

1. Introduction to the Inquiry

Contents

Introduction	47
Background to the Inquiry	48
<i>Time for Action</i>	48
Immediate Government Actions	49
The National Plan	50
<i>Family Violence—A National Legal Response</i>	51
Scope of the Inquiry	52
Terms of Reference	52
Matters outside the Inquiry	53
Processes of reform	55
Consultation processes	55
Community consultation and participation	56
Appointed experts	56
Consultation documents	57
Overview of the Discussion Paper	58
Definitions and terminology	58
Structure of the Discussion Paper	61
How to make a submission	70

Introduction

1.1 On 9 July 2010, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire into and report on the treatment of family violence in Commonwealth laws, including child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence. The ALRC was requested to consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.¹

1.2 In undertaking the Inquiry, the ALRC was asked to consider legislative arrangements across the Commonwealth that impact on those experiencing family violence and whether those arrangements impose barriers to providing effective support to those adversely affected by this type of violence. The ALRC was also asked

¹ The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at <www.alrc.gov.au>.

to consider whether the extent of sharing of information across the Commonwealth and with state and territory agencies is appropriate to protect the safety of those experiencing family violence.

1.3 This introductory chapter summarises the background to the Inquiry, its scope, the processes of reform and concludes with an overview of the Discussion Paper.

Background to the Inquiry

1.4 This Inquiry follows the one concluded by the ALRC in conjunction with the New South Wales Law Reform Commission (the Commissions) in October 2010, and the resulting report, *Family Violence—A National Legal Response* (2010) (ALRC Report 114). In discussing the limits of the Terms of Reference in that inquiry, the Commissions identified that family violence was also relevant—or potentially relevant—to other legislative schemes in the Commonwealth field and suggested that the Australian Government should initiate a further inquiry in regard to such areas.² The Terms of Reference in this Inquiry reflect this suggestion.³

1.5 Both inquiries emanate from the work of the National Council to Reduce Violence against Women and their Children (the National Council), established in May 2008, which was given the role of drafting a national plan to reduce violence against women and their children.⁴

Time for Action

1.6 The report of the National Council, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (*Time for Action*), released on 29 April 2009, drew attention to the extent of the problem of family violence in Australia. Research undertaken for the National Council reported that an estimated 750,000 Australian women 'will experience and report violence in 2021–22, costing the Australian economy an estimated \$15.6 billion'.⁵

1.7 *Time for Action* estimated that '[a]bout one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime';⁶ and stated that while violence 'knows no geographical, socio-

2 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks: Consultation Paper*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), [1.74].

3 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.69].

4 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 11.

5 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 43; KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

6 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 9.

economic, age, ability, cultural or religious boundaries’,⁷ the experience of violence is not evenly spread.

1.8 For example, Indigenous women reported higher levels of physical violence during their lifetime than did non-Indigenous women, and the violence was more likely to include sexual violence.⁸ Other groups may also experience violence in a different and/or disproportionate way, for example: women with disability; women who identify themselves as lesbian, bisexual, trans or intersex; and immigrant women.⁹ Such experiences were also strongly echoed in submissions to the ALRC and noted in *Family Violence—A National Legal Response*.¹⁰

1.9 *Time for Action* also pointed to a range of compounding factors in the presentation of violence, especially alcohol, and that of geographical and social isolation—and both were identified as critical issues for Indigenous women and children.¹¹ Similar concerns were reported in *Family Violence—A National Legal Response*.¹²

1.10 Not only are there compounding factors causing family violence, there are also compounding consequences, such as: financial difficulty flowing from economic dependence on a violent partner; homelessness, where women are seeking to escape violence at home; and health issues associated with treating the effects of violence on the victim.¹³ As commented by the Department of Premier and Cabinet Tasmania and quoted in *Family Violence—A National Legal Response*, ‘the causes of violence are various, and can manifest differently, but can “drag in” every aspect of the people’s lives’.¹⁴

Immediate Government Actions

1.11 In response to *Time for Action*, the Australian Government announced a package of immediate actions,¹⁵ including investments in a new national domestic violence and sexual assault telephone and online crisis service; in primary prevention activities

7 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 16.

8 Ibid, 17.

9 Ibid, 18.

10 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.9].

11 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 29, 30–35.

12 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.11]–[1.15].

13 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 42–45.

14 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.15].

15 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009).

towards building respectful relationships; and to support research on perpetrator treatment.

1.12 The Government also committed to working with the states and territories through the Standing Committee of Attorneys-General (SCAG) to: establish a national scheme for the registration of domestic and family violence orders; improve the uptake of relevant coronial recommendations; and identify the most effective methods to investigate and prosecute sexual assault cases.

1.13 Further immediate actions included: the development of a multi-disciplinary training package for lawyers, judicial officers, counsellors and other professionals working in the family law system, to improve consistency in the handling of family violence cases; the establishment of the Violence Against Women Advisory Group to advise on the National Plan to Reduce Violence against Women; and asking the ALRC to work with state and territory law reform commissions to examine the inter-relationship of federal and state and territory laws that relate to the safety of women and their children. In the list of ‘priority actions’ the Australian Government agreed to the inquiry that led to the report, *Family Violence—A National Legal Response*.

The National Plan

1.14 *Time for Action* identified six core areas for improvement together with strategies and actions to achieve them.¹⁶ The first ‘three-year Action Plan’ of the *National Plan to Reduce Violence against Women and their Children* (the *National Plan*) was released in February 2011,¹⁷ providing the ‘framework for action’ by all Australian governments to reduce violence against women and children.¹⁸ The six ‘national outcomes’ are:

- National Outcome 1—Communities are safe and free from violence;
- National Outcome 2—Relationships are respectful;
- National Outcome 3—Indigenous communities are strengthened;
- National Outcome 4—Services meet the needs of women and their children experiencing violence;
- National Outcome 5—Justice responses are effective; and
- National Outcome 6—Perpetrators stop their violence and are held to account.

¹⁶ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 16–20. The six ‘outcome areas’ listed are that: communities are safe and free from violence; relationships are respectful; services meet the needs of women and their children; responses are just; perpetrators stop their violence; and systems work together effectively. The plan identified 25 outcomes with 117 strategies.

¹⁷ Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011). The Government plans four three year plans overall, the first running from 2010 to 2013, 12.

¹⁸ Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 12.

