

3. Common Interpretative Framework

Contents

Summary	75
Common interpretative framework	76
Concepts of family violence	76
Towards a common definition	76
The recommended definition	77
Nature, features and dynamics of family violence	78
Implementation in the <i>Family Law Act</i>	79
The breadth of the definition	80
Illustrations of behaviour	82
The Senate Committee’s response	85
A common definition in other Commonwealth laws	85
First step to a common interpretative framework	85
Benefits of a common approach	86
Resistance to the proposed definition	88
Illustrative examples of the types of family violence	88
Nature, features and dynamics of family violence	91
Location of common definition	92
Social security	92
Child support and family assistance	95
Employment and superannuation	99
Migration	100

Summary

3.1 In considering what, if any, improvements can be made to relevant legal frameworks to protect the safety of those experiencing family violence, the definition, and understanding, of family violence are key starting points. As a foundational aspect of establishing a common interpretative framework in this Inquiry, the ALRC recommends including in the Commonwealth laws under review the same core definition of family violence. The recommended definition of family violence describes the context in which behaviour takes place, as well as the types of conduct—both physical and non-physical—that may fall within the definition.

3.2 The ALRC considers that systemic benefits would flow from the adoption of a common interpretative framework across the specified legislative areas, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers. Importantly, it should also enhance consistency in the treatment of family violence across the legislative frameworks.

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.¹

3.4 However, the Australian Bureau of Statistics points out that:

There is no single nationally or internationally agreed definition as to what constitutes ‘family violence’, ‘domestic violence’ or any similar, related term. The broad term ‘Family and Domestic Violence’ is a combination of the terms ‘Family Violence’ and ‘Domestic Violence’. These terms can be defined with reference to various contextual elements such as relationships, location of offences, and/or domestic arrangements; and may be interpreted differently depending on the particular legal, policy, service provision, or research view being taken.²

3.5 In *Family Violence—A National Legal Response*, ALRC Report 114 (2010), the ALRC and New South Wales Law Reform Commission (the Commissions) undertook a detailed review of the definitions of family violence. This was a first step in considering interaction issues across and within jurisdictions, as required by the Terms of Reference for that inquiry. The Commissions identified wide variation in definitions of family violence in Australia in: family violence legislation; the *Family Law Act 1975* (Cth); the criminal law; and other legislation, such as victims’ compensation legislation and migration regulations.³

Towards a common definition

3.6 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.⁴ Definitions of family violence usually recognise that violence can constitute more than single ‘incidents’ and

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), ‘Issues in defining family and domestic violence’.

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.

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.

can involve ‘a continuum of controlling behaviour and violence, which can occur over a number of years’.⁵ As the Department of Human Services commented,

family and domestic violence is not just a series of behaviours, but an underlying attitude and approach to intimate relationships on the part of the person who uses violence, based on an attitude of superiority, entitlement, and an adversarial approach. The experience of family and domestic violence is not simply the experience of a sequence of events, but one which influences and controls all areas of the victim’s life.⁶

3.7 In *Family Violence—A National Legal Response*, the Commissions concluded that a critical assessment of definitional issues was a necessary prelude to a consideration of when it was 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, devalue the experience of its victims, or facilitate the abuse of the protection order system in civil law.⁷

The recommended definition

3.8 The common interpretative framework recommended in *Family Violence—A National Legal Response* is based on a core definition of family violence, describing the context in which behaviour takes place and the types of conduct that may fall within the definition. The context, set out in the first part of the definition, is violent, threatening or other behaviour that coerces or controls a family member or causes that family member to be fearful. The second part of the definition provides a non-exhaustive list of the types of behaviour that may constitute family violence. The Commissions included examples of both physical and non-physical conduct, including:

- (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

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

⁶ DHS, *Submission CFV 155*.

⁷ 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].

- (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.

3.9 The Commissions considered that adopting consistent definitions of family violence, across the different legislative schemes under review, would allow the courts to send clear messages about what constitutes family violence. The Commissions recommended that the same core definition be included in 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.⁸

3.10 The Commissions distinguished the goal of achieving definitional consistency from the consequences that might flow in civil or criminal law. In particular, 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 Commissions suggested that the purposes of the respective legal frameworks should determine the appropriate legal response—whether criminal or civil.⁹

3.11 While the Commissions recommended a consistent contextual core definition, when it came to the non-exhaustive list of examples of specific types of conduct that may fall within the concept of family violence, the Commissions did not suggest that the types of conduct needed to be drafted in precisely the same terms. The Commissions considered that there should be flexibility to incorporate specific types of violence relevant to each jurisdiction, which accommodate, for example, local or demographic-specific issues. This was a pragmatic approach, given that the Commissions were considering all state and territory legislation, as well as the *Family Law Act*.

3.12 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, was that common definitions of family violence should reflect a consistent and shared understanding of the concepts that underlie the legislative schemes, reinforced by appropriate and regular training.

Nature, features and dynamics of family violence

3.13 Consistent definitions inform a shared understanding of what constitutes family violence—one plank of a common interpretative framework. In *Family Violence—A National Legal Response* the Commissions also recommended that the *Family Law Act* and state and territory family violence legislation adopt consistent or similar provisions setting out the nature, features and dynamics of family violence. This is the second plank of a common interpretative framework, which should establish a shared understanding of the features of family violence.

8 Ibid. Recs 5–1, 6–1, 6–4.

9 Ibid, Ch 4.

3.14 The Commissions recommended a provision that explained that, 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.¹⁰

3.15 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.¹¹

3.16 The Commissions considered that provisions setting out the nature, features and dynamics of family violence provide a contextual framework for judicial decision-making. They also serve an important educative function. Further, highlighting the impact of violence on particular groups may assist in the challenging task of ensuring that experiences of family violence of such groups are properly recognised across the legal system. The Commissions also considered that such legislative provisions should be developed in consultation with the groups affected.

Implementation in the *Family Law Act*

3.17 The first step towards a common definition and a shared understanding of family violence in Commonwealth laws is the proposed amendment of the *Family Law Act 1975* (Cth). After the release of *Family Violence—A National Legal Response*, the Australian Government introduced the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) (Family Violence Bill). Among other things, this Bill proposes an amendment to the definition of family violence in s 4(1) of the *Family Law Act*. The amended definition, while influenced by the work of the Commissions, was a little different from the definition recommended in the report.

3.18 The definition contained in the Bill, for enactment as s 4AB, provides that:

- (1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or

¹⁰ Ibid, Rec 7–2.

¹¹ Ibid, Recs 5–2, 7–2. The Commission also recommended that a similar provision be included in the *Family Law Act 1975* (Cth): Rec 7–3.

