6. Social Security—Relationships

Contents

Summary 149
Member of a couple 150
   Section 4 criteria 151
   Concerns with the s 4(3) criteria 152
   Does family violence always mean that there is no couple relationship? 154
   Should the Act or the Guide be amended? 156
   What sort of guidance should be included? 158
   ‘Special reason’ 159
Independent 163
   Unreasonable to live at home 163
   Continuous support 168

Summary

6.1 This chapter considers how family violence may have implications in relation to the definition of relationships in social security law and practice—that is, whether a person is considered to be a ‘member of a couple’ or ‘independent’.

6.2 Such categorisation can affect a person’s qualification for a social security payment—for example, as an actual condition for qualification for Parenting Payment (Single) and Widow Allowance—and the rate of a social security payment. Generally, being regarded as ‘single’ or ‘independent’ attracts a higher rate of payment, on the assumption that living costs are higher for a person living alone. A decision that a person is a ‘member of a couple’ may result in the refusal, cancellation or reduction of his or her social security payments. It may also lead to a debt being raised against a person, which may be pursued through court proceedings, where a person has been incorrectly paid on the single rate.

6.3 This chapter discusses the way in which a decision about a person’s relationship status is made in the social security context, and the relevance of family violence in making that decision. The issue of family violence and debt repayment is considered in Chapter 9.

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1 Social Security Act 1991 (Cth) ss 408BA, 500.
6.4 The ALRC considers that relationships are inherently difficult to define, but recognises that the effect of family violence may not always be considered appropriately in relationship decisions in the social security context. The ALRC therefore makes a number of recommendations to ensure that the impacts of family violence are expressly considered in relationship decisions in social security law through amendments to the *Social Security Act 1991* (Cth) and the *Guide to Social Security Law*.

### Member of a couple

6.5 The concept of being a couple, namely in a de facto relationship, is relevant across a wide range of Commonwealth and state and territory laws. The definition has a number of key elements and a finding that a person is in a de facto relationship may lead to a range of consequences such as the calculation of pension entitlements and the identification of next of kin.

6.6 In the social security context, ‘member of a couple’ is the basis of a different income support assessment based on the premise that it is cheaper to live as a couple than as a single person.

6.7 In the ALRC’s report, *Equality Before the Law: Justice for Women* (ALRC Report 69), the ALRC considered that the assumption that couple relationships will provide equal financial support for the people in that relationship is inaccurate and that there is a need to address entitlement to income independently.\(^3\)

6.8 While the same concerns have been raised in this Inquiry,\(^4\) it is beyond the ALRC’s Terms of Reference to consider this at large. The underlying notion of financial interdependence, and that singles require more money to enjoy the same living standard as couples, is systemic across the social security system. To reverse this assumption for victims of family violence and not for others would result in a two-tiered structure within the social security system.

6.9 The problem in this Inquiry is how best to factor in family violence issues in the social security context. Should family violence be considered as so undermining of a de facto relationship as to lead to a conclusion that the persons are not ‘members of a couple’? Or is there some other place in the social security context to include an understanding of the impact of family violence?

6.10 Section 4(2) of the *Social Security Act* defines ‘member of a couple’ to include persons formally married and persons of the opposite sex who are, in the opinion of the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), in a ‘de facto relationship’—previously, a ‘marriage-

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like relationship’. There are exceptions: ss 4(2)(a) and 4(3A) exclude people who are ‘living separately and apart’; and ss 4(6) and 24 allow persons who otherwise would be treated as a ‘member of a couple’ to be considered ‘single’ for a ‘special reason’.

6.11 Section 4(3) of the Social Security Act provides a detailed range of criteria to be considered by a decision maker in determining whether a person is a member of a couple. Many of these criteria are relevant to family violence. However, the presence of family violence is not always considered by decision makers when assessing these criteria, nor are they directed to do so, even though family violence may influence a number of the criteria. This may have implications for determining whether a person is a member of a couple or whether they are living separately and apart—including whether they are separated under one roof.

Section 4 criteria

6.12 Section 4(3) of the Social Security Act provides that, in deciding whether a person is a ‘member of a couple’, consideration is to be given to ‘all the relevant circumstances of the relationship’. In particular, regard must be had to a detailed range of criteria, which include:

- the financial aspects of the relationship;
- the nature of the household;
- the social aspects of the relationship (including whether the persons hold themselves out as married to each other);
- any sexual relationship between the persons; and
- the nature of the commitment to each other.

6.13 These criteria are points for the decision maker to consider and give weight to. They are not a checklist of circumstances that must be met in all cases, nor a balancing test requiring a relationship to satisfy the majority of criteria. They provide a core of what needs to be investigated, but do not close off the circumstances of a relationship from investigation.

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8 Ibid s 4(3)(b).
9 Ibid s 4(3)(c).
10 Ibid s 4(3)(d).
11 Ibid s 4(3)(e).
13 Re Pill and Secretary, Department of Family and Community Services (2005) 81 ALD 266, 272.
14 Stauton-Smith v Secretary, Department of Social Security (1991) 25 ALD 27.
It is possible a decision-maker might decide that the individual is a member of the couple even though she does not satisfy all or even the majority of the criteria. Conversely, many of the indicia ... might be present yet the circumstances as a whole might justify the conclusion that the couple live separately and apart.\textsuperscript{15}

6.14 In relation to determining living separately and apart, including separation under one roof, the \textit{Guide to Social Security Law} directs a decision maker to consider the criteria under s 4(3).\textsuperscript{16}

6.15 Detail is provided in the \textit{Guide to Social Security Law} as to what type of information may be relevant to each criterion in s 4(3). Relevantly, in relation to the criterion of the ‘nature of the commitment to each other’, the \textit{Guide to Social Security Law} provides that information about ‘domestic violence’, such as ‘court documentation … may indicate the absence of commitment and/or emotional support’.\textsuperscript{17}

6.16 Some scholars have noted that the criteria in s 4(3) and its interpretation by decision makers can lead to a ‘nebulous account of a de facto relationship’ due to the broad criteria and their flexible application.\textsuperscript{18} The Commonwealth Ombudsman has also noted that it is not unusual for a decision maker’s own experiences and values to weigh into the decision-making process.\textsuperscript{19} As stated by French J in \textit{Pelka v Department of Family and Community Services}:

\begin{quote}
The judgment to be made is difficult and, once out of the range of obvious cases falling within the core concept of ‘marriage-like’, will be attended by a degree of uncertainty. Indeed, it may be that different decision-makers on the same facts could quite reasonably come up with different answers.\textsuperscript{20}
\end{quote}

\section*{Concerns with the s 4(3) criteria}

6.17 Concerns have been expressed by stakeholders in this Inquiry about possible underlying assumptions of a decision maker that may disregard family violence and its potential impact on a victim’s decisions.

