



**Redfern
Legal
Centre**

Hon Mark Dreyfus KC MP
Personal Insolvency Discussion Paper
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

By email: bankruptcy@ag.gov.au

13 October 2023

Dear Hon Mark Dreyfus KC MP,

Submission in response to the Personal Insolvency 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 joint 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.

Yours faithfully,

Camilla Pandolfini
CEO

REDFERN LEGAL CENTRE

Gadigal Land, 73 Pitt St Redfern NSW 2016 | PO Box 1805, Strawberry Hills NSW 2012

Phone: (02) 9698 7277 **Web:** rlc.org.au **Email:** info@rlc.org.au

ACN: 31 001 442 039



Submission in response to the Personal Insolvency Discussion Paper

Authors: Gayatri Nair & Laura Bianchi

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2. Recommendations

Recommendation A: Increase the threshold for bankruptcy to \$50,000 immediately, with no transition period.

Recommendation B: Extend the timeframe to respond to a Bankruptcy Notice from 21 days to 60 days (or a minimum of 45 days)

Recommendation C: A person's listing/s on the NPII should be completely removed two years from discharge from bankruptcy.

Recommendation D: A person's listing/s should be completely removed from the NPII within 28 days of the date their bankruptcy is annulled.

Recommendation E: A creditor's petition dismissed by the Court should not appear on the NPII.

Recommendation F: 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.

3. 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 statewide. 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.

RLC has over 30 years of specialist experience in domestic and family violence (DFV) in New South Wales. RLC received its first formal recognition for these services in 1996 with a Special Award for dedication and commitment to the prevention of domestic violence from the NSW Minister for Community Services. The award recognised a scheme pioneered by RLC – the Women’s Domestic Violence Court Assistance Scheme – a holistic approach to the provision of services for women seeking legal protection from domestic violence which has since been extended throughout NSW by Government. Additionally, RLC has initiated or been actively involved in projects which have led to the establishment of the Welfare Rights Centre, Prisoners Legal Service, Accommodation Rights Service, Consumer Credit Legal Centre (now Financial Rights Legal Centre) and Campbelltown Legal Service, among others.

In 2014, RLC began providing legal services to victim survivors of financial abuse through our credit, debt and consumer law practice. RLC identified that there was a need for a more specialised and state-wide service for people experiencing legal issues associated with DFV and financial abuse, including family law expertise in financial matters such as property settlements, spousal maintenance and child support.

4. 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. Our lawyers are trauma informed, understand safety risks and the complexities of abusive relationships, and are aware of the non-legal needs of clients. In addition to providing legal support for victim survivors of financial abuse, the service provides community legal education and engages in capacity-building and reform work to drive systemic change and prevent financial abuse.

Our capacity-building work includes raising awareness among community sector workers, the general public, industry and Government, providing a central source of information and establishing a state-based network of community organisations to collaborate at the NSW level and nationally. Our policy and law reform work includes submissions on policy development, reform and legislative change. We

also work with Government, industry, regulators, ombudsman services and peak bodies to implement appropriate policies and procedures.

5. Financial Abuse

Economic abuse or financial abuse is a form of family, domestic and sexual violence. It has significant and devastating impacts at an individual, community and societal level. Economic abuse in an intimate partner relationship can take various forms, including accruing debt or other liabilities in the other person's name, not contributing to joint loans, controlling all finances, not making shared financial decisions, withholding necessities, preventing someone from obtaining or remaining in employment, and stopping someone from accessing education or a means to become financially independent.

6. Incidence and prevalence of financial abuse

Financial abuse is a hidden epidemic in Australia. A recent report by Deloitte Access Economics found that 43 Australian women were subjected to financial abuse every hour in 2020.¹ A 2017 study into the prevalence of economic abuse between intimate partners found that 11.5% of Australians had experienced it and that women experience it at higher rates (15.7%) than men (7.1%), though the true prevalence is likely far higher given the underreporting of DFV.² These gender differences are important because it is well understood that family, domestic and sexual violence is gendered, and that women are the majority of victims and experience more severe consequences.³ Around 85% of women who access DFV services in Australia say that they have experienced some level of financial abuse in their relationship.⁴ Economic abuse often occurs alongside other forms of abuse such as physical and emotional abuse, and sexual violence.

7. Personal insolvency and financial abuse

Our Financial Abuse Service regularly provides advice on personal insolvency. Financial stress perpetuates domestic and family violence⁵ and (DFV) it is one of the main reasons a victim survivor will remain in or return to an abusive relationship.⁶ This is because the significant risks associated with bankruptcy often 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.