1.15 National Outcome 5 included as one of its three strategies that ‘justice systems work better together and with other systems’. ‘Immediate national initiatives’ pursuant to this strategy included that the Commonwealth, states and territories should ‘consider the recommendations’ in *Family Violence—A National Legal Response*; and that the current Inquiry be established.¹⁹

1.16 A number of the broader outcomes and strategies in the *National Plan* are of key relevance in this Inquiry. They are considered in the summary of the framing principles and themes discussed in Chapter 2.

Family Violence—A National Legal Response

1.17 *Family Violence—A National Legal Response* contained 187 recommendations for reform. The overarching, or predominant principle reflected in the recommendations was that of seamlessness, and to achieve this, both a systems perspective and a participant perspective must be connected, to the greatest extent possible, within the constitutional and practical constraints of a federal system. This seamlessness was expressed in recommendations focused on improving legal frameworks and improving practice.

1.18 The Commissions considered that the improvement of legal frameworks as a result of the implementation of the recommendations will be achieved through:

- a common interpretative framework, core guiding principles and objects, and a better and shared understanding of the meaning, nature and dynamics of family violence that may permeate through the various laws involved when issues of family violence arise;
- corresponding jurisdictions, so that those who experience family violence may obtain a reasonably full set of responses, at least on an interim basis, at whatever point in the system they enter, within the constraints of the division of power under the *Australian Constitution*;
- improved quality and use of evidence; and
- better interpretation or application of sexual assault laws.

1.19 Similarly, the improvement of practice will be achieved through:

- specialisation—bringing together, as far as possible, a wide set of jurisdictions to deal with most issues relating to family violence in one place, by specialised magistrates supported by a range of specialised legal and other services;
- education and training;
- the development of a national family violence bench book;
- the development of more integrated responses;

19 Ibid, Strategy 5.3.

- information sharing and better coordination overall, so that the practice in responding to family violence will become less fragmented; and
- the establishment of a national register of relevant court orders and other information.

1.20 The Report identified a number of particular issues that are of continuing relevance in this Inquiry and which are discussed throughout this Discussion Paper. One continuing theme is the under-reporting of family violence and the range of concerns that may impede disclosure. For example, Part G concerned sexual assault, and in Chapter 24 the range of reasons for not reporting sexual violence were noted as including because: the victim may not have identified the act as sexual violence, let alone a criminal offence; victims may not consider the incident serious enough to warrant reporting; they are ashamed, fearful of the perpetrator, do not think that they will be believed, fear how they will be treated by the criminal justice system, and many consider that they can handle it themselves. Non-disclosure may also be a ‘survival strategy’.²⁰ While the discussion in Part G was focused on under-reporting in the context of sexual violence in the criminal justice system, it was noted that the problem of under-reporting is exacerbated in the family violence context and therefore that responses needed to focus on measures to promote reporting.²¹

1.21 Associated with under-reporting were factors that hinder disclosure or act as barriers to reporting, such as those faced by victims from CALD backgrounds, including communication and language difficulties, and cultural barriers such as beliefs about traditional gender roles and the importance of the family.²² Similarly the Commissions heard about the particular barriers to disclosure of family violence for Indigenous women and women with disability.²³

Scope of the Inquiry

Terms of Reference

1.22 Under the Terms of Reference, the ALRC is required to consider ‘what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family/domestic violence’. The range of legal frameworks focuses on particular Commonwealth laws: child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence.

1.23 In undertaking this reference, the ALRC was asked to consider legislative arrangements across the Commonwealth that have an impact on those experiencing family violence and sexual assault and whether those arrangements impose barriers to effectively supporting those adversely affected by these types of violence; and whether

20 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [24.17]–[24.18].

21 Ibid, [24.21].

22 For example, Ibid, [7.44], [26.37].

23 For example, Ibid, [21.65], [24.48], [25.71], [26.36].

the extent of sharing of information across the Commonwealth and with State and Territory agencies is appropriate to protect the safety of those experiencing family violence.

1.24 In undertaking this Inquiry, the ALRC was directed to be careful not to duplicate:

- (a) the work undertaken in *Family Violence—A National Legal Response*;
- (b) the other actions being progressed as part of the *National Plan* and the Immediate Government Actions announced by former Prime Minister, the Hon Kevin Rudd MP, on receiving the National Council’s report in April 2009; and
- (c) the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of vulnerable witness protections and recently endorsed principles for the protection of communications between victims of sexual assault and their counsellors.

1.25 The ‘lens’ established in the Terms of Reference is one of safety. The reform principles and themes, discussed in Chapter 2, and all proposals for reform, are considered in the light of it.

Matters outside the Inquiry

1.26 While the scope of the problem of family violence is extensive, the brief in this Inquiry is necessarily constrained both by the Terms of Reference and by the role and function of a law reform commission.

1.27 The ALRC acknowledges, as it did in *Family Violence—A National Legal Response*, that the Inquiry concerns only a narrow slice of the vast range of issues raised by the prevalence of family violence—when victims of such violence encounter the legal system in its various manifestations. As noted in that Report, a comment made by the Family Law Council in its advice to the Australian Government Attorney-General in 2009, is equally apt as a comment with respect to the problems of family violence in a much wider sense. The Council, noting that it was only focusing on family violence ‘when it becomes visible in the Family Law system in Australia’, stated that: ‘this visible pattern is only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is apparently entrenched in Australia’.²⁴

1.28 In *Family Violence—A National Legal Response*, the ALRC noted widespread concern about the link between alcohol and family violence, and recognised that any serious attempt to develop preventative measures in the area of family violence must tackle the problem of alcohol abuse in Australian society. This issue is, however, beyond the scope of the Terms of Reference for that inquiry and the current one.

²⁴ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 7.