6.18 One stakeholder considered that, due to the ‘high incidence of economic abuse in family violence’, the ‘automatic treatment of financial resources in a couple as pooled should not occur’, but rather the assumption should be ‘reversed’ in instances of

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\begin{itemize}
\item\textsuperscript{15} Re Cahill and Secretary, Department of Family and Community Services [2005] AATA 1147 at [22].
\item\textsuperscript{17} Ibid, [2.2.5.10].
\item\textsuperscript{20} Re Pelka and Secretary, Department of Family and Community Services [2006] FCA 735. The reference to ‘de facto relationship’ replaced a ‘marriage-like relationship’ in November 2008. The test under s 4 remained the same. See \textit{Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform Act) 2008} (Cth).
\end{itemize}
family violence. This reflects the concerns that economic abuse may obviate consent to the ‘significant pooling of financial resources’.

6.19 Further concerns were expressed in relation to the criteria concerning the ‘nature of the commitment to each other’. For example, the Council of Single Mothers and their Children (CSMC) and the Homeless Persons’ Legal Service submitted that the current reference in the Guide to Social Security Law to consider evidence of domestic violence as an indication of the absence of commitment and/or emotional support, ‘does not give adequate weight to the existence of family violence in determining whether a person is a member of a couple’.

6.20 There may also be a correlation between the length of the relationship and the degree of violence. In other words, that due to violence—or threats of violence—a person feels trapped and unable to leave a relationship.

6.21 The Commonwealth Ombudsman noted anecdotal instances when Centrelink has determined that a customer is a member of a couple, even where it appears the ‘relationship’ may have only continued as a result of duress or financial abuse. For example:

It is unclear whether this has resulted from decision makers believing that the criteria in s 4 of the Social Security Act 1991 do not allow them to find the customer was not a member of a couple, or whether the facts of the individual cases were not sufficiently strong to overcome those criteria which did point to the existence of a relationship.

6.22 Other concerns include:

- patterns of violence and lack of alternative accommodation may mean that a person has no choice but to remain in the same house;
- secrecy associated with family violence may mean that a person continues to hold themselves out as a member of a couple; and
- violence in a relationship may negate consent for any sexual relationship between the couple.

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21 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, Submission CFV 65.
6.23 The Welfare Rights Centre NSW (WRC (NSW)) and the North Australian Aboriginal Justice Agency (NAAJA) also raised concerns that information about family violence—such as police reports—has been used to demonstrate the existence of a couple relationship, rather than finding that one did not exist.27

6.24 Throughout the Inquiry, stakeholders indicated that determination of separation under one roof was not made consistently.28 Stakeholders provided examples of difficulties faced by customers, such as:

- where a person has obtained a protection order and the person using family violence breaches the order and returns to the home;29
- lack of refuge accommodation and the desire to give children some stability can mean it is hard to leave and the fear that if they leave the relationship, and do not have stable accommodation, they may lose custody of their children to the person using family violence;30 and
- dependency by people with disability on their partner for physical and financial assistance may lead to a finding that they are still in a relationship.31

6.25 In addition, the Sole Parents’ Union submitted that victims of family violence were not always aware that a person could be separated under one roof and that it can be difficult to prove, ‘particularly given the element of control by the perpetrator’:

> Every time I tried to leave he’d threaten that he’d take the kids away from me. He told me that no court would award me custody if I didn’t have somewhere to live and there was no way he was going to leave the house. I didn’t even know you could be separated if you were still living together.32

6.26 The Homeless Persons’ Legal Service considered that, without clear articulation of family violence as an example of people living separately and apart under one roof, there is a risk that victims of family violence may be forced into homelessness, in order to receive Centrelink payments.33

**Does family violence always mean that there is no couple relationship?**

6.27 It is inherently difficult to define, in precise terms, what constitutes a relationship. Some relationships, while unpleasant, do not necessarily involve family violence.

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27 North Australian Aboriginal Justice Agency, Submission CFV 73; WRC (NSW), Submission CFV 70.
28 National Welfare Rights Network, Submission CFV 150; ADFVC, Submission CFV 71; WRC Inc (Qld), Submission CFV 66; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, Submission CFV 65; Sole Parents’ Union, Submission CFV 63; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; Council of Single Mothers and their Children (Vic), Submission CFV 55; P Eastal and D Emerson-Elliott, Submission CFV 05.
29 Ibid.
30 ADFVC, Submission CFV 71.
31 Ibid.
32 Sole Parents’ Union, Submission CFV 63.
33 Homeless Persons’ Legal Service, Submission CFV 95.
6.28 While the current criteria in s 4 for determining a couple relationship can lead to ‘nebulous’ results, it also allows flexibility in decision making by providing a non-exhaustive list of criteria, with no fixed determination as to the weight to be placed on each criterion, and the circumstances of the whole relationship still to be considered.

6.29 This may mean that the presence of family violence can lead to a decision that a person is in a couple relationship or not. It is one factor to consider in the determination of a person’s relationship status. Likewise, if the couple is living under the same roof, they may be considered to be ‘separated under one roof’.

6.30 The ALRC therefore recommends that further information about the effect of family violence on ‘member of a couple’ decisions be provided in the Guide to Social Security Law. Directing decision makers to consider how family violence affects a victim’s decisions, actions and inactions, will improve the way in which family violence is considered in ‘member of a couple’ decisions.

