

## 3. Common Interpretative Framework

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### Summary

3.1 The Terms of Reference require the Australian Law Reform Commission (ALRC) to consider what, if any, improvements can be made to relevant legal frameworks to protect the safety of those experiencing family violence. The definitions, and understanding, of family violence are key starting points in this respect.

3.2 This chapter 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. 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.

## Common interpretative framework

### Concepts of family violence

3.3 There is no single nationally or internationally agreed definition of family violence. As noted in Chapter 2, the United Nations *Declaration on the Elimination of Violence against Women* defines violence against women as

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.<sup>1</sup>

3.4 As the Australian Bureau of Statistics has noted, definitions of what constitutes family violence are inherently likely to differ across the legal sector, researchers and service providers. These definitions do not always necessarily align with community understandings, or victim and offender perspectives, of what constitutes family violence.<sup>2</sup>

3.5 In *Family Violence—A National Legal Response*, ALRC 114 (2010), the ALRC and New South Wales Law Reform Commission (the Commissions) undertook a detailed review of the various definitions of family violence—or ‘domestic violence’ or ‘domestic abuse’ as it is referred to in some jurisdictions—as a first step in the consideration of the interaction issues across and within jurisdictions that was required by the Terms of Reference for that inquiry. The Commissions identified the wide variations in definitions of family violence in Australia in: family violence legislation, the *Family Law Act 1975* (Cth), the criminal law, and other types of legislation such as victims’ compensation legislation and migration regulations.<sup>3</sup>

3.6 A key plank of the recommendations in *Family Violence—A National Legal Response* was the adoption of a common interpretative framework across the legislation under review. The recommendations included establishing a shared understanding of what constitutes family violence across these legislative schemes—and of the nature, features and dynamics of family violence. In relation to state and territory family violence legislation, the recommendations also involved the adoption of core guiding principles based on a human rights framework, the adoption of core purposes, and striving for equality of treatment of family violence victims by establishing common grounds for obtaining protection orders and a core set of persons to be protected.

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1 *Declaration on the Elimination of Violence against Women* 20 December 1993, UN GAOR, A/RES/48/104 (entered into force on 23 February 1994), art 1.

2 Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009).

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), Chs 5 and 6.

### Towards a common definition

3.7 In developing a definition of family violence in *Family Violence—A National Legal Response*, the Commissions noted that, whatever form family violence takes, a central feature is that it involves a person exercising control and power over the victim by inducing fear, for example by using threatening behaviour.<sup>4</sup> Definitions of family violence usually recognise that violence can constitute more than single ‘incidents’. It can involve ‘a continuum of controlling behaviour and violence, which can occur over a number of years’.<sup>5</sup>

3.8 The Commissions considered that the critical assessment of definitional issues was relevant to the important question of when it is appropriate for the law to intervene to provide protection or other forms of redress to victims. On the one hand, excessively narrow definitions of family violence might cause gaps in protection to victims. On the other, excessively broad definitions may detract from the significance of family violence or devalue the experience of its victims or facilitate the abuse of the protection order system.<sup>6</sup>

3.9 The common interpretative framework recommended in *Family Violence—A National Legal Response* is based on the same core definition of family violence, describing the context in which behaviour takes place, as well as a shared common understanding of the types of conduct that may fall within the definition of family violence in the following legislation:

- state and territory family violence legislation;
- the *Family Law Act*; and
- the criminal law—in the limited circumstances where ‘family violence’ is defined in the context of defences to homicide.

3.10 The Commissions recommended that each legislative regime should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;

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4 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), 13–14. See discussion in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 5.

5 Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004), 3.

6 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.11].

- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

3.11 The Commissions considered that adopting consistent definitions of family violence across different legislative schemes allows the courts to send clear messages about what constitutes family violence.

### **Nature, features and dynamics of family violence**

3.12 The Commissions also recommended that the common definition be complemented in family violence legislation by a provision that explains the nature, features and dynamics of family violence, including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, the Commissions recommended that family violence legislation should refer to the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse (CALD) background; those from the gay, lesbian, bisexual, trans and intersex communities; older persons; and people with disability. The Commissions recommended the adoption of a similar provision in the *Family Law Act*.<sup>7</sup>

3.13 The Commissions did not recommend that all types of conduct that constitute family violence should be criminalised, nor that family violence should be given the same treatment in the various legal frameworks considered in the report. In each case, the severity and context of particular family violence may carry varying weight in different legal proceedings, depending on the reasons for advancing evidence of family violence and the purposes of the respective legal frameworks, which were also considered.<sup>8</sup> The Commissions further considered that the adoption of a shared understanding of what constitutes family violence would not compromise the objects and purposes of the legislative schemes reviewed. What was considered crucial, however, is that common definitions of family violence reflect a consistent and shared understanding of the concepts that underlie the legislative schemes, reinforced by appropriate and regular training.

3.14 The Commissions considered that significant systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting the foundational policy principles of seamlessness and

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7 Ibid, Ch 7.

8 Ibid, Ch 4.

effectiveness underlying the approach to reform advocated in the report. The Commissions considered that embracing a common understanding of family violence is also likely to have a positive flow-on effect in the gathering of evidence of family violence for use in more than one set of proceedings. Another significant benefit of adopting a commonly shared understanding of family violence is that it will facilitate the registration and enforcement of family violence protection orders under the proposed national registration of protection orders scheme, also considered in the report,<sup>9</sup> and provide more useful and comparable data upon which policies to address family violence can be based.

