

Submission of the Federation of Community Legal Centres (Vic.) Inc.

**"Superannuation and Family Law"
Attorney-General's Department Position Paper**

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This submission was prepared by the Federation Violence Against Women and Children Working Group.

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About the Federation of Community Legal Centres (Vic.)

The Federation of Community Legal Centres (Vic) Inc. (“the Federation”) is the peak body for over 40 generalist and specialist community legal centres throughout the State of Victoria. The Federation is an active participant in the National Association of Community Legal Centres. Accordingly the Federation reflects a wide community perspective.

Community legal centres include both specialist and generalist centres. Generalist community legal centres deal extensively with clients presenting with Family Law matters. Specialist centres exist for areas including women, disability, mental health, indigenous issues, tenancy, consumer and employment issues and include the Women’s Legal Resource Group and the Domestic Violence and Incest Resource Centre. Centre staff range from lawyers, financial counsellors, youth workers, social workers and administrative staff and are also assisted by dedicated volunteers from both legal and non-legal backgrounds. Centres are also linked to many other community organisations who both refer and are referred clients.

Overwhelmingly, the people who use community legal centres are on low incomes, most receiving some form of pension or benefit. A considerable, albeit declining, percentage of clients are employed. These people in particular are, for the most part, ineligible for legal aid, but are not in a position to pay a private legal practitioner. Community Legal Centres are particularly successful in meeting the needs of persons from non-English backgrounds. In summary, community legal centres work with people who, but for the assistance of the centres, would have extremely limited access to justice.

The philosophy behind community legal centres is not merely to provide legal advice, but to empower people so that they can also find ways of resolving their own problems in the future. Centres are dedicated to a preventative approach in solving client’s problems and are actively involved in community development, education and law reform activities.

The Federation has a number of working groups consisting of community lawyers and workers specialising in a range of areas. The role of these working groups is to address specific areas of law in need of reform based on the experience of clients and the casework of the various Victorian community legal centres. One such group is the Violence Against Women and Children Working Group.

The purpose of this working group is:

1. To work towards the elimination of all forms of male violence against women and children;
2. To explicitly challenge the structures (legal, social, political, economic, cultural) which condone, maintain and perpetuate male violence against women and children;
3. To work towards the improvement of the legal system’s response to male violence against women and children, so that they receive both equal access and just outcomes before the law;

4. To employ a variety of strategies, including community education, advocacy and law reform to achieve the above.

Introduction

The Federation believes that it is crucial that an equitable and consistent manner of dealing with superannuation be developed and in principal supports reforms to develop a model for equitably dividing superannuation interests for parties on separation.

Context of reform

Barriers to women participating in Superannuation Schemes

The role of women as homemaker and primary carer of the children during a marriage circumscribes their capacity to participate in the workforce. Consequently this is reflected in far less women having access and participation in superannuation schemes in their own right than their male counterparts.

Superannuation is often a considerable asset of the marriage, especially with increasing contribution rates, which one party may be denied access to, or forced to forego their interest where it remains inaccessible, cannot be shared or there is a long waiting period until the superannuation becomes payable.

Superannuation built up during a marriage is usually the result of joint contributions and intended to provide an income in retirement for both parties. Women with child care responsibilities who have little possibility of increased earning capacity or career development are left without a valuable asset which contributes to their future financial security and stability.

Impact of Family Violence

Given the widespread incidence and impact of family violence in our society it is important to recognize the impact of violence in considering future needs of parties. The physical and mental health of a victim of domestic violence may be effected to such a degree that their ability to work in the future and therefore future needs may be significantly effected. Family violence can prevent the victim from making a contribution to superannuation interests of the marriage like relationship as the victim may be so effected by the violence that they are unable to work during the relationship. The economic consequence of family violence should be considered when dividing superannuation interests.

Recommendation 1: That in determining the parties' relevant share of superannuation interests as an asset of the marriage, that due consideration be given to the barriers faced by women in participating in superannuation schemes, including the fact that women are more likely to be the main home maker the primary child carer, and also the impact of family violence.

A further major issue of concern to the Federation is:

Negotiated settlements

The underlying assumption of negotiated settlements is that both parties possess equal bargaining power, equal access to information and are able to negotiate fully on their own behalf. While in some cases it may be advantageous for couples to be able to privately arrange their affairs, it raises concerns in situations where there is an imbalance of power in the relationship. More often than not women come from a weaker bargaining position resulting from a number of factors including lack of knowledge of finances and access to less information (in particular women from culturally and linguistically diverse backgrounds) and an unequal ability to withstand the costs of lengthy negotiation or litigation which, coupled with the presumption of equality may further undermine a women's ability to negotiate a settlement.

Another major factor inhibiting women's ability to negotiate is male violence. Women may feel pressured into a settlement which is unfair to avoid violence from their former partner. The use of primary dispute resolution to assist parties with negotiating settlements is inappropriate where there is an imbalance of power between parties, particularly where one person is intimidating, threatening, abusive or violent and is feared by the other person.

It is essential that procedural safeguards be put in place to ensure that the rights of parties are protected and to ensure equitable and informed use of superannuation agreements, so that they are not open to abuse. It is crucial to have full disclosure and knowledge of each party's financial position and a declaration by each party that they understand the superannuation agreement and that the agreement has not been made under duress and that each party has received independent legal advice, signed by the legal practitioner who provided the advice.

Recommendation 2 : That in negotiating settlements it should not be presumed that both parties have equal bargaining power and it should be recognized that often women are in a weaker bargaining position due to lack of knowledge of and access to financial information, male violence and a power imbalance within the relationship. Where there is a power imbalance within the relationship primary dispute resolution mechanisms should not be used and procedural safeguards should be put in place to protect weaker parties from inequitable settlements.

Violence as a Negative Contribution

Some recognition has been given in the Family Court of the negative contribution that family violence represents to the welfare of the family as a separate concept to the direct financial effects of family violence.¹ This recognition gives weight of the realities of violence and the full impact it has on family members. The approach of the court allows justice to the survivors of violence while also making explicit the position of the law in regard to the unacceptable nature of violence in this context. We ask that any amendments clarifying the treatment of superannuation in family law property settlement allow all the contributions of the parties be considered and the continued development of this important concept of negative contribution of violence as a factor to be considered per se.

Conclusion

The Federation would welcome a model which takes account of women's economic inequality and that would improve women's socio-economic status and their access to justice. The Federation strongly urges legislative reform as a matter of urgency that will result in the equitable division of Superannuation interests on separation.

¹ Doherty and Doherty (1996)FCL 92-652