Australian Government
Attorney-General's Department

Question on Notice Response

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Senate Legal and Constitutional Affairs Legislation Committee

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

2 March 2020

Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019

Response to the Question on Notice by the Attorney-General's Department

Question on Notice

A number of submitters to the inquiry have suggested the transition arrangements included in ***Schedule 4*** are likely to disadvantage the financially-weaker party in cases where couples already have proceedings before the courts.

The committee notes the comments provided by the Department on page 4 of its submission, but is seeking a more detailed explanation of the decision, and a response to the suggestions for amendment raised by the Law Council of Australia (Family Law Section), the Family Court of Western Australia and the Family Law Practitioners' Association of Western Australia.

Response of the Attorney-General's Department

The Attorney-General's Department (the department) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the opportunity to provide further information with respect to issues raised by submissions to its inquiry into the Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019 (the Bill).

The department has been asked to provide further detail about the approach taken in the Bill's transitional provisions which allows for parties to 'opt in' to the new superannuation splitting regime by mutual agreement, and respond to the suggestions for amendment to the transitional provisions raised in submissions from the Family Law Section of the Law Council of Australia (LCA); the Family Court of Western Australia (FCWA); and the Family Law Practitioners' Association of Western Australia (FLPAWA).

Operation of the Bill's transitional provisions where de facto parties have proceedings on foot

The transitional provisions in the Bill deal with the situation where de facto parties have proceedings on foot in respect of their non-superannuation property, under Part 5A of the *Family Court Act 1997* (WA) (FCA), and those proceedings have not been finally determined at the time of commencement of new Part VIIIC.

The general rule is that the new superannuation splitting regime in Part VIIIC will not apply to those proceedings (Schedule 4, Part 2, Item 3(1)). This is intended to provide certainty for parties that their proceedings will continue to be conducted in accordance with the law as it applied when their proceedings commenced.

The Bill provides an 'opt in' mechanism which enables the parties to choose for Part VIIIC to apply to their proceeding, if they both agree (Item 3(2)). The Bill requires that the choice is made in writing and signed by both parties, after having received legal advice about the advantages and disadvantages of their decision.

As outlined in the department's submission to the Committee dated 24 January 2020, providing a mechanism for parties to 'opt in' seeks to balance the potential unfairness that may result if a party with proceedings on foot is unable to access the new regime, with the recognition that enabling one party to unilaterally apply for superannuation splitting to be included in property proceedings that are already underway may engender additional financial costs to both parties and delay the finalisation of proceedings.

The overarching policy intention of the Bill is to ensure that Western Australian de facto couples are treated in the same way as de facto couples in other parts of Australia. The department's submission to the Committee noted that the 'opt in' approach is consistent with the approach taken when Part VIIIAB of the *Family Law Act 1975* (Cth) (FLA), which relates to all de facto financial matters, was extended to de facto couples in jurisdictions by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*. The ability for parties to 'opt in' to the regime in the 2008 Bill was in response to a recommendation by this Committee in its 2008 report on the Bill.[1] Given that the operation of the new regime could significantly change the rights and obligations of the parties with respect to their superannuation assets, the approach taken ensures that both parties agree, and understand the implications of making an election for the new regime to apply, in circumstances where their proceedings have commenced but are not yet finalised.

Issues raised in submissions - transitional provisions

The submissions identified by the Committee recommend amendments to the transitional provisions in the Bill. These recommendations relate to how the new superannuation splitting regime will apply to de facto parties who have commenced but not yet finalised family law property proceedings. They also seek to clarify the position for de facto parties who have final property orders in force at the time of commencement of the Bill.

Proceedings on foot

The Committee has drawn the department's attention to submissions that recommend the Bill be amended to provide that the new superannuation splitting regime in Part VIIIC automatically applies to all de facto couples, except those who have had their property proceedings finally determined at the time the Bill commences. That is, the new regime should apply to de facto couples who have not yet initiated proceedings when the Bill commences, and couples who have initiated but not finalised their proceedings when the Bill commences. By virtue of taking this automatic approach, the need to 'opt in' by mutual agreement would no longer be required.