- (b) a sexual assault or other sexually abusive behaviour; or
- (c) stalking; or
- (d) repeated derogatory taunts; or
- (e) intentionally damaging or destroying property; or
- (f) intentionally causing death or injury to an animal; or
- (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

3.19 The Bill adopts the two-part approach to the definition recommended in *Family Violence—A National Legal Response*—providing a contextual core definition accompanied by a non-exhaustive list of examples. There are several differences between the definition in the Bill and that recommended by the Commissions, with respect to the list of behaviours that may constitute family violence. The Family Violence Bill sets this list out in proposed s 4AB(2). However, these differences are not necessarily inconsistent with the Commissions' recommendation, which was flexible in relation to this second component of the definition.

3.20 The Family Violence Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee (the Senate Committee), which reported in August 2011.¹² The Committee's response to the definition is considered below.

The breadth of the definition

3.21 Throughout the Senate Committee's inquiry, the proposed definition of family violence in the Family Violence Bill attracted broad support from many experts and stakeholders—including on the grounds of its breadth and the range of behaviour captured.¹³ Others, however, opposed the proposed definition including on 'precisely

12 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011).

13 Ibid, Committee Report, [3.63]. Submissions supporting the definition included: Australian Human Rights Commission, *Submission 254, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Family Relationships Services Australia, *Submission 163, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Australian Domestic and Family Violence Clearinghouse, *Submission 59, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service, *Submission 48, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); H Rhoades and J Dewar, *Submission 9, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

the same grounds’—that is, on the basis of the breadth and the range of behaviour captured.¹⁴ For example, the Family Law Practitioners Association of Western Australia argued that the proposed definition was ‘simply too wide and captures behaviour that goes well beyond that which most members of the community would define as “violence”’.¹⁵

3.22 In its evidence and submission to the Committee, the ALRC stated that the Commissions’ recommended definition was not too broad. While the definition sets out a wide range of behaviour in its second component, the first component—the contextual core—acts as a ‘filter’ for these behaviours, operating to exclude conduct committed outside the context of controlling or coercive behaviour. For example, the recommended definition would exclude verbal abuse in the course of an intimate relationship, or acts of violent resistance by victims, where such conduct does not engender fear or does not form part of a pattern of controlling or coercive behaviour. This filter function was an important reason for the adoption of a two-part definition in *Family Violence—A National Legal Response*.

3.23 The ALRC acknowledged, however, that there may be one potentially over-inclusive aspect of the definition. Emeritus Professor Richard Chisholm, a former Justice of the Family Court and the writer of the report for the Attorney-General, the *Family Courts Violence Review*,¹⁶ was a key contributor to the Senate Inquiry. While generally supporting the Family Violence Bill definition, in giving evidence to the Senate Committee Chisholm pointed out one way in which the definition may be too broad. In relation to the definitional core included in s 4AB(1), he commented that:

If you focus on the ‘other behaviour’, you have got ‘family violence’ means other behaviour—that is, behaviour—that causes a family member to be fearful. So any behaviour that causes a family member to be fearful literally really fits in with this definition.¹⁷

14 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011), Committee Report, [3.65] Submissions that opposed the definition included: Joint Parenting Association, *Submission 146, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); One in Three Campaign, *Submission 64, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Men’s Health Australia, *Submission 60, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Dads on the Air, Australia, *Submission 3, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Non-Custodial Parents Party (Equal Parenting), *Submission 1, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

15 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011), Committee Report, [3.65].

16 R Chisholm, *Family Courts Violence Review* (2009).

17 Commonwealth, *Parliamentary Debates*, Senate, 8 July 2011 (R Chisholm—witness), 3.

3.24 Chisholm’s submission to the Senate Committee’s inquiry illustrated the way in which this may be over-inclusive:

Suppose a family member tells another, correctly, that the family house is on fire, and this makes the person fearful. Or suppose a family member accidentally frightens another in the course of a practical joke. On a literal reading, such behaviour—telling the family member, carrying out the joke—could be seen as falling within the definition of ‘family violence’, because it is behaviour that causes the person to be fearful, and on a literal reading this would be enough to bring it within the definition of family violence.¹⁸

3.25 Chisholm noted that the definition is obviously not intended to include such behaviour, and that courts may interpret it in such a way as to give it a ‘sensible operation’.¹⁹ However, he considered that the drafting of proposed s 4AB(1) could be improved to ‘preserve its substance, but to eliminate the problem of over-inclusion’.²⁰ He suggested several possible improvements, including the following core definition:

For the purposes of this Act, family violence means behaviour by a person towards a member of the person’s family that is violent, threatening, coercive or controlling, or is intended to cause the family member to be fearful.²¹

3.26 This suggested reformulation appears to sharpen the definition recommended by the Commissions and contained in the Family Violence Bill—addressing its unintended over-inclusiveness. Professor Chisholm’s suggestion was also supported by the Family Law Council²² and by Professor Rosalind Croucher and Ms Sara Peel in giving evidence on behalf of the ALRC.²³ The re-focusing of the definition in the way proposed by Professor Chisholm advances the thinking expressed in this Inquiry and in the Commissions’ earlier work. It also meets some of the criticisms of stakeholders.²⁴

Illustrations of behaviour

3.27 In its submission to the Senate Committee, the ALRC drew attention to the ways in which the definition in the Bill deviated from that proposed in *Family Violence—A National Legal Response*, including as outlined below.²⁵

3.28 ***Economic abuse***: The ALRC submitted that economic abuse should be expressly recognised as a type of behaviour that may fall within the definition of family violence.²⁶ The definition may then be supplemented by a further definition of

18 R Chisholm, *Submission 203, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011), 4.

19 *Ibid.*, 5. See also Commonwealth, *Parliamentary Debates*, Senate, 8 July 2011 (R Chisholm—witness), 3.

20 *Ibid.*, 5.

21 *Ibid.*, 5.

22 Family Law Council, *Answers to Questions on Notice 11, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (2011).

23 Commonwealth, *Parliamentary Debates*, Senate, 8 July 2011 (R Croucher and S Peel).

24 For example, that the definition is ‘open ended’ with respect to ‘any other form of behaviour’: AFEL, *Submission CFV 158*.

25 Australian Law Reform Commission, *Submission 69, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

26 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.181].

