Submission No: 108

National Network of Women's Legal Services

Submission on

Family Law Amendment Bill 2004
&
Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

INTRODUCTION

Background to National Network of Women's Legal Services

The National Network of Women's Legal Services (NNWLS) is a national group of Community Legal Centres specialising in women's legal issues. It is comprised of the following agencies, some of which have been operating for over 20 years:

- Women's Legal Services located in capital cities in each State and Territory.
- Indigenous Women's Legal Services.
- ATSIC-funded Family Violence Prevention Services
- Domestic Violence Legal Services.
- Rural Women's Outreach workers

These services offer free legal advice, information, representation and legal education for women, providing assistance to more than 25,000 women across Australia each year. We target disadvantaged women including women from non-English speaking backgrounds, rural women, women with disabilities and Indigenous women. As a consequence, the NNWLS has developed an expertise in family law, violence against women and children and the legal aid system, as these issues affect disadvantaged women.

The Network is regularly asked to respond to government and Court initiatives and reform proposals and has developed a reputation for providing considered responses which incorporate a broad cross-section of views.

For further information contact:
Catherine Carney or Tracey Stevens; Women's Legal Resource Centre, NSW
(02) 9749 7700

Zoe Rathus: Women's Legal Service, Brisbane,
(07) 3392 0644

Joanna Fletcher; Women's Legal Service Victoria,
(03) 9642 0877

Structure of Submission

NNWLS has decided to address both the above Bills in one submission because of the significant overlap of issues. A copy of this submission will be forwarded to both the Senate Legal and Constitutional Legislation Committee and the House of Representatives Standing Committee on Legal and Constitutional Affairs which are examining the relevant Bills.

FAMILY LAW AMENDMENT BILL 2004

Part 1 - Parenting Compliance Regime

Under the current *Family Law Act* section 70NG already provides that the Family Court (and other courts exercising family law jurisdiction) can vary a parenting order when it is hearing proceedings for a contravention of an existing order. However, that section is limited to situations in which the Court finds that a contravention has occurred and the person responsible does not have a 'reasonable excuse' as defined under the Act. When this section was introduced in 2000 NNWLS supported this approach and the ability of the Court to adjourn the proceedings to allow either party to apply for a further parenting order (see subsections 70NG(1)(c) and (1A) in particular).

Many of our clients are required by court order to send their children on contact visits with fathers who have been violent towards them, and sometimes directly the children as well. Some of the orders are the result of a judicial decision and others are consented to by women in a range of circumstances (eg. they may be unrepresented or they may have been unable to effectively advocate for the violence to be taken into account in negotiations).

Many women wish their children to have an on-going relationship with their father notwithstanding demonstrated violence and initiate contact after separation. However, if concerns are raised by the conduct of the father at handover, the children disclose abuse by their father during contact visits or the children's behaviour after contact is disturbed or aggressive, the mothers find themselves in an untenable position and may start to refuse contact. Where a court order exists, they may contravene that order. These issues have been well documented.[1]

Research conducted by Rhoades in 1999 exemplifies the problems of contact enforcement cases – including where the orders were made by consent. She analysed 100 files in which an enforcement application was filed. The overwhelming majority of applications were to enforce *consent* orders (n=88). Despite the fact that the most common problem was the resident parent's concerns about domestic violence (n=55), 50 of the orders had been made by consent. In other words, even though women may be

[1] Kaye M, Stubbs J and Tolmie J (2003) *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, Families, Law and Social Policy Research Unit, Griffith University, Queensland and Rendell K, Rathus Z and Lynch A (2000) *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family,* Women's Legal Service, Brisbane.

worried about domestic violence, they still consent to the violent partner having contact. In 32 of the cases involving domestic violence the enforcement proceedings ultimately led to 'more restrictive contact arrangements' being imposed on the father.[2] NNWLS is not aware of any specific research which has been undertaken regarding the operation of the new section 70NG which was introduced after the Rhoades research.