1.29 The limits of law, both in terms of services but also in terms of its application, was expressed succinctly in a remark by Penny Taylor, a solicitor with the Top End Women’s Legal Service, that ‘you can have the perfect law, but ...’;²⁵ and the Commissioner for Victims’ Rights, South Australia, stated that:

Law alone is not a satisfactory response to family violence. The law must be augmented by consistent, comprehensive and co-operative agencies, organisations and individuals. Existing law and range of approaches to family violence serve as a baseline from which people concerned about that violence and its effects can reach out to establish better laws and approaches reflecting victims’ needs and respecting their fundamental rights.²⁶

1.30 The ALRC notes that the *National Plan* identifies many other strategies in areas beyond legal frameworks to achieve outcomes such as relationships that are respectful, and services that meet the needs of women and children.²⁷

1.31 As noted above, the lens for this Inquiry is safety. So, while the ALRC has heard concerns about matters that can be described as ‘systemic’ concerns, to address them would require solutions beyond those that can be described as improvements to protect the safety of those experiencing family violence. For example, concerns about the calculation of child support payments may be described as relating to a systemic issue. If proposals were to go to the child support system as a whole, while prompted by family violence issues, this may be seen to go beyond the brief as defined by the Terms of Reference. In such cases, where concerns of a systemic kind have been expressed to the ALRC, they are noted in the relevant context, although no proposals are developed in response. A treatment of this kind at least provides a public forum through which to note concerns in the context of a more specific inquiry, as constrained by the Terms of Reference.

1.32 The ALRC also focuses on the specific areas of Commonwealth law listed in the Terms of Reference, including: child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence. Although the list was an ‘inclusive’ one, not exclusive, the ALRC is not considering family violence issues in the *Family Law Act 1975* (Cth), on the basis that:

- the earlier report, *Family Violence—A National Legal Response*, gave extensive consideration to a range of *Family Law Act* matters within the Terms of Reference for that inquiry;

25 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.67].

26 Ibid, [1.67].

27 Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011); Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009); National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcomes 2, 3.

- the Terms of Reference for this Inquiry direct the ALRC not to duplicate, amongst other things, the work undertaken in that report;
- the ALRC recommended that the Australian Government should initiate an inquiry into how family violence should be dealt with in property proceedings under the *Family Law Act* and suggested that the Family Law Council might be the appropriate body to deal with the issue, following their 2001 Letter of Advice on violence and property proceedings;²⁸ and
- given the scope of such a potential additional matter, the ALRC considers that it is beyond what may be captured by an inclusive definition, and would require to be listed expressly in the Terms of Reference.

Processes of reform

Consultation processes

1.33 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.²⁹ Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.³⁰ For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference—and the timeframe in which the inquiry must be completed under the Terms of Reference.

1.34 The Terms of Reference for this Inquiry direct the ALRC to work closely with relevant Australian Government departments to ensure the solutions identified are practically achievable and consistent with other reforms and initiatives being considered in relation to the development of a *National Plan to Reduce Violence against Women and their Children* or the National Framework for Protecting Australia’s Children. Of particular relevance in this Inquiry are the following Australian Government departments: the Attorney-General’s Department; the Department of Immigration and Citizenship; the Department of Employment, Education and Workplace Relations; the Department of Families, Housing, Community Services and Indigenous Affairs; and the Department of Human Services. Within the latter Department, the ALRC has consulted Centrelink, the Child Support Agency, the Family Assistance Office and Commonwealth Rehabilitation Service Australia. Other relevant Commonwealth bodies include: the Office of the Australian Information Commissioner; the Australian Taxation Office, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Treasury, Safe

28 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 17–2.

29 B Opeskin, ‘Measuring Success’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.

30 *Australian Law Reform Commission Act 1996* (Cth) s 38.

Work Australia, Fair Work Australia, the Superannuation Tribunal and the Fair Work Ombudsman.

Community consultation and participation

1.35 A multi-pronged strategy of seeking community comments is being used during the Inquiry. First, internet communication tools—an e-newsletter and an online forum—are being used to provide information and obtain comment; secondly, the four Issues Papers were released; and thirdly, a national round of stakeholder consultation meetings, forums and roundtables are being conducted. In addition, the ALRC is developing consultation strategies for engaging with Indigenous peoples, those from CALD backgrounds, people with disability and people who identify themselves as lesbian, gay, bisexual, trans or intersex.

Online tools

1.36 ***E-newsletter:*** Regular Commonwealth Family Violence Inquiry e-newsletters provide a way to keep stakeholders informed about the Inquiry progress, with a calendar of stakeholder consultations or other upcoming events, and a summary of consultations and other work to date.

1.37 The comments received in response to the Issues in Focus provided an important additional means of input into the Inquiry. At the date of release of this Discussion Paper, six e-newsletters had been published.

1.38 ***Online submission:*** After a successful pilot of integrating an online submission facility for *Family Violence—A National Legal Response*, this Inquiry is also using online submission, to enable people to respond in a focused way, addressing the individual questions set out in the Issues Papers. Each question was followed by an area to enter a response, with the option to upload a pre-prepared submission or supporting document. As with other methods of submission, online submissions can be marked ‘confidential’.

Consultations

1.39 During this Inquiry to date, the ALRC has conducted 55 consultations, as listed in Appendix 2 of this Discussion Paper. Consultations were undertaken with individuals, academics, legal services and support agencies, advocacy groups, community legal services, research centres, government agencies and departments, and non-government organisations.

Appointed experts

1.40 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of its Advisory Committees and Panels and the appointment by the Attorney-General of part-time Commissioners.

Advisory Panels

1.41 A key aspect of ALRC procedures is to establish an expert Advisory Committee or ‘reference group’ to assist with the development of its inquiries. Because of the

complex nature of this Inquiry the ALRC has established Advisory Panels of experts in each of the key areas explored in the Discussion Paper, each of which is listed at the front of this publication.

1.42 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee or Panel, appropriate to the Terms of Reference, is an invaluable aspect of ALRC inquiries—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals.

Part-time Commissioners

1.43 In addition to the Advisory Panels, the ALRC was also able to call upon the expertise and experience of its two standing part-time Commissioners, both judges of the Federal Court: the Hon Justice Susan Kenny and the Hon Justice Berna Collier.

Consultation documents

Issues Papers

1.44 To facilitate consultation in the Inquiry the ALRC released a series of four Issues Papers covering the treatment of family violence in:

- employment and superannuation law;³¹
- immigration law;³²
- child support and family assistance law;³³ and
- social security law.³⁴

1.45 Producing four Issues Papers enabled streamlined consultation with the range of stakeholders interested in the differing and specific areas under consideration in the Terms of Reference. Their aim was to encourage informed community participation in the Inquiry by providing some background information and highlighting the issues then identified by the ALRC as relevant to the Inquiry. Like all other ALRC consultation documents, they could be downloaded free of charge from the ALRC's website, <www.alrc.gov.au>.