¹ Deloitte Access Economics, The cost of financial abuse in Australia 2022, Deloitte Access Economics: Sydney, NSW. <<https://www.commbank.com.au/content/dam/caas/newsroom/docs/Cost%20of%20financial%20abuse%20in%20Australia.pdf>>

² 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.

³ Ibid.

⁴ Australian Bureau of Statistics (ABS), Personal Safety, Australia. 2012, ABS: Canberra, Australia. <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12012?OpenDocument>>

⁵ 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.

⁶ Ibid. See also Summers, A. (2022). The Choice: Violence or Poverty. University of Technology Sydney. <<https://doi.org/10.26195/3s1r-4977>>

- 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.

The consequences of bankruptcy are exacerbated for victim survivors of financial abuse who already face barriers to achieving financial empowerment and independence. For example, we regularly 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 below case study demonstrates how forced bankruptcy can be an enduring result of financial abuse:

Jenny’s story

Jenny* was married for 12 years. There are two children from the relationship. She experienced significant family violence, including financial abuse. Her husband pressured her to sign documents without even allowing her to read them.

Jenny’s husband operated various businesses and ran risky investments. Some of the risky investments and businesses were run under corporate structures, all of which incurred significant liabilities including liabilities to ASIC and the ATO. Unbeknownst to Jenny, her husband had caused her to be nominated as a sole director and shareholder of the said businesses and investments. Jenny’s husband, as an employee of the company, made significant misrepresentations to the creditors.

The creditors pursued the companies and Jenny in her capacity as director. Jenny, when served with the Statement of Claim, provided it to her husband who reassured her that “it will be taken care of.” The husband failed to meet the demands of the creditors and failed to file a defence to the Statement of Claim. Default judgment was entered against Jenny and the relevant companies.

Jenny received advice from her husband’s accountant to file for bankruptcy , which she did. Following the bankruptcy, Jenny’s husband left her. She had no assets in her name. Her husband had all of their assets in his name, including the family home which he transferred into the name of his brother.

Jenny commenced proceedings with the assistance of a private lawyer in the Family Court, as it was then known. However, she had no standing to commence proceedings and orders were made that each party retain property in their respective possessions. The bankruptcy prevented Jenny from being able to seek an order setting aside the transfer of the family home by her husband to his brother.

* Name has been changed

While financial abuse is still underreported, research from Deloitte found that in 2020 financial abuse cost victim survivors \$5.7 billion and the Australian economy \$5.2 billion.⁷ These figures are significantly higher than the \$850 million consumers lost to scams in 2020.⁸

For these reasons, we believe that financial abuse must be considered when reforming personal insolvency.

8. Response to Personal Insolvency Discussion Paper

The following five key issues were discussed at the Ministerial Roundtable on Personal Insolvency:

1. Increasing the bankruptcy threshold value from \$10,000;
2. Increasing the period for a debtor to respond to a bankruptcy notice from 21 days;
3. Options for a shorter discharge period from bankruptcy for some bankrupts;
4. Options for easier annulment for inappropriate bankruptcies; and
5. Options to identify and scope measures to mitigate harms caused by unlicensed or untrustworthy advisers.

We are pleased that the Paper progresses the first two of these high priority issues from the Roundtable. We believe, however, that the changes could go further to achieve better outcomes for victims of family and domestic violence. In this submission, we respond to the questions in the Paper relevant to financial abuse and make recommendations for additional short-term reform opportunities.

We understand the Minister intends to consult on the remaining key issues at a later date, and we look forward to providing further submissions at that time, particularly in relation to the options for easier annulment for inappropriate bankruptcies in circumstances of family and domestic violence.

8.1 Increasing the bankruptcy threshold

Question 1: Do you believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to \$20,000? Please expand on your response

Question 2: If you do believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to \$20,000, should there be a transition period before any reforms take effect?

Question 3: If you do not believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to \$20,000, please explain whether an alternative amount should be considered for the threshold and why.

⁷ Deloitte Access Economics, The cost of financial abuse in Australia 2022, Deloitte Access Economics: Sydney, NSW. <<https://www.commbank.com.au/content/dam/caas/newsroom/docs/Cost%20of%20financial%20abuse%20in%20Australia.pdf>>

⁸ Australian Competition and Consumer Commission, Targeting scams - Report of the ACCC on scams activity 2020 <https://www.accc.gov.au/system/files/Targeting%20scams%20-%20report%20of%20the%20ACCC%20on%20scams%20activity%202020%20v2.pdf>>

We support the proposal to increase the threshold for forced bankruptcy. We agree, however, with the position in the Joint Submission from Financial Rights Legal Centre that \$20,000 is not enough to address forced bankruptcy for “small debts”. Small debts in the current economic climate, are increasingly larger individual debts as people face interest rate rises, rent increases and inflated prices for essential products and services.

