



4 October 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Family Law Amendment Bill 2024

We welcome the opportunity to provide feedback to assist the Legal and Constitutional Affairs Legislation Committee's review of the Family Law Amendment Bill 2024 (the **Bill**).

We commend the Government's commitment to amending the *Family Law Act 1975* (Cth) (**Family Law Act**) to consider family violence in property settlements and better recognise the ongoing financial impacts of economic and financial abuse.

Given the Economic Abuse Reference Group's (**EARG**) expertise in economic abuse, this submission will focus on the proposed amendments as they relate to economic and financial abuse.

Economic Abuse Reference Group

The [Economic Abuse Reference Group](#) is an informal group of community organisations across Australia which work collectively with government and industry to reduce the financial impact of family violence. Members include domestic and family violence (**DFV**) services, community legal services and financial counselling services.

Our work encapsulates the experience of our members (as lawyers, financial counsellors or DFV support workers) who assist clients who have experienced economic abuse.

Economic 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.

Summary of recommendations

1. Amend section 79(13) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.”
2. Amend section 79(16) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.”
3. Amend section 90SM(16) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.”
4. Amend section 90SM(19) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.”
5. Amend section 74(4) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.”
6. Amend section 74(7) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.”
7. Amend section 90SE(4) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.”
8. Amend section 90SE(7) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.”

Response to the Bill

The Bill is an important step in ensuring better financial outcomes for victim survivors of economic abuse. We are pleased to see that the current Bill reflects many of the recommendations made in [our submission on the exposure draft of the Family Law Amendment Bill \(No. 2\) 2023](#), including that:

- Examples of economic and financial abuse have been included in the definition of family violence;
- Family violence, including financial abuse, must be considered at the stage of assessing each party's contributions when determining property settlements;
- Family violence, including financial abuse, must be considered at the stage of assessing the parties' future needs when determining property settlements;
- Family violence, including financial abuse, must be considered when determining spousal maintenance applications;
- Family violence, including financial abuse, must be considered in determining the ownership of pets in settlements; and
- Family violence, including financial abuse, must be considered when determining housing.

We largely support the provisions of the Bill. However, we consider it critical in the court's determination of any financial matter that family violence also be considered as a relevant ground for a bankrupt party (or a party subject to a personal insolvency agreement) to have the capacity to seek orders in relation to property that has vested in the trustee (or property subject to the personal insolvency agreement), if the bankruptcy or personal insolvency agreement was caused by family violence, including financial abuse.

Bankruptcy & personal insolvency agreements under the Family Law Act

Currently, a victim survivor who has been made bankrupt (or is subject to a personal insolvency agreement) cannot seek orders in relation to vested property without leave of the Federal Circuit and Family Court of Australia (**FCFCOA** or **the court**), but the non-bankrupt perpetrator can. Leave is only granted in exceptional circumstances. This leads to unequal and unjust outcomes in property settlements where the bankrupt party became bankrupt because of economic or financial abuse. This is often exploited by perpetrators to extend their financial abuse and systems abuse through the family law system.

This is the missing piece in the proposed reforms and is required to give consistency to the court's treatment and consideration of family violence in determining any financial matter within the court's jurisdiction. This would ensure that the court is required to have regard to family violence in determining any financial matter, including financial matters where a party became bankrupt or entered into a personal insolvency agreement because of financial abuse.

If this change is not incorporated in this suite of reforms, it should be the subject of an urgent separate consultation to ensure that victim survivors who have been made bankrupt

as a result of financial abuse are not unjustly denied recourse through the FCFCOA, while their perpetrator can still seek orders.

The following case study illustrates how forced bankruptcy can further perpetuate financial abuse through the family law system and lead to inequities in family court outcomes.

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. Jillian was the primary homemaker and carer of their two children and the family's financial needs were met by her husband.