## Social Security

### Current definitions

3.15 The *Social Security Act 1991* (Cth) refers to ‘domestic violence’ or ‘domestic or family violence’ in a range of contexts. Neither the *Social Security Act* nor the *Social Security (Administration) Act 1999* (Cth) contains a definition of domestic or family violence. The *Guide to Social Security Law* refers to a definition that has now been repealed—s 60D(1) of the *Family Law Reform Act 1995* (Cth)—in stating that:

Domestic and family violence occurs when someone tries to control their partner or other family members in ways that intimidate or oppress them. Controlling behaviours can include threats, humiliation (‘put downs’), emotional abuse, physical assault, sexual abuse, financial exploitation and social isolations, such as not allowing contact with family or friends; AND/OR

Family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well being or safety.

Domestic violence can include violence to someone who is not a family member, for example co-tenants and people in shared housing situations.<sup>10</sup>

3.16 The *Guide to Social Security Law* provides, further, in relation to Crisis Payment, that ‘domestic and family violence’ includes: child abuse; maltreatment; exploitation; verbal abuse; partner abuse; elder abuse; neglect; sexual assault; emotional abuse; economic abuse; assault; financial coercion; domestic violence; psychological abuse, or social abuse.<sup>11</sup>

3.17 While the current definition contained in the *Guide to Social Security Law* is already broad, it may be beneficial to have a definition that is consistent with the definition of family violence in other Commonwealth laws. This would ensure that victims of family violence have some degree of clarity and certainty that the violence

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9 Ibid, Ch 30.

10 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.D.235] (Domestic and/or Family Violence (CrP)).

11 Ibid, [3.7.4.20] (Qualification for CrP—Extreme Circumstances (Domestic & Family Violence)); [3.7.4.25] (Qualification for CrP—Remaining in the Home After Removal of Family Member Due to Domestic or Family Violence).

that they are experiencing will be recognised and treated similarly across all Commonwealth laws—a common interpretive framework as suggested in *Family Violence—A National Legal Response*.

3.18 The Commissions also noted that provisions which affect the lives and safety of particularly vulnerable groups in society may be more appropriately placed in primary legislation.<sup>12</sup> Placing the definition of family violence in the *Social Security Act* may afford a measure of stability and visibility to the definition.

3.19 ‘Family member’ is defined in s 23(14) of the *Social Security Act* to include, in relation to a person (the *relevant person*):

- (a) the partner or a parent of the relevant person;
- (b) a sister, brother or child of the relevant person; or
- (c) any other person who, in the opinion of the Secretary, should be treated for the purposes of this definition as one of the relevant person’s relations described in paragraph (a) or (b).

3.20 The *Guide to Social Security Law* states that ‘the discretion in s 23(14)(c) should be used only in respect of a family relationship that is similar to that of a partner, mother, father, brother, sister or child of the relevant person and is also such that it should be treated as such a relationship’.

3.21 Currently, references to ‘domestic and/or family violence’ in the *Social Security Act* are referred to without reference to who is using the family violence<sup>13</sup> except in reference to Crisis Payment. However, ‘family member’ is also used in the proposed definition of family violence and therefore it is important to understand how the proposed definition of family violence will be interpreted in the social security context. In particular, for Indigenous communities, where the meaning of ‘family member’ has a immutable connection to custom and practice through Aboriginal law, or revitalised customs and practice through a reconnection to ‘country’ and family membership.

### Using the common definition

3.22 In *Family Violence and Commonwealth Laws—Social Security Law* (ALRC Issues Paper 39, 2011), the ALRC asked whether the *Social Security Act* and/or the *Social Security (Administration) Act* should be amended to insert a definition of ‘family violence’ consistent with that recommended by the ALRC/NSWLRC in *Family Violence—A National Legal Response* (ALRC Report 114).<sup>14</sup>

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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), Ch 6.

13 See, for example, *Social Security Act* ss 602B, 1061JHA.

14 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 1.

**Submissions and consultations**

3.23 There was strong support amongst stakeholders for consistency of definitions across Commonwealth laws, including in the area of social security.<sup>15</sup> The importance of consistency across the ‘family law system’ and the adoption of a national ‘best practice’ definition, including within all states and territories, were identified as key goals.<sup>16</sup> Consistent definitions were seen as providing the foundation for consistent decision making.<sup>17</sup> For example, the National Council for Single Mothers and Their Children said that ‘legislation is a foundation from which policy, practices, processes and culture are formed and implemented’.<sup>18</sup> Similarly, the Commonwealth Ombudsman supported the definition ‘being consistently applied across the policies and procedures of Commonwealth agencies, wherever possible’:

Having a single consistently applied definition would potentially minimise the need for a person to retell their story and obtain different types of evidence for agencies they will commonly need to approach when experiencing or fleeing family violence, such as Centrelink and the CSA. The definition recommended by the ALRC and NSW Law Reform Commission would seem to encompass the full range of behaviours that amount to ‘violence’ within the term ‘family violence’.

3.24 The Homeless Persons’ Legal Service drew attention to the ‘strong nexus’ between experiences of family violence and homelessness, and the need, therefore, for people at risk of homelessness to be able to access income support, social security and child support. In this context the service stressed the importance for homeless people to have certainty that their experiences of family violence are treated in the same way under different Commonwealth legislative frameworks.<sup>19</sup>

3.25 The Commonwealth Ombudsman queried whether there also needed to be an amendment to the definition of ‘family member’ to acknowledge ‘that “family violence” may involve violence affecting parents and children, and other members of their former and current family units that are living separately and, indeed, may have never lived together’.<sup>20</sup>

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15 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

16 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011 and Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011, respectively.