Submissions

1.46 The ALRC received 82 submissions in response to the Issues Papers, a full list of which is included in Appendix 1. Submissions were received from a wide range of

31 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011).

32 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011).

33 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC Issues Paper 38 (2011).

34 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011).

people and agencies, including: individuals; academics; lawyers; unions; employer organisations; community legal centres; law societies; women's centres and legal services; single parents groups; social workers; Indigenous legal and other services; government agencies; peak bodies; tribunals; the Office of the Australian Information Commissioner; the Commonwealth Ombudsman and the Australian Human Rights Commission.

1.47 The ALRC acknowledges the considerable amount of work involved in preparing submissions and the impact, particularly in organisations with limited funding, of committing staff resources to this task. It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries and the ALRC records its deep appreciation to all participants.

Discussion Paper

1.48 This Discussion Paper brings together all the matters considered so far in the Inquiry. It contains a more detailed treatment of the issues outlined in each of the Issues Papers, and indicates the ALRC's current thinking in the form of specific proposals for reform as well as seeking further input in response to particular questions. The ALRC is now seeking further submissions and will undertake a further round of national consultations in relation to the proposals contained in this Discussion Paper.

Overview of the Discussion Paper

Definitions and terminology

1.49 This section sets out some of the terminology that will be used in this Discussion Paper in referring to specific concepts in the family violence sphere.

Culturally and linguistically diverse

1.50 The phrase 'culturally and linguistically diverse'—and the abbreviation 'CALD'—are commonly used in referring to people of diverse backgrounds. The ALRC recognises that the discussion in this publication may apply to people who are 'culturally *or* linguistically diverse' as well as those who are 'culturally *and* linguistically diverse'. The phrase is used for convenience to embrace both kinds of diversity.

Family

1.51 The definition of 'family' or 'domestic' relationship varies across the Australian jurisdictions and legislation. In this Discussion Paper the particular definitions of 'family' are considered in the context of the specific legislation under consideration.

Family violence

1.52 The terminology that should be adopted to describe violence within families and intimate relationships has been, and continues to be, the subject of controversy and

debate.³⁵ Invariably there will be difficulties in attaching any one label to describe a complex phenomenon varying in degrees of severity and reflecting the differing experiences of persons from diverse cultural, socio-economic, geographical groups, and those in same-sex relationships or in family structures that do not replicate the nuclear family structure.

1.53 As noted in *Family Violence—A National Legal Response*, state, territory and Commonwealth legislation that refers to violence within families and intimate relationships uses various descriptions—‘family violence’, ‘domestic violence’ and ‘domestic abuse’.³⁶ The term ‘domestic’ has been criticised on the basis that it ‘qualifies and arguably reduces the term “violence”’.³⁷ The Macquarie Dictionary notes the colloquial use of the term ‘domestic’ as ‘an argument with one’s spouse or another member of the household’. Thus, from a cultural perspective, the term ‘domestic’ can trivialise the impact of the violence on the victim. However the phrase ‘family violence’ has also been criticised:

The problem with the term ‘family violence’ is not even in its gendered neutrality, but the picture that it paints that violence in the family is something in which all members are complicit, and which is just to do with difficulties in relationships between family members and problems in handling conflict in non ‘violent’ ways. ... The term is even less acceptable than the more commonly used ‘domestic violence’. ‘Domestic’ with all its implications of ‘just a domestic’, at least cannot be taken to qualify the violence by reference to the ungendered perpetrator, as ‘family’ can.³⁸

1.54 Reports and writing in this area have adopted varying terminology. Some have referred to both ‘family and domestic violence’, or vice versa;³⁹ others to ‘family violence’;⁴⁰ and some to ‘domestic violence’.⁴¹ Fehlberg and Behrens adopt the terminology of ‘violence and abuse in families’.⁴² In each case, the differing terminology—in the Australian context—attempts to refer to the same type of conduct, although the boundaries of such conduct have expanded over the years.

35 See, eg, Domestic Violence and Incest Resource Centre, *What’s In a Name? Definitions and Domestic Violence: Domestic Violence? Family Violence? Violence Against Women?*, Discussion Paper No 1 (1998).

36 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.105].

37 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 178.

38 J Behrens, ‘Ending the Silence, But ... Family Violence under the Family Law Reform Act 1995’ (1996) 10 *Australian Journal of Family Law* 35, 38.

39 See, eg, National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009); Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009); Government of Western Australia, *Family and Domestic Violence Action Plan (2007–2008)*.

40 See, eg, Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006); Queensland Centre for Domestic and Family Violence Research, *Indigenous Family Violence Prevention Forum 2009: Report* (2009).

41 See, eg, Australian Government Solicitor, *The Giving of Evidence by Victims of Sexual Assault* (2008); M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007); Australian Law Reform Commission, *Domestic Violence*, Report 30 (1986).

42 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 178.

1.55 In this Inquiry the ALRC will refer to ‘family violence’, rather than ‘domestic violence’ or ‘domestic abuse’, unless specifically quoting from sources including legislation which use alternative terminology.

Indigenous peoples

1.56 In this Discussion Paper, the ALRC may use the terms ‘Aboriginal and Torres Strait Islander peoples’ or ‘Indigenous communities’ or ‘Indigenous peoples’, which are consistent with the terminology adopted by various organisations, including the Aboriginal and Torres Strait Islander Social Justice Commissioner in his reports:

Aborigines and Torres Strait Islanders are referred to as ‘peoples’. This recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods. ... The use of the term ‘Indigenous’ has evolved through international law.⁴³

1.57 This is affirmed under international law principles and by the *United Nations Declaration on the Rights of Indigenous Peoples*.⁴⁴ ‘Indigenous women’ and ‘Indigenous children’ also reflect this terminology.

People with disability

1.58 A contemporary view of disability acknowledges a person has an impairment or medical condition but that it is disabling barriers within society—negative attitudes, inaccessible buildings and environments, inaccessible communications and information—that prevent people with disability from being treated equally and from fully participating in all aspects of community life.⁴⁵

1.59 The ALRC uses the term ‘people with disability’ throughout this Discussion Paper, to reflect each person’s value, individuality, dignity and capabilities. ‘People with disability’ is used rather than ‘people with a disability’, acknowledging that a person may have more than one disability.