‘economic abuse’, with non-exhaustive illustrative examples of such abuse.²⁷ Examples may include: coercing a partner to relinquish control over assets; coercing a person to claim social security payments; preventing a person from seeking or keeping employment; and the practice of ‘humberging’ in Indigenous communities—that is, demanding money from relatives, often by the use of standover tactics.²⁸

3.29 ***Emotional or psychological abuse***: In *Family Violence—A National Legal Response*, the conduct listed in the proposed s 4AB(2)(d), that is, ‘repeated derogatory taunts’, was characterised more broadly as ‘emotional or psychological abuse’. The ALRC considers that this broader definition is preferable. As discussed above, concerns that specifying emotional or psychological abuse as a type of family violence may lead to misuse are addressed by placing this conduct in the context of behaviour that is violent, threatening, coercive, controlling or causing fear—the core definition.²⁹

3.30 The Commissions recommended (in the context of a discussion on the definition of family violence in family violence legislation) that legislation should include examples of emotional and psychological abuse that illustrate conduct that would affect—although not exclusively—certain vulnerable groups, including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with disability; and those from the gay, lesbian, bisexual, trans and intersex communities.³⁰ As noted above, the Commissions also recommended that the same definition of family violence be adopted in the *Family Law Act*. Accordingly, other examples of emotional or psychological abuse should be included in the definition as illustrations of behaviour that affect particular groups, for example:

- threatening to institutionalise a person;
- withdrawing care on which the person is dependent;
- withholding medication or preventing the person from accessing necessary treatment or aids and equipment used in the person’s daily life;
- threatening to disclose a person’s sexual orientation against the person’s wishes; and
- racial taunts; and
- preventing a person from making or keeping connections with the person’s family, friends or culture, including spiritual ceremonies or practices.³¹

3.31 In its submission to the Senate Committee, the ALRC noted that the Family Violence Bill includes, as proposed s 4AB(2)(i), ‘preventing the family member from keeping connections with his or her family, friends or culture’ as an example of family

27 As for example in the *Family Violence Protection Act 2008* (Vic) s 6.

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), [5.183].

29 Ibid, [5.185].

30 Ibid, Rec 5–2.

31 Ibid, [5.188].

violence. The ALRC supported the inclusion of this behaviour in the definition of family violence—whether listed as an example of emotional or psychological abuse, as in the Victorian family violence legislation³² and recommended by the Commissions, or as a stand-alone example of family violence.

3.32 A further example contained in the Family Law Amendment (Family Violence) Bill 2010—Exposure Draft (the Exposure Draft Bill), was threats of suicide or self-harm with intent to torment or intimidate. While the ALRC did not consider that this example should be framed as a stand-alone example of family violence, it may usefully illustrate emotional or psychological abuse within the definition of family violence.³³

3.33 **Property damage and harm to animals:** The ALRC strongly supports the position taken in the Family Violence Bill of distinguishing harm to animals from damage to property, particularly in light of research that indicates the particular impacts on victims’ behaviours arising from fear of an animal being harmed.³⁴ However, the ALRC submitted that the reference to property damage or destruction in the Family Violence Bill in proposed s 4AB(2)(e) should make it clear that this is relevant, irrespective of who owns the property. As stated in *Family Violence—A National Legal Response*, if a person violently smashes a chair against a wall in the presence of a spouse or child, and that conduct causes fear, it is irrelevant that the person who smashed the chair owns the chair.³⁵ Similarly, this qualification should be made to the reference to ‘causing death or injury to an animal’—that is, it should apply irrespective of whether the victim owns the animal.³⁶

3.34 **Exposure of children to violence:** The Commissions recommended that behaviour of the person using violence that causes a child to be exposed to the effects of family violence should be included in the definition of family violence. In making this recommendation, the Commissions referred to the ‘considerable amount of research documenting the fact that exposure of children to family violence causes long-term emotional, psychological, physical and behavioural issues’.³⁷ The definition of family violence should also clarify that a child is exposed to the effects of family

32 *Family Violence Protection Act 2008* (Vic) ss 5, 7.

33 The Commissions heard of particular examples of threats of suicide having occurred in Indigenous family relationships, in the context of exercising coercion and control over a family member.

34 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.200].

35 *Ibid.*, [5.198].

36 *Ibid.*, [5.200].

37 *Ibid.*, [5.209]. See Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.204]–[5.212] for further reasons for the inclusion of this category in the definition of family violence. The ALRC noted that the Family Violence Bill included exposure to violence in the definition of ‘abuse’ in relation to a child in s 4(1), but urged that the legislation include such exposure in the definition of family violence. Clearly, certain behaviour can constitute both family violence and child abuse: Australian Law Reform Commission, *Submission 69, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

violence by the behaviour of the person using family violence, and not due to the failure of the victim parent to protect that child from such exposure.³⁸

The Senate Committee's response

3.35 The Senate Committee's majority report stated that the proposed definition of family violence 'provides a more descriptive and subjective, but not exclusive, test, which requires decision makers to consider the personal experiences of family members'.³⁹ It commended the Australian Government 'for giving greater recognition to the breadth of behaviours which constitute family violence'.⁴⁰

3.36 In their additional comments, the Coalition Senators stated that, while they endorsed the objective of giving greater recognition to the breadth of behaviours that may constitute family violence, they held concerns that the definition cast the net too wide.⁴¹ Referring to Professor Chisholm's evidence, the Coalition Senators considered that the proposed s 4AB(1) was 'over-inclusive', insofar as it captured 'any behaviour which causes a family member to be fearful', and made 'no allowance for the intent of the party giving rise to a "fear"'.⁴² The Coalition Senators endorsed Professor Chisholm's alternative provision, and recommended that the Bill be amended accordingly.⁴³

A common definition in other Commonwealth laws

First step to a common interpretative framework

3.37 The Discussion Paper traversed the particular Commonwealth legislative areas under review, identifying where definitions of family violence are, or are not, included in Commonwealth laws, and proposing where such definitions might best be placed.

3.38 The ALRC considers that the same approach should be adopted in relation to Commonwealth laws in relation to this Inquiry, and 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 effectiveness underlying the approach to reform advocated in the Report.

3.39 The ALRC recommends that, in the various areas under review, a common definition should be adopted. As outlined above, a common interpretative framework is based first on a consistent core definition of family violence. In the light of the comments considered by the Senate Committee in relation to the Family Violence Bill, the ALRC recommends that the core definition should provide that family violence

38 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.205]–[5.206].

39 *Ibid.*, [3.168].

40 *Ibid.*, [3.168].

41 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011), Additional comments by Coalition Senators, [1.12].

42 *Ibid.*, Additional comments by Coalition Senators, [1.13].

43 *Ibid.*, Additional comments by Coalition Senators, [1.14].

means behaviour by a person towards a member of the person's family that is violent, threatening, coercive or controlling, or is intended to cause the family member to be fearful.⁴⁴

3.40 The ALRC also considers that it is appropriate to include a non-exhaustive list of behaviours that may fall within the core definition. This second component of the definition should set out a range of behaviours that may amount to family violence. Particular kinds of behaviour may present themselves as examples—depending upon the legislative scheme under consideration. The illustrative list of behaviours contained in the second part of the definition was recommended as a non-exhaustive one and that it should be tailored to fit the context. This ensures that definitions are suitable for individual legislative schemes, while maintaining consistency across Commonwealth laws.