17 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

18 National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

19 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

20 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

3.26 The Sole Parents' Union recommended that the definition of family violence be amended to reflect behaviour by the person using family violence that causes a child to be exposed to the behaviour or exposed to the effects of the behaviour in (a)–(h) above.<sup>21</sup>

### ***ALRC's views***

3.27 As with the other areas under consideration in this chapter, the ALRC confirms its views expressed in *Family Violence—A National Legal Response* 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.

3.28 Consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas, and also facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies. The ALRC does not propose to extend or alter the definition of family violence as proposed in the *Family Violence—A National Legal Response* and considers that the particular nature, features and dynamics of family violence can be expanded upon in the *Guide to Social Security Law*.<sup>22</sup>

3.29 As discussed in Chapter 13, the indicators of vulnerability for compulsory income management are financial hardship; financial exploitation; failure to undertake reasonable self-care; or homelessness or risk of homelessness.<sup>23</sup> In that chapter, the ALRC notes concerns with introducing family violence as an indicator of vulnerability; and for any unintended use and application in broadening the definition of family violence that may affect vulnerable groups as a trigger for income management. However, the ALRC also recognises that the current indicators of vulnerability encapsulate the experiences of many people who are experiencing family violence. For example, the *Guide to Social Security Law* states that 'financial exploitation' may occur when 'a person is subject to undue pressure, harassment, violence, abuse, deception or exploitation for resources by another person or people, including other family and community members'.<sup>24</sup>

3.30 With respect to social security the ALRC considers that the *Social Security Act* should be amended to include the common definition. As the primary legislation, the *Social Security Act* contains the definition section. The ALRC considers therefore that references to family violence in the *Social Security (Administration) Act* should cross reference to this definition.

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21 Sole Parents' Union, *Submission CFV 63*, 27 April 2011.

22 See Proposal 5–1.

23 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [11.4.2.20] (Indicators of Vulnerability).

24 *Ibid.*, [11.4.2.20] (Indicators of Vulnerability). The *Guide* also recognises that family violence may lead to homelessness, in circumstances where the victim is forced to leave his or her home.



**Proposal 3–1** The *Social Security Act 1991* (Cth) should be amended to provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces and controls a family member, or causes that family member to be fearful. Such behaviour may include, but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

## Child support

### Current definitions

3.31 Family violence is not defined in either the *Child Support (Assessment) Act 1989* (Cth), or the *Child Support (Registration and Collection) Act 1988* (Cth). The *Child Support Guide* contains a broad definition of family violence:

Family violence covers a broad range of controlling behaviours. They are commonly of a physical, sexual, and/or psychological nature, and typically involve fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.<sup>25</sup>

3.32 The *Child Support Guide* also provides definitions for the following non-exhaustive list of behaviours that may be involved in family violence:

- physical abuse;
- sexual abuse;
- emotional abuse;

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<sup>25</sup> Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

- verbal abuse;
- social abuse;
- economic abuse; and
- spiritual abuse.<sup>26</sup>

3.33 As noted in *Family Violence—A National Legal Response*, provisions that affect the lives and safety of particularly vulnerable groups of society may be more appropriately placed in primary legislation.<sup>27</sup> Therefore, it may be desirable for the definition of family violence to be provided in the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act*, rather than solely in the *Child Support Guide*. Placing the definition of family violence in child support legislation may give the definition increased stability, visibility and authority.

3.34 It may also be desirable to include the common definition in other relevant Commonwealth laws that are within the reference—including family assistance legislation and social security legislation, discussed below. As noted above, consistent legislative definitions of family violence may foster a shared understanding across jurisdictions, courts and tribunals, and across agencies such as the Child Support Agency and Centrelink. Further, consistent definitions provide victims with clarity and the certainty that family violence will be recognised and treated similarly across Commonwealth laws.

### Using the common definition

3.35 In *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC Issues Paper 38, 2011, the ALRC asked whether the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) should be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence—A National Legal Response*.<sup>28</sup>

### Submissions and consultations

3.36 Stakeholders who responded to this question were overwhelmingly in favour of a consistent definition across the laws under consideration.<sup>29</sup> National Legal Aid, for example, commented that:

26 Ibid, [6.10.1].

27 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 6.

28 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 1.

29 National Legal Aid, *Submission CFV 81*, 24 June 2011; Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents' Union, *Submission CFV 52*, 27 April 2011; Confidential, *Confidential CFV 49*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

The proposed definition reflects the broad range of behaviours that family violence encompasses. Definition/s of family violence should be consistent across jurisdictions. This will help to ensure as far as possible that people receive consistent responses and outcomes in relation to their interactions with the systems involved in family violence issues. Consistency in legislative definitions would also facilitate consistency in education/training methods in relation to family violence.<sup>30</sup>

3.37 Including the proposed definition in the relevant legislation would ‘elevate and emphasise the importance of family violence considerations and resultant risk factors in child support matters’.<sup>31</sup> The clear articulation of the definition in legislation would ‘provide clarity and transparency’ and create the ‘foundation from which policy, practices, processes and culture are formed and implemented’.<sup>32</sup> A joint submission by Domestic Violence Victoria and others argued that:

building common understandings about the nature and dynamics of family violence across all organisations dealing with child support and family assistance issues is an essential first step. The development of consistent definitions, policies, screening tools, risk management guidelines and practice directions will enhance the safety of women and children experiencing family violence.<sup>33</sup>