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 (as it was then known), 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 the 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 for safety and privacy

When an individual becomes bankrupt or enters into a personal insolvency agreement, their property immediately vests in the trustee in bankruptcy (or the trustee of the agreement) and the trustee may apply to become a party to any FCFCOA proceedings. See sections 79(11) and (14) of the Family Law Act in relation to property settlement proceedings and sections 74(2) and (5) in relation to spousal maintenance proceedings. Similar provisions exist for de facto couples: see sections 90SM(14) and(17) for property proceedings and sections 90SE(2) and (5) in relation to maintenance proceedings.

Under section 79(12) of the Family Law Act, if the trustee is a party to property settlement proceedings, then an undischarged bankrupt is 'not entitled to make a submission to the court in connection with any vested bankruptcy property' except with the leave of the court. Further, section 79(13) provides that 'the court must not grant leave under subsection (12) unless the court is satisfied that there are exceptional circumstances'. Such 'exceptional circumstances' are not defined in the Act and we are not aware of any judicial consideration of family violence constituting exceptional circumstances.

A bankrupt spouse's claim to a property settlement therefore effectively vests in their bankruptcy trustee. This can have significant ramifications if the bankruptcy was a direct result of financial abuse. Many of our members assist victim survivors who have become bankrupt due to debts incurred in their name by their partner, business debts for which they have been coerced to sign personal guarantees, tax debts and other liabilities associated with their role as a dummy director for their partner's company, and more. Jillian's story above is only one such example.

Currently, sections 79(12) and 79(13) have the effect that a victim survivor who was made bankrupt because of liabilities that resulted from financial abuse cannot seek orders in relation to property that has vested in the trustee without leave of the court. The non-bankrupt party, however, can make a claim against property that has vested in the trustee and the court may order the trustee to transfer vested property to the non-bankrupt spouse. The same applies to personal insolvency agreements by way of sections 79(15) and 79(16). Identical provisions exist in relation to spousal maintenance orders: see sections 74(3) and (4) in respect of bankruptcy and sections 74(6) and (7) in respect of personal insolvency agreements.

This results in significant inequities where the perpetrator of financial abuse is able to seek orders in relation to vested property and may receive benefits as a direct result of their conduct.

We recommend amendments to the Bill which would allow a victim survivor to seek orders in relation to property that has vested in the trustee and property the subject of a personal insolvency agreement. Specifically, family violence (including economic and financial abuse as per the proposed section 4AB(2A)) ought to be considered by the court in determining whether leave should be granted to a bankrupt party to seek orders in relation to such property.

Section 79 – Alteration of property interests

Currently, subsections 79(12) and (13) of the Family Law Act provide that in property settlement proceedings:

(12) If a bankruptcy trustee is a party to property settlement proceedings, then, except with the leave of the court, the bankrupt party to the marriage is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(13) The court must not grant leave under subsection (12) unless the court is satisfied that there are exceptional circumstances.

Subsections 90SM(15) and (16) are the equivalent provisions for de facto relationships.

Subsections 79(15) and (16) have the same effect in the case of personal insolvency agreements (as an alternative to bankruptcy), while subsections 90SM(18) and (19) are the equivalent provisions for de facto relationships.

We propose that section 79(13) be amended to provide that (addition in italics and underlined):

(13) The court must not grant leave under subsection (12) unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.

And that section 79(16) be amended to provide that (addition in italics and underlined):

(16) The court must not grant leave under subsection (15) unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.

For completeness, the same amendments must be made to subsections 90SM(16) and (19) to apply to de facto relationships.

Section 74 – Power of court in spousal maintenance proceedings

Similarly, subsections 74(3) and (4) provide that a bankrupt spouse cannot seek spousal maintenance orders that relate to property that has vested in the trustee without leave of the court:

(3) If a bankruptcy trustee is a party to proceedings with respect to the maintenance of a party to a marriage, then, except with the leave of the court, the bankrupt party to the marriage is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(4) The court must not grant leave under subsection (3) unless the court is satisfied that there are exceptional circumstances.