It must be noted that it is very difficult to obtain a grant of legal aid to vary a court order. There are significant hurdles to be overcome in such applications to legal aid. Therefore, for many of our clients, the only opportunity for review of a dangerous or unworkable contact order occurs in the process of contravention proceedings. If the mother has a chance to place evidence before the court regarding the violence which has occurred and/or the concerns which have arisen through the contact arrangements, the power of the Court to vary the original order at this time can be practical and operate in the best interests of children. However, if this evidence is not forthcoming because the woman is unrepresented or she cannot prove or substantiate her claims, the Court may vary the original order in a way which is unsafe and unsatisfactory.

The proposed section 70NEB seeks to extend the ability to vary the original order to situations where the court has not found a contravention or where a reasonable excuse has been proved.

In situations where a mother has been able to prove reasonable excuse as a result of violence and the Court uses the proposed section to restrict the father's contact to a safer arrangement, NNWLS would support the amendment. However, we are concerned that there is wide range of factual situations in which these powers could arise.

NNWLS suggests that consideration be given to including in the proposed clause 70NEB clauses similar to 70NG(1)(c) and (1A) so that parties have the opportunity to properly prepare and present their cases. We make the point that the mentioned subsections were introduced partly in response to submissions by NNWLS at the time but the final drafting did not fully reflect our ideas.

The NNWLS proposal commenced by requiring the court to have regard to whether there has been a history of domestic violence or child abuse. Further, in respect of subsection 70NG(1A)(a) relating to consent, the NNWLS drafting was as follows:

> ... the circumstances surrounding the making of the original order (eg. whether it was made by consent at a mediation or legal aid conference or whether the parties were legally represented).

The purpose of the NNWLS proposal was to invite the court to scrutinise 'consent' arrangements to ascertain whether they may be the outcome of a possibly coercive process. We have always been concerned that, as enacted, the subsection did not reflect

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[2] Rhoades H, *The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New' Father* (2002) 16 IJLP&F 71-94 at 84-85

our issue and may imply that, where the original order was made by 'consent', the court should be hesitant about changing it.

Recommendation 1

That ideas similar to those contained in 70NG(1)(c) and (1A) should be added to the proposed section 70NEB but the wording should be altered slightly to clarify the intent behind the sections. The factors which should be relevant to the court's decision as to whether or not to vary the original order are as follows:

(i) whether there are any allegations of a history of family violence;
(ii) whether there are any allegations of child abuse;
(iii) the circumstances surrounding the making of the original order (eg. whether it was made by consent at a mediation or legal aid conference or whether the parties were legally represented at a court hearing);
(iv) whether there has been a change in circumstances which make complying with the original order impracticable;
(v) any other circumstance that results in the original order no longer being in the best interests of the child.

Recommendation 2

That the wording of existing 70NG(1)(c) and (1A) should be similarly amended.

Part 14 - Recovery of Child Maintenance

NNWLS is concerned that this amendment will cover a tiny number of cases and we wonder why it is really required. In most cases where a man has been paying maintenance in accordance with a court order he would have a strong 'step' parent relationship with the child and would be caught under s66M in any event.

It could place a small number of women who mistakenly identified the wrong father in very difficult financial circumstances which will also impact on the children who reside with her. Further, it seems unfair to bring in this provision when women cannot claim back payments of retrospective child support. Therefore, while a woman could be made to pay back a wrongly identified man who is not the biological father she cannot then make a retrospective claim against the real father.

Recommendation 3

That s66X not be added to the Family Law Act.

Part 15 - Frivolous or Vexatious Proceedings

NNWLS supports this provision. In particular we are pleased by s118(5)(b) which allows legal proceedings in other courts to be taken into account in assessing whether

proceedings are vexatious. Many of our clients are harassed by former partners in the civil courts for debts and over other financial matters, in domestic violence courts (often seeking 'cross-orders') and other courts.

Recommendation 4

NNWLS supports proposals to allow the court to be more robust in handling vexatious litigants.