3.38 A consistent definition in the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act* and the *Child Support Guide* would assist those experiencing family violence when engaging with different government agencies, particularly if it is available, as advocated by the National Council of Single Mothers and their Children, ‘on all modes of communication including the Child Support Agency website and that it is then consistently used for all government agencies’.<sup>34</sup> The Acting Commonwealth Ombudsman also submitted that:

Having a single consistently applied definition would potentially minimise the need for a person to retell their story and obtain different types of evidence for agencies they will commonly need to approach when experiencing or fleeing family violence, such as Centrelink and the CSA. Hopefully, it would lead to alignment of policies across relevant agencies, and reduce the likelihood of an anomalous situation where the same set of factual circumstances leads to recognition of violence by one agency, but not another.<sup>35</sup>

3.39 The role of the definition with respect to drawing attention to the impact of family violence on children was also highlighted.<sup>36</sup> Generating a more consistent and thorough understanding of the impact of family violence and fears for safety would improve the response of staff making decisions affecting victims. For example, the Council of Single Mothers and their Children (CSMC) said that women contacting the

30 National Legal Aid, *Submission CFV 81*, 24 June 2011.

31 Ibid.

32 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011. See, similarly, ADFVC, *Submission CFV 53*, 27 April 2011.

33 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011.

34 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

35 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

36 ADFVC, *Submission CFV 53*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

Council regularly describe a ‘lack of understanding of the impact on children of being exposed to family violence’:

All too often however CSMC has heard from women that the officers whose role is to assess exemptions etc from particular requirements are unaware of these provisions, or lacking a sympathetic response to disclosures of family violence. This compounds the situation where women decide not to pursue child support entitlements due to fear that this will further jeopardise their safety and that of their children.

It is imperative that information and definitions of family violence are clearly articulated in legislation and guides that decision makers refer to.<sup>37</sup>

3.40 One stakeholder, however, was strongly against the inclusion of the definition in the child support context. The Non-Custodial Parents Party (Equal Parenting) did not support what it said was an ‘unreasonable broadening of the definition of family violence’, arguing that ‘unfounded allegations of family violence’ should not be ‘an acceptance criterion to establish a relationship between child support and family violence’.<sup>38</sup>

3.41 While the ALRC asked about amending the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act* by the insertion of a definition consistent with that recommended in *Family Violence—A National Legal Response*, some stakeholders suggested a different location for the definition or changes to the proposed definition. The Law Council of Australia agreed that there should be a single definition, but submitted that it should be located in the *Family Law Act 1975* (Cth), with ‘all other Commonwealth Acts pointing to that definition as necessary’:

This would mean that if a change to the definition is ever required, there is only one Act which needs to be amended. Similarly, having one definition ensures that different definitions of the same concept are not inadvertently created if one Act is changed and the other is overlooked.<sup>39</sup>

3.42 With respect to the definition itself, National Legal Aid, for example, submitted that a small amendment should be added, namely:

the inclusion of a further subparagraph (j) **threats** to carry out the behaviours referred to in (a) – (h) above or to commit suicide or self harm. The wording of the proposed section does not include threats to an animal, but rather requires that the animal have been injured or killed for the definition of family violence to be met. In our family violence casework and advice experience ‘threats to harm’ to pets are common and have been effectively used to exercise control over victims.<sup>40</sup>

3.43 The Commonwealth Ombudsman also commented with respect to the definition of family in the child support context:

any definition of family violence in the child support, family assistance and social security legislation would need to be broad enough to include violence involving persons connected by a variety of current and former ‘family’ relationships. To this

37 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

38 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011

39 Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011.

40 National Legal Aid, *Submission CFV 81*, 24 June 2011.

end, we consider that the definition should acknowledge that ‘family violence’ may involve violence affecting parents and children, and other members of their former and current family units that are living separately and, indeed, may have never lived together. It may be necessary to separately define the term ‘family’, within the policy setting and context of the specific legislation.<sup>41</sup>

### ***ALRC’s views***

3.44 The ALRC confirms its views expressed in *Family Violence—A National Legal Response*, 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.

3.45 Consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas; and facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.

3.46 In the context of child support, the ALRC considers that the proposed common definition should be included in both the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth). Similarly, the *Child Support Guide* should also include the common definition. This is considered in Chapter 9.

3.47 While the ALRC considers that the suggestion by the Law Council for the definition to be included in the *Family Law Act* and that this be used as the reference point for other legislation has practical appeal in terms of ensuring that only one piece of legislation requires amendment, there is an educative function in having the definition in the relevant primary legislation for each area that may then inform policy documents, such as the guides, that are the principal tool for officers who have the task of implementing or working with the legislation, and associated training especially in service delivery areas.

3.48 In the context of the interactions under consideration in *Family Violence—A National Legal Response*, where over 26 legislative regimes were considered across civil and criminal law areas, this argument was perhaps stronger than in the Commonwealth arena. The ALRC also considers that achieving consistency is the principal aim, and that this can be achieved either by the approach of specific amendment to the relevant primary legislation or by amendment to one, with cross-references in the other. The *Family Law Act* is the central piece of legislation in the ‘family law system’ and child support may be considered to be part of that system. In this particular context, therefore—although not necessarily with respect to the other areas under consideration in this Inquiry—it is clearly one possible direction for reform. There are practical issues that remain, however, where cross-referencing itself

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41 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

becomes out of date, and explanations in policy material are no longer relevant.<sup>42</sup> There is also the distinct educative role and value of placing the definition in the relevant primary legislation. This is the approach the ALRC favours in the proposals being advanced in this Discussion Paper.

