AUSTRALIAN BROTHERHOOD OF FATHERS

Submission to the Legal and Constitutional Affairs Legislation Committee Parliament House

Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019

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1 Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019 (The Bill) 3

2 Australian Brotherhood of Fathers (ABF)..... 3

2 (a) Our unique perspective..... 4

3 General Outline of The Bill 5

3 (a) ABF Response..... 5

3 (b) General Objection..... 5

4 Our position on property settlements in the Family Court system 6

4 (b) Inequitable financial impact 6

4 (b) The inequities of the system..... 7

4 (c) Domestic Violence claims in property settlement..... 7

4 (d) Inconsistencies of decisions within the jurisdiction 8

4 (e) Inconsistency of decisions in relation to Domestic Violence claims in property settlement 8

5 Superannuation Splitting 9

6 Extending Federal Bankruptcy jurisdiction 10

7 Recommendation..... 10

Submission to the Legal and Constitutional Affairs Legislation Committee, Parliament House

1 Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019 (The Bill)

On 11 December 2019, Mr Leith Erikson, Founder of the Australian Brotherhood of Fathers, was invited by Sophie Dunstone, Committee Secretary of the Legal and Constitutional Affairs Legislation Committee Parliament House, Canberra, to provide a submission in relation to the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019* [Provisions].

We are grateful for the invitation to provide this submission.

It is the Australian Brotherhood of Father understands that because the Committee is seeking comments on The Bill itself, there are no terms of reference for this bill.

2 Australian Brotherhood of Fathers (ABF)

The ABF is committed to fixing policy relating to family access after separation, to provide fair access outcomes for fathers, their children and their families. As part of this we seek to change how family access disputes are dealt with by the Family Law system in Australia. Our families deserve better outcomes from shared parenting laws that can keep our children connected to their parents post separation. Statistics are very clear regarding the negative social impact children from fatherless families have on our society and the ABF can no longer stand by and allow flawed social policy to continue to damage the future of our nation.

The problems we see nationally with social policies that relate to family access after separation, include:

- Lengthy delays in the legal process
- How disputed access is determined
- Use of no fact evidence in custody matters
- How child support calculations are made
- Reduced burden of proof for Domestic Violence matters
- Unenforced penalties for false allegation and perjury

Our families need care and support to deal with the trauma associated with the break down of relationships. Fathers dealing with limited child access to their children are more likely to struggle with long lasting emotional problems akin to Post Traumatic Stress Disorder.

We believe by providing a family focused plan that promotes the role of shared parenting where suitable, can prevent many of these health issues.

Parents should have natural rights of access and a legal responsibility to care for their children. We suggest some very simple changes will go a long way toward providing positive life outcomes for children, families and our society.

Our policy's relate to the main issues arising from the break up of relationships with children and reflect a common thread found among families dealing with access problems.

- Equal shared care on separation with mandatory enforcement
- Remove the Child Support Agency calculations and replace with a flat rate child care payment
- Introduction of heavy penalties for unfounded abuse allegations
- Capped cost outcomes associated with Family Court matters
- Establishment of a family access tribunal for child access issues
- Criminalize parental alienation as child abuse
- Provide gender neutral access to crisis accommodation and support

Families need to be given every opportunity to heal and move on with life. Our children deserve the very best outcomes which include access to both parents. Together we can bring positive reforms to child access after separation.

We believe implementation of these basic parental rights of access should be the priority for every community leader and at every level of government.

We therefore do not support any legislation or legislative amendments that support the current Federal Family Court regime without addressing the issues above.

https://www.theabf.org.au/

2 (a) Our unique perspective

We are uniquely placed within Australia to provide input into legislation. Our organisation is gender neutral and our services are available to all persons that come to us. Our legacy, as embodied in our name, has been in emphasising that our services are available for fathers, in an industry where there is much gender bias in the provision and availability of resources funding and services. As a result, we believe that we have Australian leading database on fathers affected by the system, including accurate statistics on domestic violence rates, gathered without the bias of gender models.

3 General Outline of The Bill

1. This Bill will give effect to a referral of power from Western Australia to the Commonwealth in respect of superannuation matters in family law proceedings for separating de facto couples in Western Australia.

2. This Bill will also extend federal bankruptcy jurisdiction to the Family Court of Western Australia to hear bankruptcy proceedings concurrently with family law proceedings, where appropriate.

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6454

3 (a) ABF Response

(1) The ABF opposes the establishment of a referral power from Western Australia to the Commonwealth in respect of superannuation matters in family law proceedings or separating de facto couples in Western Australia. The grounds are set out in this submission below.

(2) The ABF opposes the extending of federal bankruptcy jurisdiction to the Family Court of Western Australia. The grounds are set out in this submission below.

3 (b) General Objection

We believe that the current Federal Family Law system in this country is flawed.