LGBTI

1.60 At the outset the ALRC acknowledges the significance of terminology and that terminology is often contested. While the ALRC understands there are other possible abbreviations, the term ‘LGBTI’ is used in this Discussion Paper as it is a broadly understood abbreviation that describes people who identify as lesbian, gay, bisexual, trans or intersex.⁴⁶

1.61 The ALRC is aware that the LGBTI community is not a homogenous group, but rather consists of individuals with differing sexual orientation and gender identity. In

43 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2009), vi.

44 *Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res 61/295, UN Doc A/RES/47/1.

45 See, *People With Disability, A Guide to Reporting On Disability*.

46 The ALRC notes that this is also the term adopted by the Australian Human Rights Commission following their research and consultation on protection from discrimination on the basis of sexual orientation and/or sex and gender identity. See: <http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/index.html> at 11 August 2011.

particular, the ALRC understands that people who identify as trans and intersex often have perspectives, issues and needs that are different from those of the people who identify as gay, lesbian or bisexual, and as a result should be separately consulted.

Protection orders

1.62 Protection orders under family violence legislation are variously described as: apprehended violence orders, family violence intervention orders, violence restraining orders, family violence orders, domestic violence orders, and domestic violence restraining orders. For the purposes of this Discussion Paper the ALRC uses the generic term of ‘protection order’, unless specifically quoting from legislation or case law which uses the particular terminology adopted by a particular state or territory.

Structure of the Discussion Paper

1.63 This Discussion Paper comprises 22 chapters divided into seven parts.

1.64 **Part A—Common Threads**, contains four chapters that cover common ideas and themes relevant to the whole Discussion Paper.

1.65 This chapter provides an outline of the background to the Inquiry and an analysis of the scope of the Inquiry as defined by the Terms of Reference. It also describes the development of the evidence base to support the law reform response as reflected in the proposals and questions included throughout the Discussion Paper.

1.66 Chapter 2, ‘Conceptual Framework’ considers the backdrop of international instruments that affect the range of issues in focus in this Inquiry, followed by an analysis of the broad policy themes relevant to the objective, as set out in the Terms of Reference, of protecting the safety of those experience family violence.

1.67 Chapter 3, ‘Common Interpretative Framework’, focuses on the definition of family violence in the legislative areas identified in the Terms of Reference: employment, superannuation, migration, child support, family assistance and social security. As a key aspect of establishing a common interpretative framework, the ALRC proposes including in those laws the same core definition of family violence that describes the context in which behaviour takes place, as well as a shared common understanding of the types of conduct—both physical and non-physical—that may fall within the definition of family violence.

1.68 The ALRC considers that systemic benefits would flow from the adoption of a common interpretative framework across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers.

1.69 Chapter 4, ‘Screening, Information Sharing and Privacy’, examines how family violence is disclosed to Commonwealth agencies—namely Centrelink, the Child Support Agency (CSA) and the Family Assistance Office (FAO)—and how that information is treated by those agencies. As these issues primarily concern service provision by agencies within the Human Services portfolio, this chapter also provides an overview of the structure of, and recent changes to the portfolio.

1.70 The chapter explores ways in which barriers can be minimised to encourage disclosure of family violence in a safe environment, and to ensure that upon disclosure, an appropriate case management and privacy response is triggered. This chapter focuses on screening and risk assessment processes, information sharing and privacy, and family violence policies, to ensure that victims of family violence are appropriately identified, and their needs are responded to accordingly.

1.71 The ALRC identifies a number of personal and institutional barriers to the disclosure of family violence and proposes a multifaceted approach of screening and risk assessment processes, information sharing and privacy, and family violence policies, to ensure that victims of family violence are appropriately identified, and their needs are responded to accordingly. In particular, the ALRC proposes that Centrelink, the CSA and the FAO should ‘screen’ all customers for family violence, not through direct questions, but by giving them a short statement and other information about family violence and its relevance to a person’s social security, child support and family assistance case.

1.72 However, the ALRC recognises that screening alone is not sufficient and considers that an appropriate case-management and privacy response should be triggered, including referral to a Centrelink social worker. To assist with this, and to ensure consistency across the relevant departments and agencies, the ALRC proposes that a ‘safety concern’ flag should be placed on a customer’s file where family violence and fears for safety have been disclosed. This flag should be subject to information-sharing protocols between relevant departments and agencies, subject to informed consent and privacy safeguards. Finally, to enhance consistency across the different departments and agencies, the ALRC proposes that a family violence and child protection policy be developed for each department or agency.

1.73 **Part B—Social Security**, contains four chapters, Chapters 5–8. Chapter 5, ‘Social Security—Overview and Overarching Issues’, together with Chapters 6–8, provides an overview of Commonwealth social security law and examines options for reform of the social security legislative framework to improve the safety of people who have experienced, or are experiencing, family violence.

1.74 Chapter 5 examines the social security frameworks relevant to this Inquiry—the legal framework and the agencies that administer it; the policy framework, including underlying principles; and the relevance of family violence in the social security system. The chapter proposes reforms in the key areas of interpretative frameworks around family violence, screening, and collecting information about family violence.

1.75 In order to enhance the common interpretative framework, the ALRC proposes that the definition of family violence, and its natures, features and dynamics, be included in the *Guide to Social Security Law* supported by training for relevant Centrelink staff. The ALRC also considers that, to ensure fairness in the administration of the social security system and to provide a level of self-agency, greater transparency and consistency is required in relation to the information a person can rely on to support a claim of family violence. The ALRC therefore makes proposals as to the types of information a person may use to support the claim and proposes that guidance

as to the weight placed on each type of information should be included in the *Guide to Social Security Law*. The ALRC also makes proposals to ensure the safety of victims of family violence is protected when Centrelink is seeking information to support a claim of family violence and that this information is protected through Centrelink's Deny Access Facility.

1.76 Chapter 6, 'Social Security—Relationships' considers how family violence may have implications in relation to how relationships are defined in the social security context—for example, whether a person is considered to be a 'member of a couple' or 'independent'. 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, is considered. The ALRC considers that relationships are inherently difficult to define, but recognises that the effect of family violence is not always considered in relationship decisions in the social security context. The ALRC therefore makes a number of proposals to ensure that the impacts of family violence are expressly considered in relationship decisions in social security law through amendment to the *Guide to Social Security Law*.