3.49 In relation to the form of the definition, the ALRC considers it unnecessary to include a further category to the definition of family violence regarding threats to carry out the conduct listed as illustrations of family violence. Such threats are provided for in the category of emotional abuse contained in the proposed definition.

3.50 The ALRC also considers it unnecessary for the terms ‘family’ or ‘family relationships’ to be defined in the child support legislation. Defining relationships in which family violence can occur is an important component of state and territory family violence legislation. The defined relationships provide for, and restrict, eligibility for family violence protection orders. Only persons in certain categories of relationships may obtain such orders.

3.51 By contrast, and as discussed in Chapter 9, family violence in the child support framework does not, in and of itself, prompt an outcome which determines rights between parties. There is therefore not the same imperative to define the context in which family violence may occur. Indeed, defining family or family relationships may unnecessarily limit the application of a case-management response to family violence that promotes customer safety.

**Proposal 3–2** The *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

## Family assistance

### Current definitions

3.52 The current framework for family assistance is contained in two statutes: *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth)—referred to as the *Family Assistance Act* and the *Family Assistance (Administration) Act* respectively. Neither of these Acts, nor the *Family Assistance Guide* provides a definition of ‘family violence’.<sup>43</sup>

3.53 As noted in the context of the discussion on child support, it may be desirable for definitions of family violence to be included in primary legislation. In *Family Violence—A National Legal Response*, the Commissions recommended a consistent

<sup>42</sup> For example, the *Guide to Social Security Law*, noted below, refers to a definition that has now been repealed—s 60D(1) of the *Family Law Reform Act 1995* (Cth).

<sup>43</sup> The *Guide to Social Security Law*, which is also hosted on the FAHCSIA website, does contain a definition of family violence. Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.D.235].

definition of family violence in state and territory family violence and criminal legislation, and the *Family Law Act*. As discussed above, including this definition in relevant Commonwealth laws, such as family assistance legislation, may increase clarity and certainty for victims of family violence, by ensuring that the violence they have experienced will be recognised and treated similarly across all Commonwealth laws.

### Using the common definition

3.54 In *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC Issues Paper 38, the ALRC asked whether family assistance legislation should be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence—A National Legal Response*.<sup>44</sup>

### Submissions and consultations

3.55 The response of stakeholders was very similar to that in response to the question in relation to child support, summarised above. The response of the Non-Custodial Parents Party, for example, was identical, and strongly against the proposal.<sup>45</sup> All other stakeholders who responded to this question, however, were strongly in support.<sup>46</sup>

3.56 For example, the Welfare Rights Centre (NSW) commented that:

It is crucial that family violence be given the broadest possible definition and that that definition is used consistently across all government departments and agencies. This is particularly the case given the higher levels of vulnerability (economic and otherwise) of parents receiving family assistance and social security payments.<sup>47</sup>

3.57 The ADFVC advocated that:

insertion of the definition into the legislation will give the issue prominence and clarify the scope of the issue for those interpreting the legislation. It will also offer consistency in definitions across legislation and policies.<sup>48</sup>

### ALRC's views

3.58 The ALRC confirms its views expressed in *Family Violence—A National Legal Response* that systemic benefits would flow from the adoption of a common

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44 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 30.

45 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011.

46 National Legal Aid, *Submission CFV 81*, 24 June 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents' Union, *Submission CFV 52*, 27 April 2011; Confidential, *Confidential CFV 49*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

47 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

48 ADFVC, *Submission CFV 53*, 27 April 2011.

interpretative framework, across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers.

3.59 Consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas; and facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.

3.60 The ALRC notes again the comments of the Law Council, expressed in relation both to child support and family assistance, with respect to placing the definition in the *Family Law Act* but, as noted above, considers that the primary legislation in each area should be amended.

**Proposal 3–3** *A New Tax System (Family Assistance) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–4** *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

## Employment and Superannuation

### Current definitions

3.61 With respect to employment law, neither the *Fair Work Act 2009* (Cth) nor the *Fair Work Regulations 2009* (Cth) have specific provisions dealing with family violence or the manifestation of family violence in the workplace.

3.62 Similarly, in the other areas of law considered by the ALRC in the Issues Paper, *Family Violence—Employment and Superannuation Law*, ALRC IP 36 (2010) (Employment and Superannuation Law Issues Paper), there is no definition. This includes the following areas.

3.63 In the pre-employment context, the term domestic violence is included in publications such as the Job Seeker Classification Instrument Guidelines, other material utilised by Job Services Australia, Disability Employment Services and Indigenous Employment Program providers as well as in relation to Job Capacity Assessments and Employment Services Assessments. However, there does not appear to be any relevant definition of domestic violence.

3.64 With respect to occupational health and safety:

- *Occupational Health and Safety Act 1991* (Cth) (OHS Act);
- *Safe Work Australia Act 2008* (Cth) (SWA Act);



- *Occupational Health and Safety (Safety Arrangements) Regulations 1991* (Cth) (OHS Regulations 1991);
- *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) (OHS Regulations 1994);
- *Occupational Health and Safety Code of Practice 2008* (Cth) (OHS Code); and
- Codes of Practice developed by Safe Work Australia.