We therefore do not support this proposed Bill on the basis that it would align Western Australia further with a system that we believe is flawed and in need of major reform.

4 Our position on property settlements in the Family Court system

As stated above, we are a unique organisation with most data on the experience of Father's navigating divorce and Family Law. In taking this approach, we do not attempt to de-emphasise the challenges faced by Mother's within the system. We have observed that the system is not gender neutral. The experience for Mother's and Father's unfortunately differs. There are significant resources already allocated to assisting women in the Family Law system, and there is an insufficient amount of those that are available to men.

As outlined in our introduction, we believe the best way to achieve an equitable outcome overall; is to have the focus of the system concentrate on the best interests of the Children. The legislation already decrees this, but the existence of conditions and exceptions means that in reality the single minded pursuit of a favourable outcome in divorce and in parenting and property matters results the best interests of the Children are not often achieved.

We observe this to be the case in property settlements under the current regime. The pursuit by one party to achieve the highest possible share of the asset base, and the approach used to achieve it, is not necessarily in the best interests of children. Under the current regime, the percentage of care of the children is a factor in determining property settlements. This is one of the multiple incentives in the current system for one party, more often than not, the Mother to seize and retain custody of the children in order to achieve a better outcome in the settlement.

Our legal practitioners indentify a pattern in cases whereby the Mother will hold the children, effectively hostage, to leverage a better property settlement outcome. Often the situation is relaxed post settlement, but not before inequitable harm is done to both the children and the Father.

We do not support a regime that incentivises less than equal shared care and parental alienation.

4 (b) Inequitable financial impact

Both parents have a right to retain financial security. Both parents have a right to be able to move-on from a failed marriage or relationship, to rebuild and to work towards financial independence. The original intention of the Child Support System was to establish a situation whereby children would experience households of similar wealth, with either the Mothers or their Fathers.

It is increasingly our experience that the Family Law system of asset division, spousal support and subsequent child support regime can project Father's into financial insecurity, poverty and distress.

In these cases the opposite might be applicable to the Mother, especially if she has re-partnered (combined household income is not a factor in child support calculations). In these cases, the children experience households of significantly differing affluence.

4 (b) The inequities of the system

The current system incentivises and de-incentivises certain behaviours. For example, the Father that feels he will be exceedingly burdened by ongoing financial obligations is de-incentivised from continuing his previous earning capacity. The media's "Deadbeat Dad" is often previously committed and productive father trying to come to grips with a future of financial servitude to a dishonest Mother that has taken the house, most of the wealth and possessions, and is withholding access to the children.

The Mother may be incentivised to make a false claim domestic violence to gain an advantage in the property settlement and custody dispute.

4 (c) Domestic Violence claims in property settlement

Domestic Violence remains a serious issue within our society. Domestic Violence can occur in heterosexual and same-sex relationships. Domestic Violence can be committed by men against women, women against men, men against men and women against women.

The ABF is in a unique position to have gathered statistics from our male clients, and our database evidences that gender is not the primary issue in relation to domestic violence. Our statistics indicate that victim rates may even be equal between genders (and recent studies confirming the same *Social Psychiatry and Psychiatric Epidemiology*. (DOI: 10.1007/s00127-019-01828-1)). This is contrary to other narratives that state one in three victims of domestic violence is male (One in Three Campaign: source 2012 ABS personal safety survey). We believe that there are multiple reasons why the rate of 33% may not reflect reality.

Nevertheless, within the Family Court system, it is Mother's who make the majority of claims and receive the necessary support and affected outcomes for doing so. Claims of domestic violence can result in immediate seizing of property, assets and exclusive access to children, in addition to possible criminal sanctions with significant adverse consequences.

Of the matters that our legal principals manage, domestic violence has been claimed by the Mother in almost 100% of the cases (of those claims, almost 100% of them have not been tested in Court at anytime). This figure is surely disproportionate to real world statistics and supports the notion that claims of domestic violence go hand-in-hand with adversarial family court cases.

Domestic Violence claims are considered in property settlements. Our own legal experts state that the introduction of domestic violence claims may influence a property settlement split between 5 and 15% in the claimant's favour.

While the anecdotal understanding of domestic violence is the committed acts of actual physical violence, the true definition of domestic violence is broad. It can include much of the conduct that both parties might engage in during an acrimonious separation. Domestic Violence claims have a low evidentiary burden. Since legislation was introduced, parties to Family Court cannot be prosecuted for perjury for making a false allegation of domestic violence.

We are of the belief that a combination of broad definition, low evidentiary burden, no consequences for false allegations and a financial incentive for making such claims are makes a mockery of the current system. This becomes inequitable when it is realised that the domestic violence industry has a prominent, if not at all justified gender narrative, and the services and support available to women far exceed those available to men.

4 (d) Inconsistencies of decisions within the jurisdiction

There have been many journal articles written about family law property matters in Australia discussing the inconsistent and uncertain judgements that follow.