3.41 Given that the Australian Government is moving towards implementation of an amended definition of family violence in the *Family Law Act*, as discussed above, the ALRC recognises that this may form the basis of the definitions across the areas of Commonwealth law under review in this Inquiry. The ALRC considers that consistency is the key goal, but commends consideration of the comments put to the Senate Committee with respect to the final form of the amended definition in the *Family Law Act*.

Benefits of a common approach

3.42 The ALRC confirms its views expressed in *Family Violence—A National Legal Response* that systemic benefits would flow from the adoption of a common definition across different legislative schemes. Many stakeholders in this Inquiry have strongly supported a common definition of family violence.⁴⁵ For example, DEEWR supported a 'consistent and comprehensive definition' of family violence and indicated it would consider amendment of 'relevant guidelines and material to reflect any changes'.⁴⁶ The Australian Association of Social Workers (AASW) (Qld) and the Welfare Rights Centre (WRC) (Qld) supported

the articulation of a clear uniform definition of family violence that encompasses the continuum of violent behaviours that can manifest themselves within domestically violent relationships.⁴⁷

3.43 Stakeholders identified a number of benefits from a consistent approach to the definition of family violence. FaHCSIA commented that it would support actions raised in the *National Plan to Reduce Violence Against Women and their Children* and

44 This is the formulation proposed by Chisholm during the Senate Inquiry into the Family Violence Bill, discussed above.

45 Submissions to the Issues Papers are cited more fully in the Discussion Paper: Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011). Particular submissions are referred to below. Some submissions gave general 'I agree' responses to the questions in relation to the common interpretative framework, eg: NSW Women's Refuge Movement, *Submission CFV 120*; ADFVC, *Submission CFV 102*; WEAVE, *Submission CFV 84*.

46 DEEWR, *Submission CFV 130*.

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

the *National Framework for Protecting Australia's Children*. It would also assist 'with gaining a shared understanding across the community of what constitutes family violence, who is affected and who is eligible to seek access to service and support as a consequence'.⁴⁸

3.44 Other benefits of a common approach identified by stakeholders included:

- fostering a common understanding that could then lead to appropriate training and consistent responses;⁴⁹
- the alignment of policies;⁵⁰
- a reduction in the repetition of a person's story and having to obtain different kinds of evidence;⁵¹ and
- enhancement of safety.⁵²

3.45 The ALRC considers that a common definition should have the following additional benefits:

- increase certainty for victims that family violence will be recognised and treated consistently across legal and administrative frameworks;
- improve the ease and effectiveness of decision making and interpretation of laws and policies for agencies, departments, and courts; and
- facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.

3.46 FaHSCIA submitted that 'without more definitive policy and practice guidance', there is the potential 'for inconsistent assessment of legal entitlements'. However, backed up by such guidance—and ongoing 'monitoring and maintenance'—it would 'ensure consistency into the future'.⁵³ The ALRC agrees that legislative definitions should be complemented by replication and guidance in policy guidelines—and makes recommendations to this effect in Chapters 5, 11 and 14. This is also discussed further below.

48 FaHSCIA, *Submission CFV 162*. However, FaHSCIA also listed a number of concerns about the adoption of a consistent definition across the relevant frameworks, for example that 'the proposed definition would need to be used in its entirety by all Commonwealth legislation'.

49 National Legal Aid, *Submission CFV 164*; FaHSCIA, *Submission CFV 162*; DHS, *Submission CFV 155*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*; DIAC, *Submission CFV 121*; White Ribbon, *Submission CFV 112*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*.

50 Commonwealth Ombudsman, *Submission CFV 54*.

51 DHS, *Submission CFV 155*; Commonwealth Ombudsman, *Submission CFV 54*.

52 Gippsland Community Legal Service, *Submission CFV 114*.

53 FaHSCIA, *Submission CFV 162*.

Resistance to the proposed definition

3.47 Some stakeholders regarded the ALRC's proposed definition as too broad. A number who had made submissions to the Commissions' earlier inquiry repeated their opposition to the proposed definition both to the Senate Committee inquiry into the Family Violence Bill and to this Inquiry.⁵⁴ The Non-Custodial Parents Party (Equal Parenting) opposed the inclusion of the definition in the child support context, arguing that it amounted to an 'unreasonable broadening of the definition of family violence', and that 'unfounded allegations of family violence' should not be 'an acceptance criterion to establish a relationship between child support and family violence'.⁵⁵

3.48 Family Voice Australia drew attention to Professor Chisholm's comments to the Senate Committee consideration of the Family Violence Bill.⁵⁶

3.49 The Australian Federation of Employers and Industries argued that the definition was 'unacceptably broad' and for the purposes of the *Fair Work Act 2009* (Cth) it would be 'an impractical definition on which to base an entitlement for leave or any other condition of employment'.⁵⁷ Other employer groups suggested that family violence issues are better dealt with through workplace policies and education, rather than changes to the *Fair Work Act*.⁵⁸

Illustrative examples of the types of family violence

3.50 The ALRC considers it may be useful for the definition to list examples of the types, or higher order examples, of family violence that are specified in the second part of the definition. DHS has commented that the

meaning and limits of the terms of the definition of family violence must be made very clear, to ensure that they are useful and do not lead to further confusion or conflict. It may be useful to provide examples of some of the forms of family and domestic violence within the definition so that these can be recognised.⁵⁹

3.51 In *Family Violence—A National Legal Response*, the Commissions considered that the higher level examples of family violence contained in the definition of family violence should ideally be illustrated by non-exhaustive lists of examples—in particular, in relation to emotional/psychological or economic abuse. Including such illustrative examples in the Commonwealth legislative schemes under review should help to educate service officers, lawyers, judicial officers, and those engaging with the various schemes. It may also assist in achieving more consistent responses to family

54 For example, Lone Fathers Association Australia, *Submission CFV 109*; FamilyVoice Australia, *Submission CFV 86*; Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*.

55 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*. See also Lone Fathers Association Australia, *Submission CFV 109*.

56 FamilyVoice Australia, *Submission CFV 86*. As noted above, the ALRC agrees that Chisholm's suggested reformulation improves upon the definition recommended by the Commissions and addresses its unintended over-inclusiveness.

57 AFEI, *Submission CFV 158*.

58 Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*.