Part 16 - Rules as to Costs

The proposed section 117(1A) would effectively reverse the general rule under family law by providing that the Rules can require a party to family law proceedings to bear the costs of the other party unless the court otherwise orders.

This provision could be a double edged sword for our clients. On the one hand many are disadvantaged by tactics employed by their former partner to slow or obstruct the proper progress of court proceedings. On the other hand, those who are unrepresented struggle to understand and comply with procedural orders made and we are concerned that this provision may have punitive consequences.

It may be useful to add to s117(2A) a provision which states that the Court should also take into account whether a party is unrepresented and, if so, the circumstances giving rise to that situation. Litigants who choose to self-represent to avoid the mitigating influence of a lawyer should not benefit, however, those who self-represent because they are unable to afford a lawyer and unable to obtain legal aid should have their lack of legal counsel taken into account.

Recommendation 5

That a provision be added to s117(2A) requiring a court to take into account whether a party is unrepresented and, if so, the circumstances giving rise to that situation.

Part 19 - Interaction of family law and bankruptcy

Firstly we wish to say that we consider the title to Part 19 is a misnomer. Many of the proposed amendments apply whether or not either of the parties is or becomes a bankrupt. For example, the suggested change to s79 by adding the new s79(10), is not limited to bankruptcy situations. This could occur in any case.

In particular we imagine it may occur when recently enacted provisions relating to transfers of debt become operative. It may be that a creditor of both parties jointly may seek standing in proceedings where one of the orders sought by the wife is to have a debt transferred to the name of the husband alone. While natural justice suggests this is appropriate, the reality for our clients is that financial institutions and many other creditors will be much better resourced for legal proceedings than they are. The cost and

complexity of some financial matters in the Family Court and other courts will be dramatically increased.

The government needs to consider the legal aid implications of these amendments. The recent Senate Report into Legal Aid and Access to Justice recommended an urgent increase in funding for family law.[3]

The current drafting makes it unclear how the needs of the mother and children (the s75(2) factors) are to be taken into account as against such a third party creditor. We are concerned that these provisions will make it harder for mothers to retain the family home for the benefit of their children.

Similar concerns arise in respect of s79A.

Recommendation 6

That the drafting of these new sections clarify the way in which the needs of dependent spouses and children are to be taken into account against third party creditors. Priority to providing children with security and adequate accommodation must be part of the legislative scheme.

Recommendation 7

If legislation of the kind envisaged in these two Bills proceed, funding for legal aid for property matters must be made available to parties affected by the proceedings.

[3] Legal and Constitutional References Committee (2004) Legal Aid and Access to Justice, recommendation 14.

BANKRUPTCY LEGISLATION AMENDMENT (ANTI-AVOIDANCE AND OTHER MEASURES) BILL 2004

Overview

This Bill deals with 2 main areas of law relevant to our clients-

1. It clarifies the way in which family law proceedings should be conducted when bankruptcy proceedings are running concurrently. (Of course this will not happen for couples in de facto relationships until all states have referred their powers so it would exacerbate the differences in treatment under the law already experienced by these couples.)

2. It allows a court hearing bankruptcy proceedings to make an order for the recovery of property or money which is not held legally in the name of the bankrupt, but rather in the name of an associated entity (eg the spouse, the children, the parents etc). This has nothing at all to do with family law proceedings and may occur to parties in an intact marriage.

NNWLS is concerned that the concepts contained in this Bill are wide-ranging and novel and conflate areas of law generally dealt with separately. Although the Explanatory Notes state that:

> The new Division is intended to address the problem of high income professionals divesting themselves of wealth prior to bankruptcy while continuing to derive a benefit from that wealth,

NNWLS believes that the provisions could apply in a significant number of cases where the parties are not wealthy and/or are not acting maliciously or fraudulently. The lack of time limit in respect of the age of transactions, the range of transactions covered, and the presumption of tainted purpose, with an onus then being placed on the respondent to disprove such tainted purpose, makes the proposed Bill draconian in its design.