1.77 Chapter 7, 'Social Security—Proof of Identity, Residence and Activity Tests' discusses the relevance of family violence to various qualification and payability requirements—such as proof of identity, residence, and activity and participation requirements attached to certain social security payments. This chapter considers how these qualification and payability requirements could be improved to protect the safety of victims of family violence while also maintaining the integrity of the social security system.

1.78 The ALRC makes proposals in relation to residence requirements—ensuring that where appropriate, certain subclasses of visas are able to access Special Benefit. The ALRC seeks guidance from stakeholders as to what other reforms may be necessary to residence requirements to maintain this balance. The ALRC also makes proposals to ensure that a person's experience of family violence is adequately considered in the negotiation and revision of a person's requirements for activity-tested social security payments; and the granting of exemptions from such requirements.

1.79 Chapter 8, 'Social Security—Payment Types and Methods, and Overpayment', considers mechanisms that are built into social security law and practice to assist victims of family violence, and others, including: special or supplementary payments; the way in which a person receives their regular social security payment, such as weekly or urgent payments; and nominee arrangements.

1.80 Chapter 8 discusses ways in which these payments and payment arrangements may be able to better protect the safety of victims of family violence. In particular, the ALRC considers a number of barriers for victims of family violence in accessing Crisis Payment, weekly and urgent payments and makes proposals to overcome these barriers. The ALRC also considers ways to ensure that family violence can be taken into consideration in decisions to waive the repayment of a social security debt—for example, where the debt was incurred due to economic abuse or duress.

1.81 **Part C—Child Support and Family Assistance**, contains four chapters, Chapters 9–12. Chapter 9, ‘Child Support—Frameworks, Assessment and Collection’, provides an overview of the child support frameworks relevant to this Inquiry: the legal framework and the agencies that administer it; and the policy framework—including the objectives that underpin the child support scheme. The chapter then outlines the relevance of family violence in the child support system, and proposes reforms to the key areas of interpretative frameworks around family violence, child support assessment, and the collection and enforcement of child support.

1.82 The reforms proposed in Chapter 9 would facilitate appropriate management of child support cases by the Child Support Agency, where a customer is at risk of family violence. The proposed reforms complement the proposals in Chapter 4, and relate primarily to screening and referrals at certain key points in a child support case. In particular, the ALRC proposes that the Child Support Agency should screen for family violence, and consult with customers who have disclosed family violence, prior to initiating significant action against the other party.

1.83 Chapter 10, ‘Child Support—Agreements, Personal Information, Informal Carers’ includes discussion of two alternatives to Child Support Agency assessments: child support agreements; and self-administration of child support. The chapter then addresses the treatment of personal information, including protection and exchange of information, and reporting threats of family violence. Finally, the chapter discusses the child support eligibility of carers who are neither parents nor legal guardians (‘informal carers’).

1.84 The proposed reforms in Chapter 10 are in two main sets. The first set focuses on information management by the Child Support Agency. It includes proposed processes for dealing with offensive material on Child Support Agency forms, and providing higher levels of protection for the personal information of victims of family violence. The second set of proposed reforms aims to remove barriers to child support faced by informal carers. The ALRC has proposed these reforms as children may be in informal care—often provided by grandparents—as a result of family violence.

1.85 Chapter 11, ‘Child Support and Family Assistance—Intersections and Alignments’ focuses on the points of intersection and alignment between child support and family assistance frameworks—in particular, Family Tax Benefit. The first point of intersection is the ‘reasonable maintenance action’ requirement in family assistance legislation. In accordance with this requirement, eligible parents must be in receipt of child support to receive more than the minimum rate of Family Tax Benefit. Family assistance policy recognises that this requirement may affect victims of family violence, and provides for exemptions from the requirement to take reasonable maintenance action. The second intersection point is an alignment in family assistance and child support legislation and policy in relation to determinations of percentages of care. This is a component of both child support and family assistance calculations, and affects the amount or distribution of entitlements.

1.86 Chapter 11 focuses on exemptions from the reasonable maintenance action requirement, as family violence exemptions are the key protective strategy for victims

in both child support and family assistance contexts. A strong focus is the accessibility of exemptions for victims who require them. The proposed reforms seek to achieve this by providing information in the *Family Assistance Guide*—in particular, information about the availability of partial exemptions, the duration of exemptions, and the review process. The ALRC also proposes that exemption policy should be included in family assistance legislation. The chapter concludes with an examination of the legislative and policy bases of percentage determinations, and how the rules underpinning such determinations affect victims of family violence.

1.87 Chapter 12, ‘Family Assistance’, discusses the family assistance framework and the ways in which it addresses, and in some instances fails to address, family violence. This discussion focuses on the two primary family assistance payments—Family Tax Benefit and Child Care Benefit (CCB). This chapter proposes reforms specifically targeted at family assistance law and policy, where needed, particularly in relation to CCB. Family assistance legislation provides for increased CCB in certain circumstances. The proposed reforms seek to improve accessibility to increased CCB in cases of family violence. The ALRC proposes that this be achieved by amending the *Family Assistance Guide* to explicitly recognise family violence as exceptional circumstances that may qualify for increased CCB, and by amending family assistance legislation to lower the eligibility threshold for increased rates of CCB where children are at risk of abuse or neglect.

1.88 **Part D—Income Management**, comprises one chapter, Chapter 13. ‘Income Management’ is an arrangement under the *Social Security (Administration) Act 1999* (Cth) by which a proportion of a person’s social security and family payments is quarantined to be spent only on particular goods and services, such as food, housing, clothing, education and health care. Chapter 13 discusses the relevance of family violence to income management measures and the treatment of family violence in the income management of welfare payments under the *Social Security (Administration) Act*. The chapter briefly explains the nature and the history of the income management regime and how income management may be improved to work to protect the safety of people experiencing family violence. By way of comparison, the income management model in the *Family Responsibilities Commission Act 2008* (Qld) is discussed.

1.89 In particular, Chapter 13 examines the implications of family violence for how individuals may become subject to, or obtain exemptions from, the application of income management; and the consequences of income management for people experiencing family violence. The ALRC concludes that the complexity of family violence, and the intertwining of family violence in a number of the ‘vulnerability indicators’ that trigger the imposition of compulsory income management, leads to serious questions about whether it is an appropriate response. The ALRC proposes that there should be a flexible and voluntary form of income management offered to people experiencing family violence to ensure that the complex needs of the victims are provided for and their safety protected.