Debt collectors pursue small debts aggressively, and this causes ongoing harm to people who have experienced financial abuse. Many of our clients are not aware of the debts in their name, most have no access to information about the original liability and some may not be able to access the right advice at the right time to avoid bankruptcy and the lifelong impact it can have on their employment, housing and participation in the economy, increasing a person’s reliance on government support.

Many of our clients seek advice about individual debts of between \$20,000 and \$50,000 making them vulnerable to bankruptcy proceedings if the limit was only increased to \$20,000. We recommend increasing the threshold to \$50,000, with no transition period. In our experience, this will reduce the threat and ability to unfairly bankrupt a victim survivor for small debts and remove bankruptcy as a barrier to achieving financial independence and empowerment. This reform could also mean the difference between some people leaving or staying in an abusive relationship if their partner is threatening them with bankruptcy for small debts.

Recommendation A: Increase the threshold for bankruptcy to \$50,000 immediately, with no transition period.

8.2 Increasing the period for a debtor to respond to a Bankruptcy Notice

Question 4: Do you believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days? Please expand on your answer and consider any potential impacts.

Question 5: If you do believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days, should there be a transition period before any reform takes effect? Please expand on your answer.

Question 6: If you do not believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days, please explain whether an alternative duration should be considered and why.

We agree with the recommendation made by Financial Rights Legal Centre to extend the timeframe to respond to a Bankruptcy Notice from 21 days to 60 days (or a minimum of 45 days). In our experience, the proposal to increase the period to 28 days will be inadequate for victim survivors of family and domestic violence because receiving a bankruptcy notice can be the first time a person is aware of debts in their name and the previous court proceedings against them. In our service, we advise all victim survivors to obtain their three free credit reports and this process routinely uncovers financial abuse debts, and in some cases judgments, debts that they were previously unaware of.

Statements of claim can be served to a person’s last known address, and default judgment applied for after 28 days – without the confirmed direct knowledge of the person. Most of our clients have had to flee their home to escape the abusive relationship and end up homeless or in transient accommodation.

Even where a Notice might be anticipated, most victim survivors of financial abuse have experienced trauma and may be living in crisis. Many victim survivors are overwhelmed just trying to address their essential daily needs such as stable safe accommodation, regular meals, income support and caring for children. In our experience, this is a significant barrier to victim survivors having the time and resources to respond to the Bankruptcy Notice, navigate the legal system, and obtain affordable or free advice within 28 days.

Most victim survivors receiving a Bankruptcy Notice are unable to afford a private bankruptcy solicitor. Free legal advice services, including the Financial Abuse Service, have extremely limited capacity and resources to represent on bankruptcy matters. Few services have experience advising on the complex and intersecting legal issues arising from financial abuse.

Recommendation B: Extend the timeframe to respond to a Bankruptcy Notice from 21 days to 60 days (or a minimum of 45 days)

8.3 Reducing the permanent record on the National Personal Insolvency Index

Question 8: Would a reduced record period of seven years on the NPII for bankruptcies benefit debtors? Please expand on your response.

Currently, a bankrupt will have a lifetime listing on the NPII. Bankruptcy is stigmatising and a lifetime listing creates an additional hurdle for victim survivors of family and domestic violence to overcome when rebuilding their lives and trying to regain financial security. The listing may also force a victim survivor to disclose unnecessary personal information about the past abuse if they are questioned about the bankruptcy throughout their life.

The *Bankruptcy Regulations 2021* provide limited circumstances when a bankrupt person can apply for their name to be removed from the NPII. This can include the suppression of personal information if a person’s safety is at risk, however, this will only remove a victim survivors address and/or occupation from the NPII not the listing altogether so the lifelong impact of being named as a bankrupt is ongoing.

We support the proposal for a reduced record period. However, seven years is still too long to provide people with a genuine opportunity to start a new chapter of their lives. We agree with the submission by the Financial Rights Legal Centre that a period of two years from the discharge of bankruptcy is an appropriate period.

Recommendation C: A person’s listing/s on the NPII should be completely removed two years from discharge from bankruptcy.

8.4 Removing NPII listings for successful annulments

We welcome an opportunity to provide detailed submissions in a further consultation about options to make it easier to get an annulment for inappropriate bankruptcies, especially in circumstances of

financial and economic abuse. However, in the short term, we recommend immediately removing names from the NPII if the bankruptcy was annulled more than 28 days before.