6.31 To some extent, s 4(3A) of the Social Security Act may provide for this. Subsection 4(3A) states that people who are living separately and apart should not be treated as being in a couple relationship. This includes where people are living separately and apart but remain under the one roof. This means that, in the social security context, a person is treated not as a member of a couple and can access the single rate of payment.

6.32 Generally, a physical separation as well as an emotional separation of the couple is required. They must establish that: they are living apart, either permanently or indefinitely, and there has been an ‘estrangement or breakdown in their relationship’. The Guide to Social Security Law recognises that there may be instances where a person is ‘living separately and apart under one roof’, but one or both parties must ‘form the intention to sever or not to resume that relationship and act on that intention’. The Guide to Social Security Law directs a decision maker to consider the criteria in s 4(3) when making a determination as to whether people are living separately and apart.

6.33 In particular, the Guide to Social Security Law provides that the consideration of the criterion of ‘the nature of the commitment to each other’ and the degree to which they have distanced themselves physically and emotionally, includes whether there has been a withdrawal of intimacy, companionship and support to the other party. However, as s 4(3) provides the core criteria for assessment, stakeholders raised concerns about the extent to which, and the way in which, family violence is considered in relation to this criterion.

35 Ibid, [2.2.5.20].
36 Ibid, [2.2.5.20].
37 Ibid, [2.2.5.30].
38 Ibid, [2.2.5.30].
39 Ibid, [2.2.5.30].
6.34 It is therefore necessary to inform decision makers how family violence may be relevant to each of the criteria to ensure family violence is adequately considered in making determinations about couple status and particularly the assessment of living separately and apart under one roof.

6.35 The ALRC also recommends that consistent, regular and targeted training should be provided to relevant staff on the ways in which family violence may affect the interpretation and application of the criteria in s 4(3) of the Social Security Act, in accordance with Recommendation 5–2. This was supported by stakeholders.40

**Should the Act or the Guide be amended?**

6.36 The ALRC has heard of difficulties faced by victims of family violence in proving separation under one roof. The ALRC therefore recommends that further guidance be provided to decision makers in the Guide to Social Security Law on how family violence may affect such determinations and as to how family violence affects a victim’s decision to stay or leave a violent relationship—such as financial abuse and other social and economic factors that may prevent a victim from leaving a violent relationship.

6.37 Although many stakeholders supported amending the criteria in s 4(3) of the Social Security Act to take account of the existence and effect of family violence,41 the ALRC considers amending the Guide to reflect this is preferable to amending the Act. To do otherwise may lead to unintended consequences, diminish flexibility in decision-making and create inconsistencies with other Commonwealth laws. Stakeholders agreed that further guidance should be provided in the Guide to Social Security Law about how the existence of family violence may affect each of the criteria in s 4(3).42 However, FaHCSIA considered that the Guide already covered this issue.43

6.38 In a joint submission, Professors Patricia Eastal and Derek Emerson-Elliot argued that the Social Security Act should be amended to require that, before deciding that a person is a member of a couple, decision makers must be ‘satisfied that both members have a reasonable equality of power in the partnership, or that if it is a

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40 National Legal Aid, Submission CFV 164; FaHCSIA, Submission CFV 162; National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136; ADFVC, Submission CFV 105; Homeless Persons’ Legal Service, Submission CFV 95; WEAVE, Submission CFV 85.

41 ADFVC, Submission CFV 71; WRC (NSW), Submission CFV 70; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, Submission CFV 65; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; Homeless Persons’ Legal Service, Submission CFV 40; P Eastal and D Emerson-Elliott, Submission CFV 05.

42 National Legal Aid, Submission CFV 164; National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136; DEEWR, Submission CFV 130; ADFVC, Submission CFV 105; Homeless Persons’ Legal Service, Submission CFV 95; WEAVE, Submission CFV 85; ADFVC, Submission CFV 71; WRC (NSW), Submission CFV 70; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, Submission CFV 65; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; Council of Single Mothers and their Children (Vic), Submission CFV 55; P Eastal and D Emerson-Elliott, Submission CFV 05.

43 FaHCSIA, Submission CFV 162.
dominant/submissive partnership the submissive member retains the capacity to validly consent to the partnership'. They strongly supported amendment to the Social Security Act to reflect the difficulty for victims of family violence as a result of the power imbalance in a violent relationship:

The relationship is in reality more that of a (psychological) hostage and captor relationship. As a result of this disempowerment, victims may be limited in their ability to make choices and limited capacity to change or even challenge the circumstances that they are in... The Social Security Act must be amended in order to require the decision maker to be satisfied that both members of a couple have a reasonable equality of power in the partnership.

6.39 In any decision-making process, the ALRC considers that it is important that there is flexibility, to ensure that law and policy are responsive to individual circumstances—the theme of self-agency and autonomy described in Chapter 2—but also consistency, to provide a level of certainty that like circumstances will be considered in a like manner.

6.40 For example, for victims of family violence, a determination that a person is not a member of a couple in social security law may arguably be used in other areas of law such as child support, under Commonwealth laws, and intestacy, under state and territory law. For example, if a person is considered not to be in a couple relationship and the partner were to die, what relevance would the factual determination for social security purposes have in the context of eligibility as a de facto partner for inheritance purposes?

6.41 Section 4(3A) of the Social Security Act does not provide any examples of when a person is living separately and apart. This detail is provided in the Guide to Social Security Law. This provides flexibility in decision making and, on its face, does not preclude a decision maker from considering family violence. If s 4(3A) included family violence as an example of separation under one roof, other examples would also need to be included. This may lead to a prescriptive list resulting in greater inflexibility in decision making.

6.42 Amending the s 4(3) criteria may also create an incentive for false or manipulated claims of family violence to access a higher ‘single’ rate of payment, thereby detracting from the overall purpose of social security law—to provide for those in genuine need. Accordingly, the ALRC considers that the level of verification of family violence in ‘member of a couple’ decisions should be appropriate—as discussed in Chapter 5.