The proposed scheme entitles the bankrupt to rebut the presumption of tainted property or money, but the problem is that, if the parties have separated, the bankrupt spouse may have no interest in assisting the non-bankrupt spouse to protect their share of the property cake. How would the non-bankrupt spouse prove the 'purpose' for which certain transactions were conducted? It would be difficult to obtain the evidence required and an uncooperative former spouse may be able to actively thwart the non-bankrupt's case. The bankrupt spouse may not even be a party to proceedings to recover property in the hands of a respondent entity.

The differing philosophies which underlie bankruptcy and family law legislation are almost impossible to reconcile. While bankruptcy laws seek to satisfy creditors where possible, family laws seek to preserve assets within part of a family for the protection and

security of the children of the relevant marriage. It is this clash of philosophical approach which creates many of our concerns.

For these overarching reasons and, having regard to the details set out below, NNWLS opposes the introduction of this Bill.

Recommendation 8

That the government not proceed with the *Bankruptcy Legislation Amendment (Anti-avoidance and other Measures) Bill.*

Schedule 2 – Interaction of family law and bankruptcy law

Although item 2 of Schedule 2 vests the Family Court with bankruptcy jurisdiction in certain cases it does not vest that court with exclusive jurisdiction. We believe that the different approaches to the laws of bankruptcy and family law may mean that women and children are better served by the Family Court which is used to prioritising the needs of dependents. Perhaps the Family Court should always be granted the jurisdiction to deal with cases where these issues overlap.

Recommendation 9

That where family law and bankruptcy law interact in a particular case the Family Court (or other court of similar jurisdiction) should deal with both legal areas whenever possible.

Joinder of Parties

We note that the Bill requires the bankruptcy trustee to be joined as a party in family law proceedings in certain circumstances. However, it must by noted that there are significant issues of privacy, confidentiality and safety which are relevant in family law but may not be so apparent to persons and agencies operating in the commercial world. Secrecy of address of a wife who has escaped domestic violence, privacy regarding her current place of work etc, are of critical importance. Any party joined to the proceedings must be required to comply with strict guidelines regarding privacy, confidentiality and safety. Penalties should apply to breach of such provisions.

Recommendation 10

There must be strict provisions regarding privacy, confidentiality and safety for the non-bankrupt spouse when a third party is joined to family law proceedings. Such provisions should include clear and serious sanctions for breach.

Confusion of laws and arenas

We also note that although the trustee must be joined in certain cases in family law, joining the bankrupt in bankruptcy proceedings is discretionary. If the bankruptcy proceedings occurred first and much of the property was thereby vested in the trustee, the bankrupt would only be allowed to make submissions in the Family Court about this vested bankruptcy property with the leave of the court (see para 141 of the EM). This would increase the motivation for the trustee to have the matter dealt with in the Federal Court under the Bankruptcy Act – the substantive provisions are more favourable to the trustee and, if there were a later Family Court application by the non-bankrupt spouse, she would need leave to provide evidence from the bankrupt spouse about the issue of 'tainted purpose'.

Changes to s79(4) and s75(2)

NNWLS is concerned by the addition of proposed section 79(4)(ea). Again, this change is not limited to cases where bankruptcy is an issue and all of the concerns we raised above about the proposed s79(10) in FLAB 2004 are relevant. In most cases any financial order will have an affect on the ability of a creditor to recover their debt. It is impossible to see how the future needs of dependent spouses and children are to be taken into account or ranked against this criteria. It is also not possible to tell in the current drafting how this paragraph competes with the provisions and long-standing case law related to contributions. The proposed new paragraph is not tempered in any way by a requirement that the affect on a creditor only be considered if this is 'just and equitable' or if this will not create hardship for the spouse and/or children.

Similar concerns apply to proposed s75(2)(ha).

Recommendation 11

That the proposed s75(2)(ha) and s79(4)(ea) are dangerous and impossible to align with other provisions of s75(2) and s79(4).