59 DHS, *Submission CFV 155*.

violence from departments and the legal system. The family violence legislation of Victoria and South Australia may be instructive in this regard.⁶⁰

3.52 Alternatively, relevant policy guides—in particular, the *Guide to Social Security*, the *Child Support Guide*, and the *Family Assistance Guide*—may illustrate the categories of family violence specified in the legislation with lists of examples. As discussed in Chapters 5, 11 and 14, the ALRC recommends that legislative definitions of family violence should be replicated and reflected in relevant policy guides. Further, whatever list of behaviours is adopted in particular legislation may be amplified in an illustrative way in the relevant policy guide. Policy guides therefore provide appropriate platforms for complementary material regarding the legislative definition.

3.53 The ALRC considers that the illustrative categories of family violence in the definition should be tailored to each legal framework to reflect the presentations of family violence, and the particular risks victims may face, in that context. Some stakeholders suggested including additional, amended, or expanded, examples of behaviour that may constitute family violence.

3.54 The AASW (Qld) and WRC (Qld), for example, suggested that other examples could be given in the illustrative list, including socially isolating a person denying cultural and/or religious autonomy, as well as threats to commit any of the above or threats to commission others to do so.⁶¹ National Legal Aid also suggested that threats to carry out the behaviours listed should be included as well as a threat ‘to commit suicide or self harm’.⁶² A specific example was given concerning animals:

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.⁶³

3.55 With respect to Indigenous peoples, the Aboriginal and Torres Strait Islander Women’s Legal Services NQ Inc submitted that the definition ‘fails to acknowledge the extent to which a person’s cultural, spiritual and family life form part of the person’s sense of self-worth’. It suggested that emotional and psychological abuse are ‘too general and generally an inaccurate description for specific types of abuse such as’:

- Cultural abuse;
- Deliberately isolating a person from their family, their community or social life, their cultural life or their religious or spiritual beliefs;
- Demeaning a person with reference to their culture, or spiritual beliefs.⁶⁴

60 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 9; *Family Violence Protection Act 2008* (Vic) ss 5–7.

61 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

62 National Legal Aid, *Submission CFV 164*.

63 *Ibid.*

64 Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

3.56 In the migration context, the ‘threat of removal’ from Australia was considered by many stakeholders as a form of family violence used 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.⁶⁵ Many stakeholders supported amendments to the *Procedures Advice Manual 3* to provide illustrative examples. For example, the ANU Migration Law Program 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.⁶⁶

3.57 Other examples of matters suggested to be considered were:

- expanding the paragraph referring to causing a child to be exposed to family violence—paragraph (i) in the Commissions’ definition—to refer specifically to the ‘short-term effects’ of the listed behaviours;⁶⁷
- as an example of child abuse, the ‘denial of access by the child to one of his/her parents’;⁶⁸
- ‘legal abuse through the [Federal Magistrates Court], and the threat of future financial devastation via legal abuse’;⁶⁹
- that any definition of family violence ‘needs to reflect the differing experiences of victims taking into account their specific circumstances of age, abilities, race, culture, lifestyles and gender’;⁷⁰
- socially isolating a person, denying cultural and/or religious autonomy;⁷¹
- the ‘increasingly common incidence of violence by teenage children (usually sons) against mothers’;⁷²
- threats of violence—‘victims of violence report that perpetrators can maintain control with threats of even a “look” if past acts have shown what a perpetrator is capable of’.⁷³

65 ANU College of Law, *Submission CFV 79*; AASW (Qld), *Submission CFV 38*; ADFVC, *Submission CFV 26*.

66 ANU Migration Law Program, *Submission CFV 79*.

67 Women’s Information and Referral Exchange, *Submission CFV 93*.

68 Lone Fathers Association Australia, *Submission CFV 109*.

69 Confidential, *Submission CFV 83*.

70 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

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

72 CPSU, *Submission CFV 147*.

73 Confidential, *Submission CFV 165*.

3.58 DHS commented on the inclusion of ‘economic abuse’ in the list of behaviours that may amount to family violence. It stated that, in particular areas such as child support, this term ‘raises especially sensitive issues ... because the Child Support program facilitates and enforces transfers of money from one to the other’.⁷⁴

3.59 The Multicultural Disability Advocacy Association stated that the definition should capture the fact that forms of violence can be culturally specific and not apparent to others and recommended that specific examples of family violence experienced by different sectors of society be included within the definition.⁷⁵

3.60 The National Welfare Rights Network (NWRN) considered that the examples of behaviour should be informed by direct consultation with people who have experienced family violence who identify as being from those groups.⁷⁶

Nature, features and dynamics of family violence

3.61 The ALRC also recommends in Chapters 5, 11 and 14 that relevant policy guides should contain a statement regarding the nature, features and dynamics of family violence—in particular, the *Guide to Social Security*, the *Child Support Guide* and the *Family Assistance Guide*.

3.62 Including a statement of the nature, features and dynamics has a number of benefits. In brief, such a statement serves an important educative function for staff, and provides a contextual basis for training and the identification of family violence concerns (through screening or other measures). However, the ALRC does not consider that such a provision is necessary in the Commonwealth legislation under review, as prevention of family violence is not the primary purpose of such legislation.

3.63 The ALRC considers that the formulation of the nature, features and dynamics recommended for state and territory family violence legislation in the *Family Violence—A National Legal Response* provides an instructive model for relevant Australian Government departments. However, the departments should modify the formulation to best reflect the exigencies of the framework in which they operate. Some stakeholders have suggested modification or additions to the formulation.⁷⁷ For example, WEAVE submitted that the formulation should also address ‘the impact of family violence on children and young people’.⁷⁸ This may be particularly relevant in the social security and child support contexts—for example, to complement legislative provisions and policy regarding youth allowance and the child support eligibility of informal carers of children who have experienced family violence.⁷⁹

74 DHS, *Submission CFV 155*.

75 Multicultural Disability Advocacy Association, *Submission CFV 60*.

76 National Welfare Rights Network, *Submission CFV 150*.

77 See, eg, Women’s Health Victoria, *Submission CFV 133*; WEAVE, *Submission CFV 14*.

78 WEAVE, *Submission CFV 85*.

79 See Chs 6 and 12.

3.64 The Lone Father’s Association objected to the component of the formulation stating that ‘family violence is predominantly committed by men’, arguing that this ‘amounts to illegal gender profiling of males’.⁸⁰ While the ALRC considers it important that definitions of family violence, both in legislation and policy guides, are gender-neutral,⁸¹ it is appropriate for policy guides to state that, while anyone may be a victim of family violence, or use family violence, it is predominantly committed by men.

3.65 *Time for Action* reported that ‘overwhelmingly sexual assault and domestic and family violence is perpetrated by men against women’, although it acknowledged that men can also be victims of family violence.⁸² In *Family Violence—A National Legal Response*, the Commissions considered that, ‘where state and territory governments accept statistics indicating that family violence is predominantly used by men against women, this should be reflected in the principles of family violence legislation’. In the ALRC’s view, this principle is also applicable to the Australian Government and the relevant policy guides published by its departments.

