



5 August 2024

Hon Mark Dreyfus KC MP  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
AUSTRALIA

By email: [bankruptcy@ag.gov.au](mailto:bankruptcy@ag.gov.au)

Dear Hon Mark Dreyfus KC MP,

**Submission in response to the Personal Insolvency – Minimal Asset Procedure Discussion Paper**

Thank you for the opportunity to provide input to the Personal Insolvency discussion paper.

Given Redfern Legal Centre's expertise in financial abuse, this submission will focus on personal insolvency as it relates to economic and financial abuse. Redfern Legal Centre endorses Financial Rights Legal Centre's submission that addresses the specific questions raised in the Attorney-General's Department current Paper.

We welcome the opportunity to meet with you to discuss our submission. We have no objection to this submission being published.

## **1. Introduction: Redfern Legal Centre**

Redfern Legal Centre (RLC) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. We provide free legal advice, legal services and education to people experiencing disadvantage in our local area and statewide. We work to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs – to our local community as well as state-wide. Our specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, and police accountability, and we provide outreach services including through our health justice partnership. Our Financial Abuse Service (FAS) is one of our specialist statewide services.

## **2. RLC's Financial Abuse Service NSW**

Since 2019, RLC's specialist state-wide Financial Abuse Service NSW has provided legal advice and representation to clients affected by financial abuse from an intimate partner in NSW. This is the only service of its kind in Australia. We provide free confidential legal advice, including co-advice appointments with specialist family lawyers advising alongside credit, debt and consumer lawyers, as well as representation in eligible cases. In addition to providing legal support for victim survivors of financial abuse, the service provides financial counselling, social work, community legal education and engages in capacity-building and reform work to drive systemic change and prevent financial abuse.

## **3. Personal insolvency and financial abuse**

Our Financial Abuse Service regularly provides advice on personal insolvency. Financial stress perpetuates domestic and family violence<sup>1</sup> (DFV) and it is one of the main reasons a victim survivor will remain in or return to an abusive relationship<sup>2</sup>. This is because the consequences of bankruptcy can create a cycle of ongoing financial abuse by incentivising the perpetrator to:

- Put debts in their partner's name to avoid the threat of bankruptcy themselves.
- Use their own previous bankruptcy as the rationale for putting all liabilities in their partner's name.
- Threaten that their partner's life will be ruined by bankruptcy if they leave the relationship.
- Use voluntary bankruptcy to force creditors to pursue the victim survivor alone for joint debts.

Debt collectors pursue small debts aggressively, which causes ongoing harm to people who have experienced financial abuse. Many victim survivors are not aware of the debts in their name, have no access to information about the original liabilities, and may be unable to access timely and appropriate advice at the right time to avoid bankruptcy. We often advise victim survivors who have been forced into bankruptcy and lose standing in their family law property settlement. We are also regularly contacted by victim survivors who should not have been made bankrupt because they had legal defences available to them to dispute the original debts but did not receive appropriate advice in time.

The consequences of bankruptcy are exacerbated for victim survivors of financial abuse who already face barriers to achieving financial empowerment and independence. Bankruptcy has lifelong impacts on victim

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<sup>1</sup> Kutin, J., Russell, R., and Reid, M., Economic abuse between intimate partners in Australia: Prevalence, health status, disability and financial stress. *Australian and New Zealand Journal of Public Health*, 2017. 41(3): p. 269-274.

<sup>2</sup> Ibid. See also Summers, A. (2022). *The Choice: Violence or Poverty*. University of Technology Sydney. <<https://doi.org/10.26195/3s1r-4977>>

survivors' employment, housing and participation in the economy, increasing their reliance on government support.

#### **4. Response to Minimal Asset Discussion Paper**

RLC welcomes the proposal to introduce a Minimal Asset Procedure (**MAP**) into Australia's personal insolvency system. We endorse the recommendations made by Financial Rights Legal Centre to the Personal Insolvency discussion paper and we make the following additional submissions specific to our experience in financial abuse.

##### **4.1 Identifying financial abuse in Minimal Asset Procedure applications**

We are regularly contacted by victim survivors seeking advice about bankruptcy for financial abuse related debts. Many of these clients would fall within the proposed criteria for a MAP, however, that may not be their best option. It is rarely appropriate for a victim survivor of financial abuse to become bankrupt because there are often alternative options available. Depending on the circumstances, this can include a responsible lending complaint on the basis the credit was unsuitable or a compassionate waiver. With appropriate, timely advice, most victim survivors will resolve their debts without bankruptcy, or in the future, we anticipate without the need for a MAP either.

For these reasons, we recommend the MAP application process include questions to identify whether the debt/s arose in circumstances of financial abuse. These questions should be drafted in consultation with experts in domestic and family violence to ensure they are appropriate, effective and trauma informed.

If the MAP application questions detect signs of financial abuse, we recommend the applicant be provided with referrals to a financial counsellor and/or community legal centre for advice about the appropriateness of a MAP application before it is accepted. This is particularly important if a person can only apply for a MAP once in their lifetime. If a victim survivor enters into a MAP without first exhausting other debt resolution options, they are restrained from being able to apply for a subsequent MAP if they find themselves in debt again but in more appropriate circumstances for a MAP.

##### ***Kelly's Story***

Kelly\* ended a violent relationship with Rick.\* Kelly reported that Rick refused to accept that the relationship was over and continued to stalk and assault her. He had been arrested for domestic violence offences but released on bail and she feared he would find her.

Due to the physical and emotional impact of the domestic violence, Kelly was unable to keep working and fell into rent arrears. She was evicted and the landlord obtained an order against her in the NSW Civil and Administrative Tribunal for unpaid rent and damage to her rental property totalling more than \$20,000 due to Rick's violent outbursts. The landlord's insurer had paid out under their policy and sought to recover this debt from Kelly, which she could not afford to pay.