Changes to s79A and s83

NNWLS is concerned by the breadth of this provision. As we understand the provision, a trustee of a bankrupt could seek to have property orders set aside even where the bankruptcy occurs after the property proceedings have been finalised. This offends against concepts of certainty which are very important in law and in family law in particular.

We are also concerned that the trustee will have the resources to run complex legal proceedings but this may be impossible for a spouse - particularly one who has recently been through Family Court property proceedings. There is almost no legal aid available for property matters so even the legal fees could take away a home a mother has just secured for her children.

NNWLS can envisage the situation where a spouse squanders his share of property proceedings by reckless gambling after the case has been finalised and then declares himself bankrupt. The trustee could then bring an application under s79A and an entirely innocent and divorced former spouse and children could be punished for wasteful behaviour over which they had no control. In some cases such behaviour may even be engaged in intentionally to defeat the gains made by a former spouse in property proceedings. This would fall within the category of financial abuse in terms of domestic violence.

The proposed provisions of s83(1A) raise similar concerns in respect of spousal maintenance.

Schedule 1 – Amendments relating to tainted property and tainted money

NNWLS is concerned that a presumption of tainted purpose can be raised merely by the trustee *alleging* that the purpose of a particular transaction was tainted. Presumably trustees would only start proceedings if they took the view that transactions were tainted and, once the allegation is made, it is presumed to be so unless the contrary is proved (s139AFA(2)). Given that a trustee's role is to satisfy the bankrupt's creditors, and they are to have an unfettered power to assert that a transaction of any age is tainted, it is likely that they will always allege tainted purpose and commence proceedings on that basis. NNWLS is very concerned about the ability of our clients to then successfully oppose the trustee, who will have significantly greater resources at their disposal. We repeat that such cases will be complex and expensive.

It seems particularly unfair that there is no time limit which runs. Further, it seems unfair that the only person whose 'purpose' is examined is the bankrupt's (see s139AFA(2). What happens if the bankrupt spouse had a tainted purpose but the non-bankrupt spouse was entirely innocent?

We are concerned that clients whose husbands' are professionals who choose to put the home in the wife's name as a very potential hedge against some kind of future professional negligence claim which is not entirely covered by insurance would be caught. Also a couple who run a small business and are protecting personal assets, but not in a situation where they are anticipating financial disaster, may be caught under the proposed regime.

It must be remembered that these cases may be run in 2 situations –

1. where the family is still intact but one of the parties to the marriage has become bankrupt

2. where the parties have separated and there are concurrent family law proceedings and the trustee has intervened.

If the court decides that property or money is tainted the proposed Bill sets out matters which a court must take into account in deciding whether or not to make an order against such property or money. In respect of property the relevant subsection is 139F(1). Set out below are the matters and some comments:

a) the nature and extent of any estate or interest that any other person or entity has in the property and any hardship that the order might cause that other person or entity

NNWLS is concerned that the proposed provision is focused on hardship to others not to the 'respondent entity'. This may provide no protection to an older wife with few employment skills. It does not appear to leave room to even argue these issues. If family law proceedings were running currently this provision would not sit comfortably with the provisions of s75(2).

Further, even if children were present and their hardship were an issue the section appears to be concerned only with hardship to people with 'any estate or interest' in the property so hardship to children, in terms of lack of stability of their home environment or other quality of life issues, would not be considered (unless the children happened to have some legal interest in the property).

b) the respondent entity's current net worth and any hardship the order might cause the respondent's creditors

Again the focus is on others and not the respondent. This fits with the amendment to the FLA requiring the court to take into account the ability of creditors to recover debts when making property orders (new s75(2)(ha)). However, the needs of a respondent spouse are again invisible and this will clash with other provision of the FLA where there are concurrent proceedings.

ba) the extent to which the market value of the property reflects the bankrupt's ultimate contribution (whether financial or non-financial);