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[1] See recommendation 4 of the Senate Committee on Legal and Constitutional Affairs, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

The FCWA and the FLPAWA recommend against requiring both parties to 'opt in' to the regime. These submissions contend that the 'opt in' regime is too onerous for parties, may disadvantage the financially weaker party, and perpetuate inequitable property splits. In particular, the submissions outline a scenario where a financially stronger party deliberately initiates proceedings before the Bill commences, so that the new regime will not apply to them.

While these submissions suggest that the 'opt in' approach in the Bill will necessarily disadvantage the financially weaker party (because there would be no incentive for the party with the higher superannuation balance to agree to split their superannuation), there may be circumstances where the party with more superannuation may also benefit from opting into the regime. This is because, unless the parties' superannuation is in the payment phase, it is a future interest that cannot be paid out until a condition of release is satisfied (typically reaching retirement age).

Currently, the FCWA can consider the parties' superannuation interests when determining what would be a just and equitable split of the property pool (FCA, sections 205ZD(3)(f)(ii) and 205ZG(7)(a)), but the court has no power to order a split of that superannuation. To achieve a just and equitable outcome, the court may make an order that the party with less superannuation has a greater share of the liquid assets. This may leave the party with more superannuation a smaller share of the other assets than they might have received if a portion of their superannuation could have been split. Having fewer liquid assets can mean difficulty in meeting immediate expenses (such as funding new housing or a new vehicle).

The FCWA's submission notes that the 'opt in' approach in the Bill was not adopted in 2001, when the *Family Law Legislation Amendment (Superannuation) Act 2001* allowed the superannuation of married couples to be split under the FLA across Australia. Under that Act, the new superannuation splitting regime applied to all married couples who had initiated, but not yet finalised, their property proceedings. There was no requirement for both parties to consent to the new regime.

The FCWA contends that it is more appropriate to model the transitional provisions in the Bill on the 2001 amendments. This is because the 2001 amendments related to superannuation splitting rather than de facto financial matters more broadly, and it would also ensure that de facto couples in Western Australia are treated in the same way as married couples were when superannuation splitting was introduced for them in 2008.

An automatic application approach is not without some potential adverse consequences. For instance, a party may unilaterally seek superannuation splitting orders in a matter close to finalisation to perpetuate delay in finalising those proceedings, thereby resulting in additional costs for parties to proceedings. However, the department appreciates the concerns raised by the FCWA and FLPAWA that the transitional provisions of the Bill should not operate to perpetuate inequality faced by disadvantaged and financially weaker parties. The setting of transitional provisions necessitates the balancing of these factors.

Finalised proceedings

The FLPAWA raises a concern that the Bill does not, on its face, prevent an application for orders under the new superannuation splitting regime (section 90YX) where de facto parties already have final property settlement orders in force pursuant to Part 5A of the FCA upon commencement of the Bill.

There is no express transitional provision that operates as an automatic bar to prevent de facto couples with final property settlement orders in force pursuant to Part 5A of the FCA upon commencement of the Bill applying for orders under the new Part VIIIC. However, there are other provisions in the Bill that would need

to be satisfied before an application under the new regime could be made that would, in practice, make such applications unlikely. For example, under proposed subsections 44(7) and (9) of the Bill, an application for orders under Part VIIIC can only be made within 2 years of the end of the de facto relationship, unless the court grants leave for the application on the basis of hardship to a party or child. Parties with final court orders in place upon commencement of the Bill would generally be out of time to commence new proceedings, unless the court granted leave. Further, in the event that an application under Part VIIIC was made within 2 years, or leave was granted at a later time on the basis of hardship, the court would be required to take into consideration the parties' previous property orders under Part 5A of the FCA when determining whether it would be just and equitable to make superannuation splitting orders (see proposed paragraph 90YZD(4)(i)).

The FLA, under section 81, contains a clean break principle, which provides that court orders ought to finalise the financial relationship between the parties. It is intended that the Bill would maintain consistency with this general principle, and that Western Australian de facto couples who already have final court orders dividing their property will not be able to access the new regime and have their superannuation interests split. While other provisions in the Bill would make applications from those with final orders unlikely, including an additional express transitional provision that operates as an automatic bar would assist in reducing any uncertainty with respect to the situation of de facto parties with final orders in place on commencement.

The department welcomes the opportunity to provide any further information the Committee requires in response to these or any other submissions received.