6.43 A tension also exists between reflecting the true nature of a relationship and ensuring unintended consequences do not flow from changing the criteria on which a couple relationship is determined—the theme of ‘fairness’, discussed in Chapter 2. The ALRC envisages that amending the criteria in s 4(3) may lead to unintended consequences for both the victim of family violence and the social security system. The
ALRC therefore considers that the emphasis in the *Guide to Social Security Law* should be placed on ensuring family violence is adequately considered in determining separation under one roof by including family violence as a circumstance where a person may be living separately and apart under one roof.

**What sort of guidance should be included?**

6.44 The case of *Kosarova v Secretary, Department of Education, Employment and Workplace Relations* considered whether the Administrative Appeals Tribunal (AAT) failed to have regard to extensive violence when considering whether a person was ‘living separately and apart’ under s 4(3) of the *Social Security Act*. Riethmuller FM stated that:

> Family violence must be a significant consideration when determining whether parties are members of a couple: it strikes at the very heart of the concept of ‘companionship and emotional support’ to each other. It is difficult to conceive of a case involving significant family violence, that would not require such violence to be carefully considered in the context of determining the nature of the parties’ commitment to each other, and in particular the nature of their emotional support.46

6.45 The National Welfare Rights Network (NWRN) submitted that such guidance may be supported by reference to the principles enunciated in the case of *Kosarova* and by should provide that the decision maker should ‘consider the impact of extreme violence on the nature of the household (s 4(3)(b)) and the nature of the parties’ commitment to each other (s 4(3)(e))’.47

6.46 However, the NWRN considered that it should not be necessary to prove ‘extreme violence’ as described in *Kosarova* in order for family violence to be taken into account and that all forms of family violence—not only physical violence—need to be considered.

6.47 The Australian Association of Social Workers Queensland (AASW (Qld)) and the Welfare Rights Centre Inc Queensland (WRC Inc (Qld)) recommended that the *Guide to Social Security Law* should also include

examples showing the impact of family violence on each relationship ‘factor’ and also include suggestions for questions to assist in eliciting this information. For example, in relation to finances, questions should consider the level of decision making victims of family violence have had on family resources and the way in which this has impacted on them.48

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46 *Kosarova v Secretary, Department of Education, Employment and Workplace Relations* [2009] 888. The decision in *Kosarova* is yet to be incorporated into the *Guide to Social Security Law*.

47 National Welfare Rights Network, Submission CFV 150; WRC (NSW), Submission CFV 70.

48 AASW (Qld) and WRC Inc (Qld), Submission CFV 136.
Stakeholders agreed that the Guide to Social Security Law should clearly state that family violence may be taken into account in a determination of separation under one roof. Such guidance could include:

the impacts of family violence on victims, including financial abuse, and other environmental and social factors that may prevent a victim from leaving, such as the extreme public housing shortage in some locations and the high cost of private rental.

In particular, the way in which financial resources are exploited within family violence situations needs to be better understood to allow for the treatment of income as separate and not pooled as a ‘household income’.

Recommendation 6–1  The Guide to Social Security Law should suggest the ways in which family violence may affect the interpretation and application of the criteria in s 4(3) of the Social Security Act 1991 (Cth).

Recommendation 6–2  The Guide to Social Security Law should include family violence as a circumstance where a person may be living separately and apart under one roof.

‘Special reason’

The Secretary of FaHCSIA has a discretion, under s 24 of the Social Security Act, to rule that, for a ‘special reason’ in the particular case, a person should not be treated as a ‘member of a couple’. The Guide to Social Security Law states that s 24 is intended to be an ‘option of last resort and should only be applied when all other reasonable means of support have been explored and exhausted’. When the discretion under s 24 is applied and a person is determined not to be a member of a couple, the person is: treated as a ‘single’ person for all purposes of the Social Security Act; paid the single rate of payment; and ‘only their individual income and assets are included in the assessment of the rate of their payment’.

Section 24 does not preclude family violence from being taken into consideration by a decision maker. However the ALRC is concerned that there may be insufficient guidance and training for decision makers about how family violence can affect a person’s decisions. The ALRC therefore recommends that further guidance as to how family violence may constitute a ‘special reason’ should be included in the

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49 National Legal Aid, Submission CFV 164; National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136; DEEWR, Submission CFV 130; ADFVC, Submission CFV 105; Homeless Persons’ Legal Service, Submission CFV 95; WEAVE, Submission CFV 85; ADFVC, Submission CFV 71; Council of Single Mothers and their Children (Vic), Submission CFV 55; Homeless Persons’ Legal Service, Submission CFV 40.

50 ADFVC, Submission CFV 71.

51 AASW (Qld) and WRC Inc (Qld), Submission CFV 136.


53 Ibid.
Guide to Social Security Law. This was supported by stakeholders. However, Eastal and Emerson-Elliot considered s 24 to be an inappropriate mechanism for decision making on ‘such a significant and basic issue as whether a relationship is genuinely that of a couple, or is that of captor and hostage’.

6.52 The ALRC notes that while Recommendation 6–1 may go some way to addressing concerns of family violence in ‘member of a couple’ decisions, for consistency, family violence should also be expressly considered in relation to the s 24 discretion.

6.53 The ALRC noted in the Family Violence—Commonwealth Laws, ALRC Discussion Paper 76 (2011) (Discussion Paper), that if reliance is to be placed on the discretion in s 24 for persons experiencing family violence, it needs to be adequately accessible. In particular, the ALRC queried whether its use as an ‘option of last resort’ presents a barrier to those experiencing family violence from accessing the discretion.

6.54 Stakeholders mentioned that s 24 was rarely used for family violence and victims were unaware that they could invoke this discretion. One reason for its disuse appears to be lack of knowledge of the discretion itself—both by customers andCentrelink officers.

6.55 The ALRC therefore recommends that information about the discretion be provided to customers as part of Recommendation 4–2 to ensure that customers are aware of its availability.

Unusual, uncommon or exceptional?

6.56 The Guide to Social Security Law states that the ‘special reason’ must be ‘unusual, uncommon or exceptional’—that is, there must be something unusual or different to take the matter the subject of the discretion out of the ordinary course. The discretionary power must also be exercised for the purpose for which it was conferred—that is, to make provision for those who are in genuine need.