When Kelly sought help from RLC, she was living in a women's refuge and felt she had no choice but to file for bankruptcy because she had over \$60,000 worth of debt that she was aware of, but she was also being contacted daily by debt collectors and creditors that she had never heard of. She had recently received notice that her licence had been suspended for \$3,000 in unpaid fines Rick had incurred while driving her car.

RLC negotiated with the providers of the debts that Kelly was aware of and sought documents and further information from the debt collectors. The lawyer found that there were multiple payday loans where Rick had used Kelly's details to obtain small loans and taken the funds for himself.

RLC successfully negotiated waivers of over \$40,000 and the landlord's insurer agreed to waive the remaining debt just before Christmas. Kelly is now in permanent accommodation, has had her licence reinstated and is seeking to re-enter the workforce.

Her credit report has been cleared of the debts and other impacts of the financial abuse, and she avoided bankruptcy and its consequences, allowing her to regain her financial independence

\* Names have been changed

#### Recommendations:

- 1. In the Minimal Asset Procedure application, include questions to identify signs of financial abuse.**
- 2. If financial abuse is suspected during the application, develop a process to provide referrals to a financial counsellor or community legal service.**

## 4.2 Minimal Asset Procedure and Family Law Property Settlement

When a party to proceedings becomes bankrupt, the bankrupt's assets vest in the trustee. Under the *Family Law Act 1975* (Cth), the Trustee cannot commence proceedings in the Federal Circuit and Family Court of Australia (**FCFCOA**). However, they can seek to be joined as a party to the proceedings if proceedings are already underway. A party, including a bankrupt party, can commence proceedings anytime. The bankrupt party cannot seek orders regarding property that vests in the trustee. However, they can seek orders regarding other property, including a superannuation splitting order.

This means that if a victim survivor of financial abuse is bankrupt, they are unable to seek orders pertaining to property that has vested in the trustee. However, the perpetrator is still able to seek an order for a property settlement and seek that they be prioritised over the creditor, because a non-bankrupt spouse can seek an interest in property that has vested in the trustee, even where their conduct has contributed to the forced bankruptcy. We acknowledge that this interaction between the *Bankruptcy Act 1966* and the *Family Law Act 1975* is intended to protect the non-bankrupt spouse. However, perpetrators of family violence often exploit the system to the detriment of the victim survivor who is left bankrupt, has no standing in the FCFCOA, and often loses their home, while the perpetrator is able to seek priority over the property vested in the trustee. We recommend the *Family Law Act 1975* be amended to allow a victim survivor who is made bankrupt because of financial abuse debts, to have standing to seek orders in relation to vested bankruptcy property.

We make the same recommendation in relation to the MAP; that a victim-survivor who enters into a MAP because of financial and economic abuse, should have standing to seek an adjustment of interest with respect to property. From our understanding of the Discussion Paper, the *Family Law Act 1975* would not presently restrict this, but we wouldn't want to see the relevant sections of the *Family Law Act 1975* and the *Bankruptcy Act 1966* expanded to cover MAPs as well. While those who enter into a MAP, by its nature, have minimal assets and the cost of seeking an order in the FCFCOA for small property pools are often prohibitive, we raise this issue to, firstly, highlight the need for reform for bankrupt victim survivors of financial abuse, and secondly, to ensure consistency with that recommendation for victim survivors who enter into a MAP.

#### ***Jillian's Story***

Jillian\* was appointed a director of Company XYZ Constructions Pty Limited. Jillian was not involved in the business but signed paperwork in the context of experiencing significant family violence and relying

on her husband for her and the children's financial needs. Jillian was the primary homemaker and carer of their two children.

The company was made insolvent because of its liabilities and Jillian, who had signed personal guarantees, was made bankrupt. The liabilities exceeded \$600,000. Shortly before the company became insolvent, Jillian's husband withdrew all the available money from the home loan redraw account and all the money from the offset account, which was approximately \$80,000.

Jillian owned a property in her name, of which she had received one half share as an inheritance. Jillian and her husband purchased the other half share from Jillian's sister and the property was transferred into Jillian's name. The property was valued over \$1 million and there was approximately \$400,000 in equity. The mortgage had been refinanced over the years to support the husband's business.

When Jillian was made bankrupt, her equity in the property vested in the Bankruptcy trustee. Jillian's husband commenced proceedings in the FCFCOA, joining the trustee as a party to the proceedings. He sought sixty percent of the equity in the property. There was nominal superannuation. Jillian had no standing to seek any orders pertaining to the property as a bankrupt. Her husband succeeded in receiving fifty percent of the equity, with the creditors receiving the remainder. Jillian received no funds from the property settlement and her credit rating was severely impacted by her bankruptcy. Meanwhile, her husband used the funds to purchase another property in his sole name, then set up another company and began operating his business under a new name.

\* Name has been changed

#### Recommendations:

3. **Amend the *Family Law Act 1975 (Cth)* to allow a bankrupt spouse or de facto to have standing to seek an adjustment of interest with respect to property, in circumstances of financial abuse.**
4. **Ensure that a spouse or de facto in a Minimal Asset Procedure retain standing to seek an adjustment of interest with respect to property.**

## 5. Conclusion

Victim survivors of financial abuse are uniquely impacted by bankruptcy laws and need to be considered in the proposed reforms to remove barriers to financial independence and long-term financial security.

Thank you for the opportunity to provide feedback on the Personal Insolvency – Minimal Asset Procedure Discussion Paper. We welcome the opportunity to discuss this submission in further detail.

Yours sincerely,



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