3.65 With respect to superannuation:

- *Superannuation Act 1976* (Cth)—specifically, the provisions with respect to early access to superannuation;
- *Superannuation (Resolution of Complaints) Act 1993* (Cth)—which establishes the Superannuation Complaints Tribunal;
- *Superannuation Industry (Supervision) Act 1993* (Cth)—which makes provision for the prudent management of certain superannuation funds and supervision by Australian Prudential Regulatory Authority (APRA), the Australian Securities & Investments Commission (ASIC) and the Commissioner of Taxation; and
- *Superannuation Industry (Supervision) Regulations 1994* (Cth)—which articulate the grounds for early access to superannuation.

3.66 In the superannuation context, there is also no relevant definition of family violence.

### **Using the common definition**

3.67 In the Employment and Superannuation Law Issues Paper, the ALRC did not ask a specific question with respect to the definition of family violence across the various legislative areas under consideration. Nonetheless it is consistent with the approach in *Family Violence—A National Legal Response*, and the other Issues Papers in this Inquiry to consider its inclusion with respect to the areas covered within the areas of employment and superannuation law. It was also the subject of comment by many stakeholders in this Inquiry.

### ***Submissions and consultations***

3.68 For example, in a joint submission, Domestic Violence Victoria and others submitted that:

The definition of family violence would need to be consistent with definitions adopted by other jurisdictions (we refer to recommendations 5–1 and 5–3 of the ALRCs *Family Violence: A National Legal Response Final Report* (2010)).<sup>49</sup>

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49 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

3.69 Two stakeholders commented about including a definition of family violence for the purposes of accessing flexible working arrangements under s 65 of the *Fair Work Act*. The Australian Domestic and Family Violence Clearinghouse suggested that:

‘domestic or family violence’ includes physical, sexual, mental, verbal or emotional abuse by a member of the employee’s immediate family or a member of the employee’s household.<sup>50</sup>

3.70 Women’s Health Victoria added that, if family violence is included under s 65 of the *Fair Work Act*, they would recommend, ‘accompanying materials be produced for both employers and employees explaining the reason for its inclusion, legal definitions of what constitutes family violence’.<sup>51</sup>

3.71 The Queensland Law Society supported the approach of a consistent definition of family violence ‘throughout the various Commonwealth and State Acts’—‘in order to avoid confusion’.<sup>52</sup>

### **ALRC’s views**

3.72 The ALRC considers that consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas; and facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies. The ALRC therefore proposes that the *Fair Work Act 2009* (Cth) and that relevant guidelines and material be amended to reflect it. The ALRC also proposes that the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to include the proposed common definition.

**Proposal 3–5** The *Fair Work Act 2009* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–6** The following guidelines and material should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1:

- Department of Education, Employment and Workplace Relations and Job Services Australia Guidelines, Advices and Job Aids;
- Safe Work Australia Codes of Practice and other material
- Fair Work Australia material; and
- other similar material.

50 ADFVC, *Submission CFV 26*, 11 April 2011.

51 Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

52 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

**Proposal 3–7** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) and, where appropriate, all Australian Prudential Regulation Authority, Australian Taxation Office and superannuation fund material, should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

## Migration

### Current definitions

3.73 The *Migration Regulations 1994* (Cth) define the term ‘relevant family violence’ to mean a reference to conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator; or
- (d) the property of the alleged victim; or
- (e) the property of a member of the family unit of the alleged victim; or
- (f) the property of a member of the family unit of the alleged perpetrator;

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.<sup>53</sup>

3.74 This definition takes a similar approach to the definition of family violence in the *Family Law Act 1975* (Cth), as at the time of writing this Discussion Paper,<sup>54</sup> in giving focus to the effect of the conduct on the victim, rather than categorising types of conduct.<sup>55</sup>

### *Judicial consideration of the term ‘violence’*

3.75 The term ‘violence’ is not defined by the *Migration Regulations*, but it has been the subject of some judicial consideration. Early authorities on this issue took a broad view that violence was ‘not meant to exclude instances where the damage suffered by the applicant was not wholly physical’.<sup>56</sup> However, in *Cakmak v Minister for Immigration and Citizenship*, the Full Federal Court commented that the term ‘violence’ was restricted to physical violence, and that things like belittling, lowering

<sup>53</sup> *Migration Regulations 1994* (Cth) reg 1.21(1).

<sup>54</sup> At the time of writing, a proposal to amend the definition in the *Family Law Act 1975* (Cth) was under consideration: Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

<sup>55</sup> *Migration Amendment Regulations (No 13) 2007* (Cth) reg 3 amended the definition and replaced the term ‘domestic violence’ with ‘family violence’. The definition of ‘relevant family violence’ applies to all visa applications made on or after 15 October 2007.

<sup>56</sup> See *Malik v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 291. This approach was also adopted in *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279; *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251.

self esteem, ‘emotional violence’ or ‘psychological violence’ broadened the scope of the *Migration Regulations* beyond their words.<sup>57</sup>

3.76 In *Sok v Minister for Immigration and Citizenship* the Full Federal Court, disapproved of these comments, holding that violence is not restricted to actual or threatened physical violence.<sup>58</sup> The court considered that ‘domestic violence’ is a term of art in contemporary Australia and, in the modern day context, is generally understood to encompass emotional abuse or economic deprivation.<sup>59</sup> A critical part of the courts’ reasoning was that reg 1.23(2)(b) of the *Migration Regulations* refers to violence that causes the victim to fear for his or her ‘personal well-being or safety’, and that personal well-being is generally considered to encompass psychological health.<sup>60</sup>

### ***ALRC consideration of the term ‘relevant family violence’***

3.77 In *Family Violence: Improving Legal Frameworks*, ALRC CP 1 (2010) the Commissions foreshadowed these issues and asked how the definition of ‘relevant family violence’ in the *Migration Regulations* was working in practice.<sup>61</sup> The Commissions flagged that the responses received would be used in this Inquiry.