6.57 The Guide to Social Security Law directs the decision maker to consider three questions, while also looking at the full circumstances of the case:

- Is there a special reason to be considered in this couple’s circumstances?

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54 National Legal Aid, Submission CFV 164; National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136; DEEWR, Submission CFV 130; ADFVC, Submission CFV 105; WEAVE, Submission CFV 85.
55 P Eastal and D Emerson Elliott, Submission CFV 145.
57 Ibid.
58 National Legal Aid, Submission CFV 164; WRC (NSW), Submission CFV 70.
59 National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136.
60 Boscolo v Secretary, Department of Social Security [1999] FCA 106.
61 Re Secretary, Department of Social Security and Porter (1997) 48 ALD 343.
• Is there a lack of being able to pool resources for the couple as a result of the circumstances?
• Is there financial difficulty as a result of the couple’s circumstances?62

6.58 While the Guide to Social Security Law considers some common scenarios,63 it does not provide family violence as an example of where the discretion might be exercised. Some stakeholders indicated that family violence was not adequately taken into consideration by the decision maker in exercising the discretion in s 24.64 A number of cases serve to demonstrate how family violence has previously been considered in exercising the discretion under s 24.

6.59 In Perry and Department of Family and Community Services, the AAT found that a longstanding history of family violence did not amount to a ‘special reason’ under s 24, as the applicant was not prevented by some external force from separating from the person using family violence.65

6.60 Similarly, in Lynwood and Secretary, Department of Education, Employment and Workplace Relations, the applicant was seen to have suffered from family violence from her husband over a long period. While her husband did not help in any way with the raising of 11 children, this was not seen as ‘something unusual or different to take the matter the subject of the discretion out of the ordinary course’.66 Other cases have been determined in a similar manner.67

6.61 On the other hand, in Rolton v Department of Education, Employment and Workplace Relations, the AAT found that, while the person was a member of a couple under s 4 of the Social Security Act, her circumstances, ‘namely, her being in an abusive and controlling relationship, and the nature and severity of her mental condition, amounted to a special reason within the meaning of section 24(2)’.68

Alternatives for reform

6.62 Stakeholders recommended that family violence should be taken into account expressly in considering the special reason discretion in s 24 of the Social Security

63 Ibid.
64 WRC Inc (Qld), Submission CFV 66; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; Council of Single Mothers and their Children (Vic), Submission CFV 55; P Eastal and D Emerson-Elliott, Submission CFV 05.
67 Bruce and Secretary, Department of Social Security [1995] ATA 341 (22 November 1995); Williams and Secretary, Department of Social Security [1997] AATA 228 (2 July 1997); Scheibel and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2011] AATA 282 (21 January 2011).
in particular to ‘require recognition by the decision maker of the disempowering effects of family violence and “battered women’s syndrome”’.60

6.63 Easteal and Emerson-Elliott identified that the ‘real problem arises from the fact that women living with, or having lived with, serious family violence are unable to consent to a marriage-like relationship in the first place’ likening such relationships to ‘master/slave relationships, where the battered woman does not consent to what is happening but has no power—in fact no will—to change or even challenge the circumstances in which she finds herself’.71

6.64 Similarly, the CSMC noted that, due to abuse experienced by victims of family violence and threats made if they leave, victims may have no choice but to remain in a violent situation. ‘In these circumstances they are not part of a ‘couple’ by any usual definition—there is no equality or sharing in that situation’.72

6.65 Easteal and Emerson-Elliott submitted that, as a result of the decision in Rolton, ‘consideration is being given to amending section 24 of the Act to specifically recognise circumstances such as those in Rolton’.73 However, they also submitted that, while liberalising the discretion in s 24 of the Act would be welcome, ‘it would only be a band-aid solution to the problem’.74

6.66 The WRC Inc (Qld) argued that, while s 4 ‘provides a definition of what a member of a couple is, s 24 allows for a decision maker to state what a member of a couple is not’.75 The Centre therefore recommended the addition of a new subsection to s 24 to provide that a victim of family violence should not be treated as a member of a couple. The Centre raised concerns about the potential for such a provision to be abused, but considered that the definitions surrounding duress at both common law and in statute would, to some extent, guard against such abuse.

6.67 The WRC (NSW) considered that the Guide to Social Security Law should direct a decision maker expressly to consider family violence in the exercise of the s 24 discretion and any previous decisions should be backdated, where appropriate.76

6.68 The WRC Inc (Qld) raised an additional concern about the use of modifying words, like ‘extreme’, ‘special’ or ‘exceptional’ and submitted that they have dealt with many cases where a decision maker has agreed that a circumstance prevents a victim from living in their place of residence, however due to this situation being quite normal in the victim’s life, the requirement is not met.77

69 ADFVC, Submission CFV 71; WRC (NSW), Submission CFV 70; WRC Inc (Qld), Submission CFV 66; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, Submission CFV 65; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; P Easteal and D Emerson-Elliott, Submission CFV 05.

70 WRC (NSW), Submission CFV 70.

71 P Easteal and D Emerson-Elliott, Submission CFV 05.

72 Council of Single Mothers and their Children (Vic), Submission CFV 55.

73 P Easteal and D Emerson-Elliott, Submission CFV 05.

74 Ibid.

75 WRC Inc (Qld), Submission CFV 66.

76 WRC (NSW), Submission CFV 70.

77 WRC Inc (Qld), Submission CFV 66.
6.69 However, throughout social security law and policy, references are made to modifying words such as ‘extreme’ or ‘special’. It is beyond the ALRC’s Terms of Reference to recommend that such words be deleted from social security legislation.

**Recommendation 6–3** The *Guide to Social Security Law* should direct decision makers expressly to consider family violence as a circumstance that may amount to a ‘special reason’ under s 24 of the *Social Security Act 1991* (Cth).

### Independent

6.70 Whether a person is ‘independent’ can affect his or her qualification for, or rate of payment of, Youth Allowance, Disability Support Pension, Special Benefit and Pensioner Education Supplement. It can also affect whether a person is paid a social security payment directly or through a parent.