Participants in the system are faced with uncertainty in relation to the judicial outcomes concerning a myriad of issues, including the handling of superannuation entitlements and third party debts (and other areas). There is also significant uncertainty and inconsistency in relation to the treatment of domestic violence in property cases. These uncertainties and lack of predictability impact the entire jurisdiction and most commonly reduce the likelihood of parties achieving an early settlement

We believe this issue, along with the many other profound issues that we have referred to are simply unacknowledged and unaddressed by the Family Court.

4 (e) Inconsistency of decisions in relation to Domestic Violence claims in property settlement

One of the many areas where the inconsistencies of the system are apparent is the treatment of property interests where there are claims of domestic violence. It is debatable whether property settlement should be another area of law that attempts to address domestic violence, there is no clear message from the Family Court as to how these matters should be dealt with.

The general approach in *Kennon v Kennon [1997] FLC 92-757* has been to accept that certain conduct during a marriage may have adversely impacted on the party's function within the relationship, ability to contribute, make those contributions more arduous, and could be a factor considered in property settlements. As is typical for the jurisdiction, subsequent decisions have blurred the doctrine: there need not be a course of conduct, the repetition need not be frequent, and it need not be during the marriage.

As the case law currently stands, if there is some sort of "bad behaviour", at any point during the marriage or after, that's happened more than once, the victim should receive more in the

property settlement. In accordance with our own practitioner's experience, a figure is then "arbitrarily" plucked out of the air, in the realms of a 5 to 15% adjustment. We claim that this indefinable principle goes so far as to be useless in providing any predictive value, essential for increasing the likelihood of settlement.

Accordingly, as an advocacy group, we cannot in principle support the current property settlement system.

5 Superannuation Splitting

We understand the intention of The Bill is to bring Western Australia in line with the Commonwealth Family Law Act, and all other states and territories in relation to the ability of de-facto couples, who are parties to family law proceedings, being able to split their superannuation interests as part of their family law property division.

The ABF opposes the Bill on the grounds that it does not support the current Commonwealth Family Court approach to property settlements per se. Superannuation is yet another asset within the property pool that we believe is inequitably distributed in the property settlement process. Significant revision needs to be made to the Commonwealth regime, and as an advocacy group we are attempting to facilitate said reform through multiple means.

Superannuation is also another area where decisions are very inconsistent. The Full Court in *Coghlan v Coghlan [2005] FLC 93-220, 79,646* appeared to endorse a simple but crude starting point could be years of cohabitation as a proportion of the years of fund membership. In *Palmer v Palmer [2012] FamCAFC 159* the Full Court took the value at commencement of cohabitation then gave the wife half based on contributions to the marriage. In *McKinnon v McKinnon [2005] FLC 93-242*, the full court rejected a formula approach. There appears to be no identifiable methodology for assessing the equitable distribution of superannuation in property settlements.

Our objection to The Bill is in-line with our stance in relation to Family Law legislative reform. Accordingly, as an advocacy group, we cannot in principle support the current property settlement system.

6 Extending Federal Bankruptcy jurisdiction

We understand that The Bill will also extend federal bankruptcy jurisdiction to the Family Court of Western Australia to hear bankruptcy proceedings concurrently with family law proceedings, where appropriate.

We have no specific objection to this streamlining of process but our general objection to The Bill is in-line with our stance in relation to Family Law legislative reform. Accordingly, as an advocacy group, we cannot in principle support the current property settlement system.

7 Recommendation

We do not support The Bill.

There are too many significant flaws in the Federal Family Court system, that we cannot endorse the Western Australian system aligning with it: in any regard.

We believe that the system fails and harms families, including children, parents, grandparents and relatives. The system unnecessarily dissipates wealth of the separated parents and the financial legacy of the children.

The industry support services are failing and are inequitably available to those who need them.

The system and support services demonstrate significant gender bias.

We believe that the system results in broken individuals, intra-generational harm and the deaths of our otherwise productive citizens.

We believe that the Family Law system in Australia harms our society. This occurs because the full impact of the system and the cost to our society is largely unknown: and concealed.

The required changes are not being facilitated through case law or via industry stakeholders (such as The Law Reform Commission) who have a vested interest in the status quo.

We recommend statutory reform. The Australian Brotherhood of Fathers advocates for this reform through multiple avenues in our society.

References/Citations:

1. https://www.theabf.org.au/
2. https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6454
3. *Social Psychiatry and Psychiatric Epidemiology*. (DOI: 10.1007/s00127-019-01828-1))
4. ***Kennon v Kennon [1997] FLC 92-757***
5. ***Coghlan v Coghlan [2005] FLC 93-220, 79,646***
6. ***Palmer v Palmer [2012] FamCAFC 159***
7. ***McKinnon v McKinnon [2005] FLC 93-242***

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