Location of common definition

3.66 The ALRC considers that the key outcome is to achieve consistency of understanding across the Commonwealth legal frameworks under review. In some instances this will be achieved by including a common definition in the primary legislation itself; in others, the appropriate place may be elsewhere, such as in policy guides for decision makers. The next section examines each of the areas under review and considers where best to place the definition.

Social security

3.67 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) contain 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).⁸³

3.68 The *Guide to Social Security Law* provides that ‘domestic and family violence’ in relation to Crisis Payment includes: child abuse; maltreatment; exploitation; verbal abuse; partner abuse; elder abuse; neglect; sexual assault; emotional abuse; economic

80 Lone Fathers Association Australia, *Submission CFV 109*.

81 This is consistent with the aim of this Report—to improve the safety of all victims of violence, whether male or female.

82 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), 29.

83 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.D.235] (Domestic and/or Family Violence (CrP)).

abuse; assault; financial coercion; domestic violence; psychological abuse, or social abuse.⁸⁴

3.69 ‘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).

3.70 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’.⁸⁵

3.71 The National Welfare Rights Network (NWRN) commented on the narrowness of s 23(14) and stated that the discretion in (c) is ‘exercised in a very circumspect manner’. NWRN argued that the discretion was ‘not the most appropriate mechanism for extending the definition of “family member”’.⁸⁶ NWRN suggested including a detailed definition of family member—independent of the definition of ‘member of a couple’ in s 4.

3.72 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,⁸⁷ except in relation to Crisis Payment. The recommendations made in Chapter 9 would delete this latter reference.⁸⁸ However, ‘family member’ is also used in the recommended definition of family violence and therefore it is important to understand how this definition will be interpreted in the social security context. In particular, for Indigenous communities, where the meaning of ‘family member’ has an immutable connection to custom and practice through Aboriginal law, or revitalised customs and practice through a reconnection to ‘country’ and family membership.

3.73 DEEWR raised concerns about the potential narrowing of the definition of family violence. In this regard, DEEWR noted that the existing definition of domestic violence in the *Guide to Social Security Law* can include violence to someone who is not a family member, such as co-tenants or people in shared housing situations, while the ALRC’s recommended definition of family violence would not extend to such situations.⁸⁹ Similarly, the Commonwealth Ombudsman noted that any definition of family violence in child support, family assistance and social security legislation would

84 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).

85 Ibid, [1.1.F.60] (Family member).

86 National Welfare Rights Network, *Submission CFV 150*.

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

88 Rec 9–2.

89 DEEWR, *Submission CFV 130*.

‘need to be broad enough to include violence involving persons connected by a variety of current and former “family” relationships’, and it may be necessary to separately define ‘family’.⁹⁰

3.74 It may therefore be necessary to complement the recommended definition of family violence in the social security definition with a definition of family member in the *Social Security Act*. The ALRC considers that such a definition should capture at least the categories of relationships that *Family Violence—A National Legal Response* recommended should be covered by state and territory family violence legislation. These categories include:

- past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- family members;
- relatives;
- children of an intimate partner;
- those who fall within Indigenous concepts of family; and
- those who fall within culturally recognised family groups.⁹¹

3.75 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. While the current definition contained in the *Guide to Social Security Law* is already broad, the ALRC considers that placing the definition of family violence in the *Social Security Act* may afford a measure of stability and visibility to the definition. References to family violence in the *Social Security (Administration) Act* should cross-reference to this definition. The ALRC also considers that the particular nature, features and dynamics of family violence should be expanded on in the *Guide to Social Security Law*.

3.76 From the first responses to the Issues Paper, there was strong support among stakeholders for consistency of definitions in the areas under review, including in the area of social security.⁹² DEEWR supported in principle the amendment of the definition in the *Social Security Act*, noting that any amendments would need to be jointly considered by DEEWR and FaHCSIA, as joint administrators of social security policy and law. While DEEWR supported a consistent and comprehensive definition of family violence, it considered that it may not be practical or effective to include a definition in every Departmental document.⁹³

90 Commonwealth Ombudsman, *Submission CFV 62*.

91 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 7–6.

92 See Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Ch 3.

93 DEEWR, *Submission CFV 130*. It commented that reference to a source definition ‘may be appropriate’.

3.77 In the pre-employment context, the term domestic violence is included in publications such as the Job Seeker Classification Instrument (JSCI) Guidelines, other material utilised by Job Services Australia (JSA), Disability Employment Services (DES) and Indigenous Employment Program (IEP) providers and in relation to Job Capacity Assessments and Employment Services Assessments. However, domestic violence is not definite in these publications.

3.78 The ALRC recommends in Chapter 8 that the JSCI include a new and separate category of family violence.⁹⁴ The ALRC also recommends that JSA, DES and IEP deeds and contracts should include a requirement that providers should appropriately and adequately consider the existence of family violence when tailoring service responses to individual job seeker needs.⁹⁵

3.79 If such amendments are made, the recommended definition of family violence should be included in the JSCI Guidelines and relevant JSA, DES and IEP deeds and contracts.

Child support and family assistance

Child support

3.80 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.⁹⁶

3.81 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;
- verbal abuse;
- social abuse;
- economic abuse; and
- spiritual abuse.⁹⁷

94 Rec 8–3.

95 Rec 8–6.

96 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

97 *Ibid.*, [6.10.1].

Family assistance

3.82 The 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’.⁹⁸

Amending the primary legislation?

3.83 Provisions that affect the lives and safety of particularly vulnerable groups of society may be more appropriately placed in primary legislation.⁹⁹ The ALRC considers it desirable for the definition of family violence to be set out in the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act* as well as in the *Family Assistance Act* and the *Family Assistance (Administration) Act*. Placing the definition of family violence in the primary legislation gives the definition increased stability, visibility and authority.

3.84 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. It would also provide victims with clarity and the certainty that family violence will be recognised and treated similarly across Commonwealth laws. A joint submission by Domestic Violence Victoria and others argued that, in the child support and family assistance context, 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’.¹⁰⁰ Moreover, 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’.¹⁰¹ 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’.¹⁰²

3.85 The Council of Single Mothers and their Children (CSMC) said that it was ‘imperative’ that information and definitions of family violence are ‘clearly articulated in legislation and guides that decision makers refer to’.¹⁰³ CSMC considered that this may address a ‘lack of understanding of the impact on children of being exposed to family violence’, and a lack of ‘sympathetic response to disclosures of family violence’.¹⁰⁴

98 The *Guide to Social Security Law*, which is also hosted on the FAHCSIA website, does contain a definition of family violence. FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.D.235].