6.71 These payments may be assessed on the basis that the person is independent of, or dependent on, his or her parents. If a person is assessed as dependent, the parents’ income and assets are considered in determining eligibility. This is based on the presumption that parents with sufficient resources will provide financial and material support to their children.

6.72 There are a number of circumstances in which a person may be considered ‘independent’. Of most relevance to victims of family violence is the provision for independence where it is ‘unreasonable to live at home’. To be considered independent in these circumstances, it must be unreasonable for the person to live at home and the person must not be receiving ‘continuous support’. These two criteria are discussed separately below.

**Unreasonable to live at home**

6.73 The *Social Security Act* provides that a person is regarded as ‘independent’ if he or she:

(a) cannot live at the home of either or both of his or her parents:

(i) because of extreme family breakdown or other similar exceptional circumstances; or

78 *Social Security Act 1991* (Cth) ss 94, 540, 739, 1061PA.


(ii) because it would be unreasonable to expect the person to do so as there would be a serious risk to his or her physical or mental well-being due to violence, sexual abuse or other similar [exceptional or unreasonable] circumstances.81

6.74 In addition, for Youth Allowance, Disability Support Pension and Special Benefit, a person is considered ‘independent’ if the person cannot live at the home of his or her parents:

(iii) because the parent or parents are unable to provide the person with a suitable home owing to a lack of stable accommodation.82

6.75 The ALRC considers that family violence should be expressly included in the Social Security Act as one of the grounds upon which it is unreasonable for a person to live at home. The ALRC recognises that family violence may fall under either ‘extreme family breakdown’ or ‘serious risk’. However, examples of conduct contained in the family violence definition recommended in Chapter 3, may not be caught by ‘violence’, such as psychological or emotional abuse, deprivation of liberty, and exposing a child to family violence. ‘Family violence’ captures a wider range of conduct than ‘violence’, insofar as that conduct is violent, threatening, controlling, coercive or engenders fear.

6.76 Child abuse and neglect are also not expressly included in the existing interpretation of these provisions in the Guide to Social Security Law. Physical, psychological and sexual abuse are taken into account, however the ALRC considers child abuse and neglect should be expressly considered as a circumstance where it is unreasonable to live at home. This was supported by most stakeholders who responded to the Discussion Paper.83 However, DEEWR considered that the current description already encapsulated these situations.84

6.77 While the current description may encapsulate child abuse and neglect, for clarity, the ALRC recommends such an amendment be made.

6.78 For it to be considered unreasonable for a person to live at home, the decision maker must be satisfied of a ‘serious risk’ to a person’s ‘physical or mental well-being’. This requires judgment as to whether there is a risk of harm to a person’s wellbeing, and whether such a risk is ‘serious’. The ALRC considers that the requirement for such judgment is inappropriate; and implies that family violence, child abuse and neglect may not harm a person’s physical or mental well-being in some cases. This is inconsistent with contemporary evidence about the effects of these factors on child developmental and health outcomes.

81 Social Security Act 1991 (Cth) ss 1067A(9), 1061PL(7).
82 Ibid s 1067A(9).
83 National Legal Aid, Submission CFV 164; National Children’s and Youth Law Centre, Submission CFV 156; National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136; ADFVC, Submission CFV 105; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, Submission CFV 99; Homeless Persons’ Legal Service, Submission CFV 95; WEAVE, Submission CFV 85.
84 DEEWR, Submission CFV 130.
6.79 In the ALRC’s view, the very fact of family violence, child abuse or neglect may lead to a decision that it is unreasonable for a person to live at home, without the need to prove that such conduct had a certain effect on the person.

6.80 This view was supported by a number of stakeholders. The NWRN stated its support, ‘because once family violence is established the risk posed by this is well known, the decision maker should not have to turn their mind to satisfaction of an additional requirement such as this’. DEEWR suggested, however, that such changes to legislation could lead to unsubstantiated allegations of family violence with the sole purpose of obtaining income support.

6.81 The ALRC considers that appropriate safeguards could be put in place to guard against unsubstantiated claims—such as the level of verification required to support a claim of family violence. This is discussed in further detail in Chapter 5.

**Serious risk to physical or mental well-being**

6.82 Family violence, child abuse and neglect are not expressly included as a ‘serious risk to a person’s physical or mental well-being’ in the Social Security Act. The provision currently takes into account sexual, physical and psychological abuse of a child through interpretation in the Guide to Social Security Law. While the Guide states that ‘severe neglect’ may be a ‘similar exceptional circumstance’ of ‘extreme family breakdown’, a similar provision is not made for a ‘serious risk to a person’s physical or mental well-being’. The Guide to Social Security Law does provide, however, where there are allegations of child abuse or serious risk of abuse or neglect, referral should be made to a social worker.

6.83 The Guide to Social Security Law provides that indicators of ‘serious risk’ to a young person’s physical or mental well-being include ‘sexual, physical or psychological abuse’. The Guide recognises that the claimant need not be the direct victim of abuse and that it would usually be accepted as unreasonable to expect the claimant to live in a home where other household members have been or are being subject to such abuse.

6.84 In a submission to the 2005 Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support, the University of Queensland Union submitted that ‘it is left up to policy and, in practice, subjective judgement, to define violence’ and that despite the fact that policy makes reference to risk to mental wellbeing, including psychological abuse, in our experience, assessing officers/social workers can be

85 National Legal Aid, Submission CFV 164; National Children’s and Youth Law Centre, Submission CFV 156; National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136; ADFVC, Submission CFV 105; Homeless Persons’ Legal Service, Submission CFV 95; WEAVE, Submission CFV 85.

86 DEEWR, Submission CFV 130.

87 Ibid.


89 Ibid.
reluctant to consider violence that is not overt and visible as serious enough to warrant qualification for independent YA [Youth Allowance].

6.85 The University of Queensland Union also raised concerns that Centrelink policy in this regard is endorsing an acceptance of ‘conflict’ which is normal in our communities, and that this extends to conflict relating to sexual, political and religious choice. At the same time as accepting a level of conflict as ‘normal’.

