend, Bridget drains all the money out of a joint NAB account and tells her husband Indiana she has a 21-year-old boyfriend. Indiana is very angry because he needed the cash for chemo. An FVO is duly issued for anger mismanagement (again, reasons for anger are deemed irrelevant). Family Judge Jim makes it clear that "The FLA (FVCEP) Act 2018 ties my hands" and that he won't allow Indy access to any portion of the family wealth pool to fund a barrister. He gets allotted Freddie, a 25-year-old trainee barrister, who forgets his name, the kid's name and is comprehensively dusted by Bridget's QC. Some 4 years later Judge Jim awards 65% to Bridget because Indiana has "no future health needs".

When Indiana dies of stress, Grace takes his case to The High Court. Gaegler CJ (applying ***Condon*** (2013) HCA 7, #180-196, ***Russell*** (1976) HCA 23, the famous US family law spousal cross examination case of ***Elkins*** (2007) 41 Cal. 4th 1337) and some astute observations of Sir Maurice Byers QC) strikes down this Act. If you want adversarial justice, he says, then no kangaroo courts, no 150 second usurpation of constitutional facts, and no more silly stuff by Judge Jimmy impeding Indy from counsel of his choice. Over $4 billion of property cases are thus voided under "the judicial power": who pays?

Catherine and Grace talk to their Uncle Alan. He encourages them not to comply with Family Court Orders as "they should all be thrown overboard in a chaff bag". The Jones family now all vote PHON.

To summarise

If this Bill prohibits cross-examination of spouses under all FVOs, not only those where physical violence is asserted, then:

(a) A further upsurge in FVO claims should be expected. Why? Because according to Sydney academics, 100% of family lawyers see them already used for tactical purposes in family law litigation. And over 16% of FVOs are already retaliatory.

(b) Expect a far higher proportion of FVO applications to become contested, with potential catastrophic impact on queues in Magistrates Courts in all States. Why? Because a Men's Rights Group already tweets this very message every weekend to many and when you deprive people of access to legal advice in state courts, the internet now fills the information void. It's much more pervasive than angry dads kvetching at the pub.

(c) The current standard practice of refusing to facilitate rational interim distributions will crater this Bill. Why? Because it gives people no other option in Family Court if they suffer injustice or perceive they do. Financially irrational behaviour pushes problems elsewhere.

(d) If the Bill provides no mechanism for a party to cross-examine their spouse in person nor access to their own funds to hire legal counsel, then expect either constitutional challenges or further mass civil disobedience in due course with possible social, financial and political fallout.

(e) Compliance with Court Orders is currently a major concern. If a large swathe of the litigating population believe that this is an unfair process, expect compliance rates to decline further and contravention order applications to increase.

Solutions

Family Courts are shambolic. It doesn't matter why. There are only 4 main policy options that can pre-empt the foreeable consequences outlined above, given the relevant context of overcrowded courts:

1. Price cap the monopoly services of barristers.
2. Require litigants to narrow disputes from the get go so each spouse can afford to hire lawyers.
3. Hope people can borrow more money from friends, which is haphazard and unfair.
4. Hope Treasury doesn't look too closely at the AIFS predictions and FVO growth rates but try public funding of the measure on a contingency, without modelling its impact.

Additional subsections as the most efficient integrity measure

To repeat – we are in favour of the intent of this Bill, but strongly recommend some safeguards – so as not to repeat the mistakes of the past.

We suggest adding this language to 102NA:

4) *Parties to a dispute before any Court administering The Principal Act have an overarching obligation to procure the prompt payment of a sum representing the quantum of their financial dispute not reasonably in contention.*
5) *Registrars must roster accredited family lawyers to carry out any cross-examination in circumstances where sums paid under subsection (4) are less than $500,000.*
6) *Any person nominated by a Registrar under subsection (5) has a non-delegable personal obligation to perform the cross-examination as counsel for their designated examining party, save that payment for those services is not to exceed the sum of five hundred dollars.*

That's maximum net expenditure of $86,500 by Law Society members for the 122-173 citizens (on present numbers) who'll be constrained by this Bill. Co-opting officers of the Court ensures citizens do indeed have access to competent counsel and removes incentives that will otherwise vest somewhere else in the current dystopian system.

If you are not prudent, it is possible – in the context of scarce public resources – that this Bill will do more harm than good without safeguards. Forethought regarding likely behavioural impacts allows introduction of simple but effective safeguards that can pre-empt these well-meaning policy changes from having disastrous unintended results.

We wish you well in your deliberations of the impact of this Bill and thank you for your time in reading this submission.

Best Regards

Divorce Partners Pty Ltd.
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About Divorce Partners

We are a private sector mediation firm that enables primarily quintile 2 and 3 Australians to inexpensively and promptly resolve divorce disputes. We educate online by using general information and data. Our clients do not use lawyers because they cannot afford the lack of value on offer, legal aid doesn't have a budget for them and Relationships Australia has finite resources and long queues.

Divorce Partners was formed by folks with expertise in finance, economics, law, statistics, mediation, negotiation theory, operations research, technology and pinot noir. We deploy insights from an economics concept called game theory (essentially the mathematics of negotiating) to solve separation problems at very low cost.

We don't believe that bespoke legal advice is affordable, nor realistically achievable given the current mess in family courts. We apply statistics based on mediated community outcomes to outline a selection of normative solutions used by other demographically analogous couples. Couples narrow disputes quickly with data. Sometimes the couple is spoken to separately in shuttle communications, in compliance with the no talk terms of an FVO.

We resolve 84% of disputes in less than a month at a cost around 78% lower than our competitors. Some couples with complex situations may take a little bit longer. Some remain angry and fail. Some dither. Some do need the help of truly exceptional lawyers. Our standardised solutions do not work for everyone, but our clear focus on practical financial impacts and prompt proximate triage work for the vast majority – quickly, inexpensively and with lower stress levels than any other methods. We work very well with self-represented persons, taking many couples out of court queues and saving millions for children, adults and other taxpayers.

In many instances, especially in this demographic, the fees and financial carnage lawyers inflict are a multiple of the real financial gap between the parties. Our financially sane solutions are agreed by the vast majority of couples, documented by a panel lawyer, and approved daily by your registries.

We have strong views that the needs of modern Australia families require better solutions than those currently provided or being promoted by incumbents. We want to move to a system that can make separation prompt, fair, non-confrontational and efficient for all Australians. Not just those rich enough, subsidised enough, belligerent enough, or unlucky enough to end up in the vortex of our dystopian family courts confronted by their very cross spouses.

We look forward to a robust public debate next year about the overhaul of the current regime.