Currently, bankruptcies that are annulled remain on the NPII for life, noting the date of the annulment on the record. We are of the view that this is unnecessarily punitive for any bankrupt person, but especially oppressive for victim survivors of financial abuse who face significant barriers to reestablishing their credit record and financial security. It may also put the victim survivor in a situation where they are questioned about the listing in the future and forced to disclose their experience of abuse. This is not only re-traumatising for the victim survivor but also results in third parties obtaining inappropriate personal information.

In the UK, a person whose bankruptcy is annulled remains on the register for only 28 days. This is a fair and reasonable proposal to allow time for the administrative process to be complete.⁹

Recommendation D: A person's listing/s should be completely removed from the NPII within 28 days of the date their bankruptcy is annulled.

8.5 Removing NPII listings for creditor's petitions

For the same reasons explained above, we agree with the recommendation made in the Joint submission from Financial Rights Legal Centre that a creditor's petition dismissed by the Court should not appear on the NPII.

Recommendation E: A creditor's petition dismissed by the Court should not appear on the NPII.

8.6 Bankruptcy and Family Law property orders

Where a victim survivor of financial abuse is forced into bankruptcy, they lose standing to seek an adjustment of interest with respect to property under the *Family Law Act 1975* (Cth). That is, they lose the right to seek a property settlement with their ex-partner (except in relation to superannuation). 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 and the Family Law Act 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 Family Court, and often loses their home, while the perpetrator is able to seek priority over the property vested in the trustee.

There is a concurrent consultation happening in relation to the *Exposure Draft: Family Law Amendment Bill (No. 2)* and this will also need to contemplate bankruptcy. We recommend the Minister have regard to the intersection between these areas of law to ensure that if a victim survivor is made bankrupt because of economic abuse, they have standing to seek an adjustment of interest with respect to property (i.e. a property settlement).

⁹ The Individual Insolvency Register (UK). <<https://www.insolvencydirect.bis.gov.uk/eiir/IIRFAQ.asp#13>>

Currently, they do not have that right, other than for superannuation. Therefore, amendments need to be made to the *Family Law Act 1975* (Cth) to allow a bankrupt spouse or de facto to seek orders notwithstanding bankruptcy.

We will also make this recommendation in our submission on the *Exposure Draft: Family Law Amendment Bill (No. 2) 2023* and welcome the opportunity to provide further expert input into this issue.

The following case studies illustrate how forced bankruptcy can be an enduring result of financial abuse in family law.

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 Family Court, 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 from the Family Court 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

Louisa's story

Louisa* was married for almost twenty years. Unbeknownst to her, her husband listed her name as a director of several companies and then proceeded to make risky investments through those

companies. He held all assets in his name and left her with all the risk. Louisa signed some documents after experiencing relentless pressure and threats from her husband, not fully understanding the legal implications of what she had signed.

Louisa's husband's business dealings resulted in her becoming bankrupt. Louisa separated from her husband. Proceedings were commenced in the Family Court and Louisa attempted to represent herself. As she was a bankrupt person, she had no standing to seek orders for a property settlement. Her husband retained the assets in his name, including a property. Louisa, as a bankrupt, received nothing. Had she not been made bankrupt because of her husband's business dealings; Louisa would have been able to seek a property settlement. Louisa now has no grounds to set aside the Orders made by the Court.

This case shows the significant disadvantage experienced by a party who has been financially abused, and the interactions between Family Law and Bankruptcy legislation. This is an area of law which needs reform to protect people experiencing financial abuse.

* Name has been changed

Recommendation F: Amend the *Family Law Act 1975 (Cth)* to allow a bankrupt spouse or de factor to have standing to seek an adjustment of interest with respect to property.

9. 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.

We are of the view this can be achieved through increasing the bankruptcy threshold to \$50,000 and giving people 60 days to respond to a Bankruptcy Notice. We also support completely removing a person's listing on the NPII 28 days after an annulment or two years from discharge of the bankruptcy. We also recommend that a creditor's petition dismissed by the court should not appear on the NPII.

This consultation intersects with the concurrent consultation in relation to the *Family Law Amendment Bill (No. 2) 2023*, and for both we submit amendments should be made to allow a bankrupt spouse or de facto to have standing to seek an adjustment of interest with respect to property.

We look forward to the opportunity to comment in relation to the additional key areas for reform identified in the Roundtable, specifically:

- Options for a shorter discharge period from bankruptcy for some bankrupts;
- Options for easier annulment for inappropriate bankruptcies; and
- Options to identify and scope measures to mitigate harms caused by unlicensed or untrustworthy advisers.

Thank you for the opportunity to provide feedback on the Personal Insolvency Discussion Paper. We welcome the opportunity to discuss this submission in further detail. Please contact Gayatri Nair at gayatri@rlc.org.au.