**Extreme family breakdown**

6.86 The Guide to Social Security Law states that family breakdown must be ‘extreme’, and the existence of ongoing conflict alone is insufficient to consider a person independent under this criterion. Factors that may indicate extreme family breakdown are said to include evidence that the emotional or physical well-being of the person or another family member would be jeopardised if the person were to live at home.

6.87 Examples of other ‘similar exceptional circumstances’ include ‘severe neglect’, ‘criminal activity or substance abuse by the parents’, ‘extreme and abnormal demands’ on the young person, and refusal to permit the young person to work or study. The Guide to Social Security Law also provides that where ‘parents refuse to allow the young person to live at home, this does not constitute “extreme family breakdown” unless there is evidence of extreme and enduring family conflict’.

6.88 The NWRN raised concerns that the legislation refers to ‘family breakdown’, which overlooks the fact that families may remain intact, despite the persistence of damaging family violence. However, the ALRC considers that if an amendment is made expressly to refer to family violence, it should be encapsulated under this limb by virtue of this amendment.

6.89 Stakeholders suggested that family violence needs to be recognised expressly as a circumstance when it may be unreasonable for a person to live at home. In doing so, stakeholders expressed the need to ensure that the decision maker takes into account other less visible forms of family violence, such as economic abuse. Women Everywhere Advocating Violence Elimination (WEAVE) and the National Council of

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90 University of Queensland Union, Submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support (2004).
91 Ibid.
93 Ibid.
94 Ibid.
95 National Welfare Rights Network, Submission CFV 150.
96 North Australian Aboriginal Justice Agency, Submission CFV 73; ADFVC, Submission CFV 71; WRC (NSW), Submission CFV 76; WRC Inc (Qld), Submission CFV 66; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; Homeless Persons’ Legal Service, Submission CFV 40; P Easteal and D Emerson-Elliott, Submission CFV 05.
97 ADFVC, Submission CFV 71; WRC (NSW), Submission CFV 76; WRC Inc (Qld), Submission CFV 66; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; Homeless Persons’ Legal Service, Submission CFV 40.
Single Mothers and their Children (NCSMC) considered that child abuse should be expressly considered.\(^98\) For example, the Homeless Persons’ Legal Service considered that:

> Unless express reference is made to family violence there is a risk that some of these elements of family violence [economic abuse, emotional abuse, stalking, deprivation of liberty, damage to property and causing a child to be exposed to violent or abusive behaviour] will not be considered by decision-makers as sufficiently extreme to be considered in the determination of whether a person is independent.\(^99\)

6.90 The WRC (NSW) recommended that family violence should be a stand-alone criterion upon which independence may be established:

> the existence of family violence should be an express criterion upon which independence may be established.\(^100\)

6.91 Similarly, the WRC Inc (Qld) noted that, while legislation currently refers to violence, sexual abuse, or other similar [exceptional or unreasonable] circumstances, family violence has specific connotations and therefore should be expressly referred to in this context.\(^101\) In addition, the National Children’s and Youth Law Centre submitted that the ‘test of independence in extreme family breakdown should be reviewed to accommodate situations where the child’s parents refuse to allow the child to live at home’ and that the test in relation to ‘extreme family breakdown’ should not be of such a high threshold’.\(^102\)

6.92 WEAVE submitted that the response by Centrelink staff is ‘highly variable depending on whether the staff member carries a belief that young people make up family conflict to rort the system or a belief that young people can be victims of violent parents’.\(^103\)

6.93 In light of these concerns, the ALRC recommends that the \textit{Social Security Act} and the \textit{Guide to Social Security Law} should expressly refer to family violence, child abuse or neglect as a circumstance where it may be unreasonable to live at home.

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<tr>
<th>Recommendation 6–4</th>
<th>The \textit{Social Security Act 1991} (Cth) provides that, a person is independent if the person cannot live at the home of either or both of his or her parents:</th>
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<td>(i)</td>
<td>because of extreme family breakdown or other similar exceptional circumstances; or</td>
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\(^99\) Homeless Persons’ Legal Service, \textit{Submission CFV 40}.
\(^100\) WRC (NSW), \textit{Submission CFF 70}.
\(^101\) WRC Inc (Qld), \textit{Submission CFV 66}.
\(^102\) National Children’s and Youth Law Centre, \textit{Submission CFV 64}.
\(^103\) WEAVE, \textit{Submission CFV 58}.
because it would be unreasonable to expect the person to do so as there would be a serious risk to his or her physical or mental well-being due to violence, sexual abuse or other similar unreasonable circumstances.

The Australian Government should amend ss 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) of the Social Security Act 1991 (Cth):

- expressly to take into account circumstances where there has been, or there is a risk of, family violence, child abuse or neglect; and
- to remove the requirement for the decision maker to be satisfied of ‘a serious risk to the person’s physical or mental well-being’.

Recommendation 6–5 The Guide to Social Security Law should expressly refer to family violence, child abuse and neglect as a circumstance in which it may be ‘unreasonable to live at home’ under the provisions of ‘extreme family breakdown’—Social Security Act 1991 (Cth) ss 1067A(9)(a)(i), 1061PL(7)(a)(i); and ‘serious risk to physical or mental well-being’—Social Security Act 1991 (Cth) ss 1067A(9)(a)(ii), 1061PL(7)(a)(ii).

Continuous support

6.94 In addition to its being unreasonable to live at home, to be considered ‘independent’, the person must not be in receipt of ‘continuous support’ from a parent, guardian or income support (other than a social security benefit) from the Commonwealth, or a state or territory.104

6.95 Stakeholders have identified three main concerns with the ‘continuous support’ requirement. First, the requirement may put a victim of family violence at risk of further violence, or the person may decide not to claim the independent rate due to fear of further violence. Secondly, despite reporting receipt of continuous support, a victim of family violence may not be receiving the support due to economic abuse. Thirdly, that the amount of continuous support is not taken into account and therefore may not be adequate.