1.90 In Chapter 13 the ALRC also proposes a review of the voluntary income management measures and streams to provide welfare recipients experiencing family violence with a flexible opt-in and opt-out measure.

1.91 **Part E—Employment**, comprises five chapters, Chapters 14–18. Chapter 14, ‘Employment Law—Overarching Issues and a National Approach’, together with Chapters 15–17, examines possible options for reform to employment-related legislative, regulatory and administrative frameworks to improve the safety of people experiencing family violence. The chapter examines the relevance of family violence to the employment law system; issues associated with disclosure of family violence—including verification of family violence and privacy issues; the need for national initiatives which address family violence in the context of employment; and associated reforms to data collection.

1.92 The ALRC’s key proposal in Chapter 14 is that the Australian Government should initiate a national education and awareness campaign around family violence in the employment context. The ALRC also proposes that the Office of the Australian Information Commissioner should develop a model privacy policy and guidance material in relation to family violence-related personal information. With respect to data collection, the ALRC considers the possible roles Fair Work Australia should play in considering the effect of family violence on the employment of those experiencing family violence in relation to the National Employment Standards, enterprise agreements and individual flexibility arrangements.

1.93 Chapter 15, ‘The Pre-Employment Stage’, deals with ways in which the framework underpinning the pre-employment stage of the employment law spectrum, with a particular focus on employment services provided by contractors to the Australian Government, could be improved to protect the safety of victims of family violence. The chapter examines ways in which Job Services Australia (JSA)—the national employment services system—Disability Employment Services (DES) and Indigenous Employment Program (IEP) systems do, or could, respond to the needs of job seekers experiencing family violence.

1.94 In particular, the chapter addresses:

- JSA—including tender arrangements, information sharing processes and protocols and screening for family violence;
- JSA and DES provider responses to disclosure of family violence by job seekers;
- the Job Seeker Classification Instrument (JSCI)—conduct and content of JSCIs;
- Employment Services Assessment (ESAt) and Job Capacity Assessment (JCA)—referral to, and conduct of, ESAts and JCAs and the impact of family violence;
- education and training; and
- employment services for specific groups of job seekers, including Indigenous peoples, job seekers from culturally and linguistically diverse (CALD) backgrounds, job seekers with disability and those in rural and remote areas.

1.95 In particular, the ALRC proposes in Chapter 15 that those who wish to tender to become job service providers must demonstrate an understanding of family violence

and its impact on job seekers. The ALRC also proposes that the JSCI should include a new category of information in relation to family violence. With the enhanced disclosure of family violence that might result, the ALRC also considers what information-sharing processes and protocols, as well as privacy safeguards, are appropriate. Other proposals in this chapter concern JSA and DES provider responses to the disclosure of family violence, the conduct of ESAs and JCAs, and education and training for a range of people involved in the pre-employment stage.

1.96 Chapters 16 and 17 focus on the *Fair Work Act 2009* (Cth). Chapter 16, ‘Employment—The *Fair Work Act 2009* (Cth)’ provides an overview of the *Fair Work Act* and examines possible options for reform to the Act, and the institutions created under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. The chapter examines the background, constitutional basis, coverage and objects of the *Fair Work Act*, as well as the role and processes of Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO). The ALRC suggests ways in which those institutions or their processes do, or could, function to protect the safety of those experiencing family violence.

1.97 The key focus of Chapter 16 is on the National Employment Standards. The ALRC makes two key proposals—first, that family violence be included as a circumstance in which an employee should have a right to request flexible working arrangements and, secondly, that family violence-related leave be included as a minimum statutory entitlement under the National Employment Standards.

1.98 Chapter 17, ‘Employment—The *Fair Work Act 2009* (Cth) Continued’, complements Chapter 16 and considers enterprise agreements—specifically the inclusion of family violence clauses and the role of individual flexibility arrangements; modern awards; unfair dismissal; and the general protections provisions under the *Fair Work Act*. The ALRC concludes that the Australian Government should encourage the inclusion of family violence clauses, that such clauses should include a range of minimum requirements and proposes that the Fair Work Ombudsman should develop a guide to negotiating such clauses in agreements. The ALRC also considers the appropriateness of individual flexibility arrangements (IFAs) in circumstances where an employee is experiencing family violence and proposes that the Fair Work Ombudsman should develop a guide to negotiating IFAs in such circumstances.

1.99 With respect to modern awards, the ALRC considers ways in which modern awards might incorporate family violence-related provisions and suggests this should be considered in the course of Fair Work Australia’s reviews in 2012 and 2014. In relation to unfair dismissal, the ALRC acknowledges the broad formulation of ‘harsh, unjust and unreasonable’ and suggests consideration of family violence in determining whether ‘exceptional circumstances exist’ for the purposes of granting an extension of time in which to make an application. Finally the ALRC considers the general protections provisions under the *Fair Work Act* and suggests that discrimination on family-violence related grounds under those provisions could be considered in the context of the post-implementation review and by the Australian Human Rights Commission.

1.100 Chapter 18, ‘Occupational Health and Safety Law’, examines ways in which the Commonwealth occupational health and safety (OHS) system, in the context of moves to harmonise OHS law across Australia, might be improved to protect employees experiencing family violence. In particular it examines: legislative duties—specifically, duties of care and the duty to report notifiable incidents; the nature and role of regulatory guidance; the importance of education, training and measures to raise awareness about family violence as a work health and safety issue; and issues associated with data collection.

1.101 The central premise underlying Chapter 18 is that, where family violence becomes an OHS issue for employees, they should be given the highest level of protection reasonably practicable, and employers should introduce measures to address family violence in such circumstances. This reflects one of the principles underlying the Model Work Health and Safety Bill developed by Safe Work Australia.

1.102 The ALRC concludes that legislative or regulatory obligations may not be the most appropriate means by which to address family violence in the OHS context. The ALRC considers that significant amendments to the OHS system, due to come into effect on 1 January 2012, existing legislative and regulatory duties appear to be sufficiently broad to encompass family violence. Rather, it is lack of awareness or consideration of family violence as an OHS issue that should be the focus of reforms. Accordingly, the ALRC makes a range of proposals in Chapter 18 focused on: increasing awareness of family violence as a work health and safety issue; the incorporation of systems and policies into normal business practice to develop the capacity of employers and employees to effectively manage family violence as an OHS risk; and data collection mechanisms to establish an evidence base upon which to plan future policy directions in this area.