3.78 Stakeholders in that inquiry suggested that the current definition of ‘relevant family violence’:

- is too narrow and should be broadened to reflect current understandings of family violence, including having the reasonableness test removed;<sup>62</sup>
- should reflect the broader definition used in the Victorian family violence legislation, or align more generally with the definition in the *Family Law Act* and all state and territory definitions of family violence;<sup>63</sup>
- is problematic in its inclusion of the term ‘relevant’, as this is out of step with other state, territory and federal definitions of family violence, and appears to suggest that relevance of violence is determined according to culture.<sup>64</sup>

### **Using the common definition**

3.79 In the Issues Paper, *Family Violence and Commonwealth Laws—Immigration*, (ALRC IP 37, 2011) (the Migration Issues Paper), the ALRC asked what issues arise in the use of the ‘relevant family violence exception’, and whether the *Migration*

57 *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183, [62].

58 *Sok v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 170.

59 *Ibid.*, [24].

60 *Ibid.*

61 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), Question 4–6.

62 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 288.

63 *Ibid.*

64 *Ibid.*

*Regulations* should be amended to insert a definition of family violence consistent with that recommended in *Family Violence—A National Legal Response*.<sup>65</sup>

### ***Submissions and consultations***

3.80 A majority of stakeholders supported amending the *Migration Regulations* to include a definition of family violence consistent with that recommended in *Family Violence—A National Legal Response*.<sup>66</sup> In doing so, several strong themes emerged from the submissions with respect to the current definition of ‘relevant family violence’.

#### ***‘Relevant’ family violence***

3.81 First, submissions highlighted as problematic the use of the term ‘relevant’ as confusing and unnecessary.<sup>67</sup> For example, the Australian Association of Social Workers (Qld Branch) submitted that:

The concept of ‘relevant’ as it is included in the current legislation is questionable and the AASW strongly argues that all forms of violence need to be assessed and recognised as relevant to decision makers.<sup>68</sup>

3.82 The Refugee and Immigration Legal Service submitted that ‘relevant’ can be interpreted to mean ‘cultural’ relevance, rather than taking into account all dimensions of domestic and family violence.<sup>69</sup>

#### ***The reasonableness requirement***

3.83 Stakeholders also questioned the utility of requiring a decision maker to make an assessment as to the state of mind of the victim, and whether the violence caused the victim to be reasonably apprehensive about his or her safety or well-being. For example, the Law Institute of Victoria argued that:

The focus on the victim, rather than the perpetrator, is inappropriate because it allows myths and stereotypes to persist about the nature and dynamics of family violence, including who is a victim, what constitutes violence and what is a reasonable response by the victim.<sup>70</sup>

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65 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 1.

66 ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

67 Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

68 Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011.

69 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

70 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

3.84 As an example of this concern, National Legal Aid submitted that:

It is not uncommon for victims of family violence to return to the family home several times before making the final decision that they can no longer continue to live with their partner ... However, returns home and assertive behaviour can be misinterpreted as evidence that the victim is not reasonably fearful/apprehensive and so the victim fails to meet the definition of ‘relevant family violence’.

The emphasis on fear also places an onus on the victim to not only provide evidence of the family violence but also of their mental state at the relevant time. There can be practical implications given the length of time which is sometimes involved in assessing applications and claims. A woman who is now enjoying better health because she is no longer in fear could be potentially disadvantaged as to her credibility.<sup>71</sup>

3.85 On the other hand, Visa Lawyers Australia—while supporting the ALRC’s definition—emphasised that, in their experience, ‘the current definition of family violence contained in the *Migration Regulations* works well enough in practice’ and argued that:

the definition was developed for the purposes of determining the victim’s right to a visa despite the breakdown of intimate relationships on which the visa application was based, rather than to establish all the details of the perpetrator’s behaviour per se.

The ALRC’s proposed definition shifts the focus from the victim’s personal experience of family violence to an itemised list of perpetrator behaviour, which has the potential to place undue emphasis on evidence of the perpetrator’s behaviour which may be difficult for the victim to provide. If changes to the definition of family violence are introduced then we respectfully submit that consideration needs to be given to whether the new definition will place onerous evidentiary burden on the applicant.<sup>72</sup>

#### ***Violence perpetrated by someone other than sponsor***

3.86 Stakeholders also commented that the definition of ‘relevant family violence’—when read together with visa criteria in *Migration Regulations* sch 2, stating who can be the ‘alleged perpetrator’ and ‘alleged victim’—does not account for instances where violence is used by someone other than the sponsor, such as a family member of the sponsor. For example, Domestic Violence Victoria and others in a joint submission submitted that:

In Touch Multicultural Centre Against Family Violence can cite multiple cases in which their clients are subjected to violence from family members of the sponsor (brothers, fathers-in-law, mothers-in-law, uncles-nephews etc). In such cases, the victim will not be able to utilise the Family Violence provisions resulting in a significant inequity in the access the equity of the provisions.<sup>73</sup>