6.96 To address these concerns, the ALRC recommends that DEEWR and Centrelink review their policies, practices and training to ensure that, in cases of family violence, Youth Allowance, Disability Support Pension and Pensioner Education Supplement, applicants do not bear sole responsibility for providing specific information about the financial circumstances of their parents and the level of ‘continuous support’ available to them. This was supported by stakeholders.105 However, the NWRN cautioned that the applicant should never be required to provide financial information about his or her

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104 Social Security Act 1991 (Cth) ss 1067A(9), 1061PL.
105 National Legal Aid, Submission CFV 164; National Welfare Rights Network, Submission CFV 150; AASW (Qld) and WRC Inc (Qld), Submission CFV 136; DEEWR, Submission CFV 130; Homeless Persons’ Legal Service, Submission CFV 95; WEAVE, Submission CFV 85.
parents in cases of family violence unless that information is in his or her direct possession or control.\textsuperscript{106}

6.97 Information-gathering powers under ss 192–195 of the \textit{Social Security (Administration) Act} allow Centrelink, as delegates, to collect internal and external evidence about a customer’s circumstances and are primarily used to collect information to establish an individual’s eligibility or correct entitlements.\textsuperscript{107} The ALRC considers that the use of such powers may be the best way to collect information about continuous support in circumstances of family violence.

6.98 The ALRC therefore considers that this review should also include consideration of the powers under s 192 of the \textit{Social Security Act}—a suggestion made by a number of stakeholders who recommended that Centrelink use its powers under s 192 of the \textit{Social Security Act} with a view to assisting a customer.\textsuperscript{108} However, care should be taken to ensure that the use of such powers does not put the safety of the victim in further jeopardy.

**Concerns with the ‘continuous support’ requirement**

6.99 Continuous support is defined in the \textit{Guide to Social Security Law} as ‘regular and ongoing assistance to the young person’s upkeep’.\textsuperscript{109} The onus is on the applicant to provide relevant supporting information.

6.100 In relation to this requirement, stakeholders raised concerns that the bulk of the burden for establishing independence was placed on the young person;\textsuperscript{110} and that the ‘continuous support’ criterion does not look to the adequacy of support.\textsuperscript{111}

6.101 The WRC Inc (Qld) submitted that the continuous support requirement can potentially act as a tool for further control of a victim where a legal guardian claims to be providing support, however according to the client, no such support exists.\textsuperscript{112} Similarly, the WRC (NSW) and the National Children’s and Youth Law Centre submitted that a family breakdown may mean that a young person is unable to ‘obtain information of parental income and assets to determine eligibility for a claim’\textsuperscript{113} and that ‘it may not be in the best interests of a young person to seek this information from parents when the nature of the domestic environment is openly hostile or violent’.\textsuperscript{114}

\textsuperscript{106} National Welfare Rights Network, \textit{Submission CFV 150}.

\textsuperscript{107} Australian National Audit Office, \textit{Centrelink Fraud Investigations} (2010).

\textsuperscript{108} National Legal Aid, \textit{Submission CFV 164}; National Welfare Rights Network, \textit{Submission CFV 150}; AASW (Qld) and WRC Inc (Qld), \textit{Submission CFV 136}.


\textsuperscript{111} WRC (NSW), \textit{Submission CFV 70}; WRC Inc (Qld), \textit{Submission CFV 66}; WEAVE, \textit{Submission CFV 58}; National Council of Single Mothers and their Children, \textit{Submission CFV 57}.

\textsuperscript{112} WRC Inc (Qld), \textit{Submission CFV 66}.

\textsuperscript{113} WRC (NSW), \textit{Submission CFV 70}.

\textsuperscript{114} National Children’s and Youth Law Centre, \textit{Submission CFV 64}.
Accordingly, stakeholders agreed that the onus should not be placed on a young person to obtain details of a parent’s income or assets in circumstances of family violence.\footnote{115}

Potential solutions provided by stakeholders included waiver or exemptions from the continuous support requirement,\footnote{116} shifting the onus onto parents or legal guardians to provide evidence of continuous support\footnote{117} or that Centrelink use its powers under the \textit{Social Security (Administration) Act} to collect such information.\footnote{118}

The ALRC considers that to require parents to provide their own details of any continuous support would not remedy the issue of whether or not a young person actually receives the support. In addition, a parent may refuse to do so. The ALRC therefore considers that shifting the onus onto a parent to provide information about continuous support would not address stakeholder concerns.

The WRC Inc (Qld), which supported removing the requirement of continuous support for victims of family violence, considered that there is scope in the legislation surrounding fraudulent or misleading information as well as a general ability of the Commonwealth to recover monies paid when entitlements are claimed by such methods and that ‘these provisions are strong enough to account for the potential of misuse if this onus were to be removed’.\footnote{119}

The ALRC understands that the requirement that a person is not in receipt of continuous support works to ensure that people who are not in need of support do not gain support—reflecting the theme of ‘fairness’ discussed in Chapter 2. In addition, to waive the requirement for victims of family violence only may also raise concerns of a two-tiered system. The ALRC therefore considers that there is still need for the ‘continuous support’ requirement rather than waiving the requirement for victims of family violence.

\textbf{Recommendation 6–6} The Department of Education, Employment and Workplace Relations and Centrelink should review their policies, practices and training, including consideration of the information gathering powers under s 192 of the \textit{Social Security Act 1991} (Cth) to ensure that, in cases of family violence, applicants for Youth Allowance, Disability Support Pension and Pensioner Education Supplement, do not have sole responsibility for providing specific information about the:

\footnotesize{\begin{itemize}
  \item National Children’s and Youth Law Centre, Submission CFV 156; WRC (NSW), Submission CFV 70; WRC Inc (Qld), Submission CFV 66; National Children’s and Youth Law Centre, Submission CFV 64; WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57; Homeless Persons’ Legal Service, Submission CFV 40.
  \item WRC Inc (Qld), Submission CFV 66.
  \item WEAVE, Submission CFV 58; National Council of Single Mothers and their Children, Submission CFV 57.
  \item WRC (NSW), Submission CFV 70.
  \item WRC Inc (Qld), Submission CFV 66.
\end{itemize}}
(a) financial circumstances of their parent or guardian; and
(b) level of ‘continuous support’ available to them.