1.103 **Part F—Superannuation**, comprises one chapter, Chapter 19, which examines ways in which the Australian superannuation system does, or could, respond to protect the safety of people experiencing family violence. While the intersection between family violence and superannuation is not one that has received much attention in the past, other than to a limited extent within the family law arena, there are a range of areas of superannuation in which family violence has a particular impact on or consequence for the economic security and independence of victims of family violence.

1.104 The chapter consist of two main parts. The first part deals with circumstances in which a victim of family violence may have been coerced into taking action in respect of their superannuation. It considers superannuation agreements, spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the context of an inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth) and considers changes to the regulation of, and guidance material with respect to, SMSFs.

1.105 The second part of Chapter 19 examines circumstances in which a victim of family violence may wish to seek early access to superannuation benefits for the

purposes of, for example, leaving a violent relationship. In considering early release on the basis of severe financial hardship, the ALRC proposes amendments to the eligibility requirements for making an application and to guidance material for decision makers in granting early release. The ALRC also considers whether compassionate grounds could be amended to account for family violence, or whether a new ground of early release on the basis of family violence should be introduced. The ALRC also outlines a range of other issues relevant to early release, including in relation to application forms, training, applicant safety measures, time limits and data collection and systems integrity measures

1.106 **Part G—Migration**, comprises three chapters, Chapters 20–22. Chapter 20, ‘Migration Law—Overarching Issues’, considers a number of broad issues surrounding the family violence exception contained in the *Migration Regulations 1994* (Cth). The exception—which is invoked mainly in partner visa cases—provides for the grant of permanent residence to victims of family violence, notwithstanding the breakdown of the spousal or de facto relationship on which their migration status depends. A major focus of this chapter concerns whether the family violence exception should be expanded to apply to a broader range of onshore permanent and temporary visa categories, including the Prospective Marriage (Subclass 300) visa.

1.107 The ALRC considers that the family violence exception should be made available to all *secondary visa applicants* for onshore permanent visas. Similarly, the ALRC proposes in Chapter 20 that the family violence exception should be made available to holders of a Prospective Marriage (Subclass 300) visa who have experienced family violence, but who have not married their Australian sponsor. Beyond these cases, the ALRC acknowledges that those on other temporary visas may also experience family violence. However, in light of the need to ensure the integrity of the visa system the ALRC does not propose that the family violence exception be extended to apply to temporary visa holders.

1.108 The ALRC considers that the proposals in Chapter 20 need to be complemented by adequate education, training and information dissemination to all those within the system. Accordingly, the ALRC proposes that the Australian Government should ensure consistent and regular education and training in relation to the nature, features and dynamics of family violence, including its impact on victims, for visa decision makers, competent persons and independent experts, in the migration context. The ALRC also proposes that information about legal rights, family violence support services, and the family violence exception should be provided to visa applicants prior to and upon arrival in Australia, and that such information should be provided in a culturally appropriate and sensitive manner.

1.109 Chapter 21 ‘The Family Violence Exception—Evidentiary Requirements’, builds on Chapter 20 and focuses on the evidentiary requirements for making a family violence exception claim under the *Migration Regulations 1994* (Cth). In order to meet the family violence exception, applicants must make a claim based on judicially or non-judicially determined evidence of family violence. The chapter begins by giving an overview of the evidentiary requirements in the Australian context, including its legislative history. This is followed by an examination of stakeholder concerns in

relation to judicially and non-judicially determined claims of family violence. Chapter 21 then considers equivalent family violence provisions in other jurisdictions including: the United States, Canada, New Zealand and the United Kingdom, before examining a number of options for reform.

1.110 Chapter 22, ‘Refugee Law’, considers the position of asylum seekers who seek protection in Australia on the basis of having experienced family violence. The first part of the chapter includes an analysis of refugee case law in Australia in relation to family violence, and considers whether legislative changes to the *Migration Act 1958* (Cth) are necessary to improve the safety of victims of family violence. The ALRC concludes that family violence claims can fall under the definition of a refugee contained in the United Nations *Convention Relating to the Status of Refugees* (the Refugee Convention), as incorporated into Australian law by the *Migration Act*. However, the ALRC considers that this is a complex area of the law which is prone to inconsistent decision-making. Assessments of family violence claims require a visa decision maker to have an in-depth understanding of the intersection between family violence and refugee law, and the relevant country information. Accordingly, in order to improve consistency in decision-making, the ALRC proposes that the Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act* to require visa decision makers to have regard to the *Procedures Advice Manual 3 Gender Guidelines* when making refugee status assessments.

1.111 The second part of Chapter 22 considers whether other amendments, such as those proposed in the Complementary Protection Bill 2011 (Cth) are necessary to protect victims of family violence whose claims may fall outside the Refugee Convention, but who may need international protection. The ALRC considers that the measures proposed by the Bill provide limited scope for protection of victims of family violence. For the Bill to provide meaningful protection to victims of family violence, substantial amendments would need to be made to the exclusions criteria, which would significantly alter the nature of complementary protection affecting all persons who may need complementary protection, beyond those who are victims of family violence.

How to make a submission

1.112 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.113 There is no specified format for submissions and they may be marked ‘confidential’ if preferred. The ALRC prefers electronic communications and submissions, and strongly encourages stakeholders to make use of the online submission form available on the ALRC website. However, the ALRC will gratefully accept anything from handwritten notes to detailed commentary and scholarly analyses

on relevant laws and practices. Even simple dot-points are welcome. Submissions will be published on the ALRC website, unless they are marked confidential.⁴⁷

1.114 The ALRC appreciates that tight deadlines for making submissions places considerable pressure upon those who wish to participate in ALRC inquiries. Given the deadline for delivering the final report to the Attorney-General at the end of November 2011, and the need to consider fully the submissions received in response to this Discussion Paper, all submissions must be submitted on time—by **Friday 30 September 2011**.

1.115 It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries. The quality of the outcomes is assisted greatly by the understanding of contributors in needing to meet the deadline imposed by the reporting process itself. This Inquiry is no exception.

In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in this Discussion Paper must reach the ALRC by **Friday 30 September 2011**.

The ALRC encourages stakeholders to use the online submission form available at <<http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-discussion-paper>>.

Submissions not marked confidential will be published on the ALRC website.

47 Submissions provided only in hard copy may not be published on the website.