71 National Legal Aid, *Submission CFV 75*, 20 May 2011.

72 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

73 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

3.87 Similarly, the Refugee and Immigration Legal Service (RAILS) argued that, in its experience:

We are aware that of situations where the sponsoring spouse has not directly perpetrated the violence, but neither have they acted to protect their partner against this violence. We suggest that the legislation be amended to reflect this scenario, or where the sponsoring spouse does nothing to intervene to protect their partner, their apparent condoning of the violence can be regarded as coming within the provisions of the existing legislation.<sup>74</sup>

3.88 The ANU College of Law submitted that the assumption that limiting the family violence exception only to instances where the perpetrator is the sponsoring partner ‘does not correspond to the reality and complexity of family violence contexts’.<sup>75</sup>

3.89 In Chapter 20, the ALRC considers whether the family violence exception should extend to cases where the person using the violence is someone other than the sponsor. However, for the purposes of the definition of family violence, the ALRC acknowledges stakeholder concerns that, in the migration context, family violence may be committed by someone other than the sponsor.

***The threat of withdrawal of sponsorship and removal***

3.90 Another theme that emerged was that the two year probationary period for partner visas—discussed in Chapter 20—allowed sponsors to use the threat of removal from Australia to coerce and control victims of family violence, many of whom lack an understanding of their legal rights, or who may be totally dependent on the sponsor. Stakeholders suggested that the threat to withdraw sponsorship, with the consequences of removal, is routinely used to perpetuate power imbalances in relationships.<sup>76</sup> For example, the ANU College of Law submitted that:

It is our experience when dealing with victims of family violence that the threat to withdraw sponsorship is one of the most common forms of devices used to ensure compliance with the perpetrator’s wishes ... As it stands the current definition does not capture coercion to this level. The failure to accept the repercussions of threats at this level have meant that the victim is often required to argue their case with decisions makers on the grounds of personal danger should they return home instead of the climate of threats they lived under during the relationship.<sup>77</sup>

3.91 The threat of removal was also raised as an issue by stakeholders in relation to Prospective Marriage (Subclass 300) visas, where a sponsor threatens to withhold marriage from the applicant.<sup>78</sup> Similar concerns were also raised in relation to secondary visa applicants on visas where there is a pathway to permanent residence, and the primary visa applicant uses the threat of not including the secondary visa applicant in the application for a permanent visa as means of perpetuating family

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74 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

75 ANU College of Law, *Submission CFV 79*, 7 June 2011.

76 ANU College of Law, *Submission CFV 79*; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

77 ANU College of Law, *Submission CFV 79*, 7 June 2011.

78 Confidential, *Submission CFV 36*, 12 April 2011; Confidential, *Submission CFV 35*, 12 April 2011.

violence dynamics.<sup>79</sup> The concerns in these two particular contexts are discussed in Chapter 20.

### **ALRC's views**

3.92 The ALRC confirms its views expressed in *Family Violence—A National Legal Response* 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.

3.93 The ALRC considers that the use of the term 'relevant', and the 'reasonableness' requirement that focuses on state of mind of the victim in the current definition of 'relevant family violence' are problematic. In the ALRC's view, all forms of family violence should be considered by the decision-maker, with an understanding of the controlling and coercive conduct that causes the victim to fear for his or her safety or well-being. As the Commissions argued in *Family Violence—A National Legal Response*:

Emphasising the coercive, controlling nature of family violence and how it engenders fear serves an important educative function, as well as a dual pragmatic function ... it allows new behaviours—including seemingly 'minor events' which may have a particular significance to victims—to be included, provided that they meet this definition.<sup>80</sup>

3.94 The ALRC acknowledges that, in the migration context, family violence may be committed by members of the family unit of a sponsor. The ALRC considers that a definition that focuses on 'controlling and coercive conduct' can adequately cover instances where the visa applicant is subjected to family violence committed by family members of the sponsor, at the instigation or coercion of the sponsor. In addition, the ALRC considers that the definition can also capture a range of other conduct, including where a sponsor threatens to withdraw sponsorship and have the visa holder removed from Australia.

3.95 Thus, the ALRC considers that the *Migration Regulations 1994* (Cth) should be amended to insert a definition of family violence consistent with that recommended in *Family Violence—A National Legal Response*. The ALRC considers that the definition accounts better for the nature, features and dynamics of family violence and will help to improve the safety of those experiencing it.

3.96 The ALRC also considers it important that guidance be given to decision makers in the Department of Immigration and Citizenship's *Procedures Advice Manual 3* (PAM 3) guidelines as to what controlling and coercive conduct may include for the purposes of the definition. At present, PAM 3 has no examples as to what conduct may

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79 ANU College of Law, *Submission CFV 79*, 7 June 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

80 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 235.



constitute family violence, nor any specific guidance concerning the definition. Rather officers are instructed that the definition is ‘apt to be re-interpreted by the courts, which could have implications for the types of ‘actions’ captured by the definition’, and advice should be sought as to the current judicial interpretation.<sup>81</sup>

**Proposal 3–8** The *Migration Regulations 1994* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–9** The Department of Immigration and Citizenship’s *Procedures Advice Manual 3* for decision makers should include examples to illustrate coercive and controlling conduct that may amount to family violence, including but not limited to:

- (a) the threat of removal; and
- (b) violence perpetrated by a family member of the sponsor at the instigation, or through the coercion, of the sponsor.

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81 Department of Immigration and Citizenship, *Procedures Advice Manual 3* (2010), s 13.3.