99 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.

100 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*.

101 National Legal Aid, *Submission CFV 81*.

102 Council of Single Mothers and their Children, *Submission CFV 44*. See, similarly, ADFVC, *Submission CFV 53*.

103 Council of Single Mothers and their Children, *Submission CFV 44*.

104 *Ibid.*

3.86 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.¹⁰⁵

3.87 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. However, 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. Legislative definitions also inform associated training especially in service delivery areas.

3.88 Achieving consistency is the principal aim. This can be achieved either by specific amendment to the relevant primary legislation or by amendment to one, with cross-references in the others. As noted above, amendment to the *Family Law Act* is the first step towards implementing an improved definition of family violence in Commonwealth laws. It is likely, therefore, to form the model on which the other definitions are based. The ALRC recommends that the relevant primary legislation in each case, as considered in this Report, include the definition.

3.89 The *Family Law Act* is the central piece of legislation in the ‘family law system’ and child support may be considered—to some extent—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—reference to the *Family Law Act* definition is clearly one possible direction for reform. There are practical issues that remain, however, where cross-referencing itself becomes out of date, and explanations in policy material are no longer relevant.¹⁰⁶ There is also the distinct educative role and value of placing the definition in the relevant primary legislation.

Defining family member?

3.90 The recommended definition of family violence refers to the term ‘family member’, and this is not defined in the child support and family assistance legislation. However, the ALRC considers it unnecessary for these legislative frameworks to define the terms ‘family’, ‘family member’ or ‘family relationships’. 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.

105 Law Council of Australia Family Law Section, *Submission CFV 67*.

106 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).

3.91 By contrast, and as discussed in Chapter 11, family violence in the child support framework does not, in and of itself, prompt an outcome that determines rights between parties. There is, therefore, not the same imperative to define the context in which family violence may occur. Indeed, legislatively defining family or family relationships may unnecessarily limit the application of an issues-management response to family violence that promotes customer safety.

3.92 However, where departments consider that staff would be assisted by guidance regarding the relationship context of family violence within a particular framework, departments may set out further information within policy guides. For example, DHS has stressed the need for recognition of family violence occurring in relationships other than families or couples:

‘domestic’ violence can occur between people co-habiting for other reasons, such as friends, people living in a shared house or in other non-familial domestic arrangements, or live-in caregivers.¹⁰⁷

3.93 It may be appropriate to set out such information to complement the definition in the relevant policy guide—in this case, the *Child Support Guide*.

3.94 The ALRC has taken a similar approach in relation to former relationships in the child support context. DHS submitted that the family violence concept ‘needs to include both *current* and *former* members of a family/relationship or household’.¹⁰⁸ While the Commissions recommended in *Family Violence—A National Legal Response* that this should be specified in state and territory family violence legislation,¹⁰⁹ in the child support context such guidance regarding the legislative interpretation may, where necessary, be situated in policy guides.

3.95 In the family assistance context, while family violence does not generally prompt outcomes that affect rights and entitlements there is some limited scope for it to do so. In particular, exemptions from the ‘reasonable maintenance action’ requirements enable victims of family violence to forgo child support, where necessary for their safety, without an associated reduction to their Family Tax Benefit Part A (as discussed in Chapters 11 and 13). Further, family violence may be relevant in obtaining increased rates of Child Care Benefit (as discussed in Chapter 14).

3.96 It may therefore be necessary to complement the recommended definition of family violence in the family assistance definition with a definition of family member in the legislation or the *Family Assistance Guide*. The categories of relationship recommended to be included for the purposes of state and territory family violence legislation are referred to above.

107 DHS, *Submission CFV 155*.

108 *Ibid.*

109 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 7–6.

Employment and superannuation

3.97 The ALRC considers that consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. In an employment context, such consistency can then underpin awareness raising initiatives, education, training as well as responses to family violence, including articulation of duties, rights and entitlements.

3.98 As outlined in Chapters 15–18, while in many respects the intersections between family violence and employment are increasingly being recognised, neither the *Fair Work Act 2009* (Cth) nor the *Fair Work Regulations 2009* (Cth) has specific provisions dealing with family violence or the manifestation of family violence in the workplace. As a result, there is no specific reference to, or definition of, family violence in Fair Work Australia (FWA) or Fair Work Ombudsman (FWO) material.

3.99 Similarly, given Safe Work Australia’s view that family violence is not an OHS issue, the Model Work Health and Safety Act, Regulations and Codes of Practice under the harmonised OHS regime do not refer to, or contain a definition of, family violence.

3.100 While placing the definition of family violence in primary legislation may give the definition increased stability, visibility and authority, in the context of the *Fair Work Act*, given there are limited direct legislative entitlements, it is unnecessary at this time. Rather, the ALRC considers the consistent definition of family violence should be included in FWA and FWO material and other relevant material developed by bodies such as the Office of the Australian Information Commissioner, Equal Opportunity for Women in the Workplace Agency, and the Australian Human Rights Commission.

3.101 However, in the course of the phased implementation of reforms in the employment context, outlined in Chapter 15, it may be necessary to reconsider the inclusion of a definition of family violence in the *Fair Work Act*. For example, in the course of considering whether amendments should be made to the National Employment Standards (NES), 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)).¹¹⁰

3.102 Similarly, two stakeholders suggested 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, for example, suggested that ‘domestic or family violence’ should include ‘physical, sexual, mental, verbal or emotional abuse by a member of the employee’s immediate family or a member of the employee’s household’.¹¹¹

110 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

111 ADFVC, *Submission CFV 26*.

3.103 Women’s Health Victoria added that, if family violence is included under s 65 of the *Fair Work Act*, it would recommend, ‘accompanying materials be produced for both employers and employees explaining the reason for its inclusion, legal definitions of what constitutes family violence’.¹¹²

3.104 However, the Australian Chamber of Commerce and Industry expressed the view that the consistent definition is ‘far too wide as a workable definition for the purposes of determining minimum conditions of employment’ under the *Fair Work Act*.¹¹³

3.105 In the OHS context, as outlined in Chapter 18, the ALRC considers there are some circumstances in which primary duties of care may encompass risks arising from family violence. Accordingly, the ALRC recommends that Safe Work Australia include family-violence related information in Codes of Practice and other relevant material. In the course of doing so, the ALRC recommends that the consistent definition of family violence is included.

Superannuation

3.106 There is no relevant definition of family violence in the central pieces of superannuation legislation, including the *Superannuation Act 1976* (Cth), *Superannuation Industry (Supervision) Act 1993* (Cth), or *Superannuation Industry (Supervision) Regulations 1994* (Cth). To ensure family violence may be considered in the context of spousal contributions, self-managed superannuation funds and early access to superannuation, the ALRC recommends that where appropriate, all Australian Prudential Regulation Authority, DHS, Australian Taxation Office and superannuation fund material, should provide for a consistent definition of family violence as set out in Recommendation 3–1.