Subsections 90SE(3) and (4) are the equivalent provisions for de facto relationships.

Subsections 74(6) and (7) have the same effect in the case of personal insolvency agreements (as an alternative to bankruptcy), while subsections 90SE(6) and 90SE(7) are the equivalent provisions for de facto relationships. Again, leave can only be granted in 'exceptional circumstances'.

This will be relevant when lump sum orders are sought in relation to spousal maintenance, or a party is seeking a transfer of an asset to satisfy a spousal maintenance claim. Seeking such an order provides surety that spousal maintenance is paid.

We propose that subsection 74(4) be amended to provide that (addition in italics and underlined):

(4) The court must not grant leave under subsection (3) unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.

And that section 74(7) be amended to provide that (addition in italics and underlined):

(7) The court must not grant leave under subsection (6) unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.

For completeness, the same amendments must be made to subsections 90SE(4) and (7) to apply to de facto relationships.

We consider these to be appropriate amendments which:

1. Codify the requirement for the FCFCOA to consider family violence in determining any financial matter, whether or not there is a bankruptcy or personal insolvency agreement on foot;
2. Are consistent with the FCFCOA's power to make orders in relation to property that has vested in the trustee, or property subject to a personal insolvency agreement;
3. Are consistent with the Bill's intent and its proposed treatment of family violence in financial matters within the jurisdiction of the FCFCOA;
4. Do not interfere with or diminish creditors' rights; and
5. Do not interfere with the operation of the *Bankruptcy Act 1966* (Cth).

Recommendations:

1. Amend section 79(13) of the Family Law Act to insert the words (in italics and underlined): "unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances."
2. Amend section 79(16) of the Family Law Act to insert the words (in italics and underlined): "unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances."
3. Amend section 90SM(16) of the Family Law Act to insert the words (in italics and underlined): "unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances."
4. Amend section 90SM(19) of the Family Law Act to insert the words (in italics and underlined): "unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances."

5. Amend section 74(4) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.”
6. Amend section 74(7) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.”
7. Amend section 90SE(4) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the bankruptcy was brought about by family violence or* there are exceptional circumstances.”
8. Amend section 90SE(7) of the Family Law Act to insert the words (in italics and underlined): “unless the court is satisfied that *the personal insolvency agreement was brought about by family violence or* there are exceptional circumstances.”

Conclusion

We are supportive of the proposed amendments to the Family Law Act. We welcome the inclusion of the examples of economic and financial abuse in the proposed section 4AB(2A) and strongly support the consideration of economic and financial abuse in the determination of any financial matter within the court's jurisdiction.

Our recommendations regarding the court's consideration of requests for leave seek to refine the Bill and further improve the family law system by providing fairer outcomes for victim survivors who have been made bankrupt or entered into personal insolvency agreements as a result of economic and financial abuse.

If these amendments are not incorporated into the Bill, we request that urgent consideration be given to the inequities that arise through the interaction between bankruptcy and family law (including by way of the *Bankruptcy and Family Law Legislation Amendment Act 2005*). A separate consultation should be conducted as a matter of priority to consider avenues for reform and ensure that victim survivors who have been made bankrupt or entered into personal insolvency agreements as a result of financial abuse are no longer unjustly denied recourse through the FCFCOA.

Thank you for the opportunity to provide feedback on the Bill. We have no objection to this submission being published and we welcome the opportunity to discuss this submission in further detail.

Yours faithfully,

ECONOMIC ABUSE REFERENCE GROUP

A handwritten signature in black ink that reads "J Opdam". The signature is written in a cursive, flowing style.

Jasmine Opdam
National Coordinator

Senior Policy and Advocacy Officer
Financial Abuse Service NSW
Redfern Legal Centre

earg@earg.org.au

73 Pitt Street, Redfern NSW 2016

www.earg.org.au