It is hard to work out what this paragraph means. It is erroneous to imagine that a court can somehow add up the financial and non-financial contributions of one party and work out what percentage of the market value it may amount to. And if the Court is to do that, what does it then mean if a market value of, say, $100,000 is considered to only reflect a contribution worth $30,000 by the bankrupt? Does this mean that the trustee can only seek orders over 30% of the property? If this is the intention, there could be quite some confusion as men try to downplay their contributions to the trustee but exaggerate them in family law proceedings. Cases may be run quite differently when bankruptcy and family law proceedings are being heard concurrently. Again there is a risk that a bankrupt spouse could actively thwart the case of the non-bankrupt spouse, in *this* context, by exaggerating their contributions and thus making a greater slice of the property cake available to the trustee and not to the estranged spouse.

NNWLS also wonders how the trustee is to obtain information about the bankrupt's non-financial contributions to a particular piece of property? Will they call the bankrupt husband to give evidence? .

bb) the extent (if any) to which the market value of the property reflects the ultimate contribution (whether financial or non-financial) of an entity or person other than the bankrupt

This paragraph seems to introduce the idea of comparing contributions of the parties family law style – but under family law contributions are not compared by reference to the extent they are reflected in the property's market value. It is therefore difficult to see how the Family Court would undertake this exercise if proceedings were running concurrently.

c) the extent to which the bankrupt used, or directly or indirectly derived a benefit from, the property

Again the interpretation of this is unclear. Presumably, it is only intended to relate to benefit derived by the bankrupt after transfer of the relevant property or money (as per sections 139AI etc), although this is not specifically stated. In NNWLS' view the definitions of relevant property and money over which trustees can seeks orders are too wide throughout the legislation. In the case of property, the bankrupt just has to have derived an *indirect* benefit from the property in the hands of the respondent entity. Is this so wide as to encompass a situation where an estranged wife is given rental income from a property in lieu of child support? Would this be seen as an indirect benefit to the bankrupt husband?

In the case of money, although the Explanatory Memorandum focuses on unfairness to creditors of not being able to satisfy debts owed to them, whilst a bankrupt is still funding a high lifestyle from their own means, the definitions relating to money over which orders can be sought do not seem to reflect this. There is no requirement for the bankrupt to have derived *any* benefit from the money after transfer at all.

d) if the respondent entity is not a trust – the extent to which the respondent entity used, or directly or indirectly derived a benefit, from the property

e) if the respondent entity is a trust – the extent to which any beneficiary of the trust used, or directly or indirectly derived a benefit, from the property

f) the extent to which the property was available for use by the bankrupt

These paragraphs raise similar questions. Of significant concern is the statement at the end of the subsection which says that the court 'must not take account of any other matter'.

There is a similar list of matters set out for 'tainted money' and a provision which, again, excludes other matters from consideration. This seems strange because if there are concurrent family law proceedings the court will be bound to take other matters into account in deciding those proceedings and there does not seem to be any guide as to how the different concepts are to be prioritized.

The factors set out in s75(2) and s79 of the FLA are not reflected in this Bill and therefore a court exercising bankruptcy jurisdiction may allocate a particular asset very differently from a court exercising family law jurisdiction. Some couples may chose to separate to bring in the family law jurisdiction so that the ultimate consequences for them are less adverse. This may encourage a new form of dishonesty and could lead to some very complicated financial and emotional outcomes for families.

It is important to understand that in bankruptcy proceedings the court may be looking at one asset only. Therefore contributions made by the 'respondent entity' to assets held in the name of the bankrupt and therefore automatically available to the trustee have no place and are not balanced against the list contained in s139F.

Conclusion to BLAAAM Comments

NNWLS believes the retrospectivity of BLAAAM highlights its draconian and punitive nature. Transactions that would have been legitimate may now justify a bankruptcy application and trustees in bankruptcy can make application to set aside finalized and implemented financial orders from marriages.

Although we have highlighted above some specific concerns about these Bills, the NNWLS is opposed to the introduction of the Bill (and the related parts of FLAB) in its entirety.