3.107 Northern Rivers Community Legal Centre suggested that the consistent definition should include ‘recognition that family violence also includes “coercing a partner or other family member to relinquish control over assets”’.¹¹⁴

Migration

3.108 The *Migration Regulations 1994* (Cth) defines 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

112 Women’s Health Victoria, *Submission CFV 11*.

113 ACCI, *Submission CFV 128*.

114 Northern Rivers Community Legal Centre, *Submission CFV 08*.

- (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.¹¹⁵

3.109 This definition takes a similar approach to the definition of family violence in the *Family Law Act*,¹¹⁶ in giving focus to the effect of the conduct on the victim, rather than categorising types of conduct.¹¹⁷

Judicial consideration of the term ‘violence’

3.110 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 view that violence was ‘meant to exclude instances where the damage suffered by the applicant was not wholly physical’.¹¹⁸ However, later authorities have reinforced an understanding of ‘violence’ to cover emotional violence, economic abuse and psychological abuse.¹¹⁹

‘Relevant family violence’

3.111 If the ALRC’s definition of family violence is adopted, this would result in the removal of the term ‘relevant’ from the current definition in the *Migration Regulations*. Stakeholders argued that including the term ‘relevant’ was confusing, unnecessary and risks not encompassing all forms of violence.¹²⁰ For example, the AASW (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.¹²¹

3.112 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.¹²²

115 *Migration Regulations 1994* (Cth) reg 1.21(1).

116 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.

117 *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.

118 See *Malik v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 291; *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279; and *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251. In, *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183 the Full Federal Court commented that the term ‘violence’ was restricted to physical violence, and that things like belittling, lowering self esteem, ‘emotional violence’ or ‘psychological violence’ broadened the scope of the *Migration Regulations* beyond their words.

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

120 Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*; Good Shepherd Australia New Zealand, *Submission CFV 41*; IARC, *Submission CFV 32*; WEAVE, *Submission CFV 31*.

121 AASW (Qld), *Submission CFV 38*.

122 RAILS, *Submission CFV 34*.

3.113 There has also been judicial concern about the impact of the term ‘relevant’ in the *Migration Regulations*. In *Al-Momani v Minister for Immigration and Citizenship*, The court considered ‘relevant family violence’ to be a subset of ‘violence’, such that a person who is found to have suffered ‘family violence’ may not have suffered ‘relevant family violence’ for the purposes of the *Migration Regulations*.¹²³ The court remarked that:

The issues represent a potential legal minefield. The minefield could be avoided if the definition of ‘relevant family violence’ were to be replaced with the proposed definition of ‘family violence’ in the *Family Law Act* if that definition is enacted. That definition has the advantage that it focuses specifically on coercive and controlling violence which carries with it the concept of an abuse of power, while maintaining the concept of induced fear.¹²⁴

3.114 In the ALRC’s view, all forms of family violence should be considered by a visa 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.

‘Reasonableness’

3.115 The adoption of the ALRC’s definition would also see the removal of the requirement that a victim ‘reasonably’ fears for his or her safety. Some stakeholders 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.¹²⁵ 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.¹²⁶

3.116 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’.¹²⁷

3.117 The Department of Immigration and Citizenship (DIAC), however, suggested there was utility in a ‘well founded’ or ‘reasonableness’ requirement, as this gives a decision maker an opportunity to test the applicant’s claims. DIAC was concerned that,

123 *Al-Momani v Minister for Immigration and Citizenship* [2011] FMCA 453, [37]–[39].

124 *Ibid*, [39].

125 See eg, Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*; Law Institute of Victoria, *Submission CFV 157*; Law Institute of Victoria, *Submission CFV 74*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

126 Law Institute of Victoria, *Submission CFV 74*.

127 National Legal Aid, *Submission CFV 75*.

as the reactions and feelings of an individual are subjective, there is a risk that a definition without the scope to test the reasonableness of those feelings may be open to behaviours which would not usually be accepted as family violence.¹²⁸

3.118 DIAC considered that a ‘reasonableness’ test would be consistent with the way it assesses Protection visa requirements, on which there is a significant body of case law.¹²⁹

3.119 The ALRC accepts that, in the migration context, there is utility in a definition of family violence that provides a threshold to test an applicant’s claims. However, the requirement in the ALRC’s definition that the conduct be ‘violent’ or ‘threatening’, or behaviour that ‘coerces or controls’ a family member, provides a lens in which to consider the conduct in question. As Professor Richard Chisholm argued:

To add a requirement of reasonable fear would mean that the person alleging violence would have to lead additional evidence of a highly personal nature, and this is not necessary if there is evidence of behaviour that is violent, or threatening, or coercive or controlling. The need for such evidence, and concerns about what the court might or might not consider reasonable, would be a disincentive to some people who have been subjected to such behaviour to disclose it to the court.¹³⁰

Violence perpetrated by someone other than sponsor

3.120 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. A number of stakeholders called for amendments to the *Migration Regulations* to reflect that family violence may be committed by someone other than the sponsor.¹³¹

3.121 For example, Domestic Violence Victoria and others 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.¹³²

3.122 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’.¹³³

128 DIAC, *Submission CFV 121*.

129 Ibid.

130 R Chisholm, *Submission 203, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

131 See eg, ANU Migration Law Program, *Submission CFV 159*; Townsville Community Legal Service, *Submission CFV 151*; IARC, *Submission CFV 149*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

132 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

133 ANU Migration Law Program, *Submission CFV 79*.

3.123 The ALRC considers that whether or not the definition of family violence should apply to circumstances where violence is committed by someone other than the sponsor is an issue to be considered in the implementation of the definition. The current requirement that the family violence must have been committed by the sponsor appears to reflect the policy that the visa holder should not have to remain in a violent relationship with the sponsor or primary visa applicant in order to preserve his or her eligibility for permanent residence. Extending the applicability of family violence to cases where the violence is committed by someone other than the sponsor may have effects on the integrity of the visa system.

3.124 However, the ALRC considers that illustrative examples of conduct that may constitute family violence can be provided for in relevant guides. For example, a number of stakeholders supported the ALRC's proposal to provide in *Procedures Advice Manual 3* (PAM) that, where family violence has been perpetrated by a family member of the sponsor, at the instigation or coercion of the sponsor, the violence can be attributed to the sponsor by recognising the instigation or coercion as a form of coercive and controlling conduct.¹³⁴

Recommendation 3–1 The Australian Government should amend the following legislation to include a consistent definition of family violence:

- (a) *Social Security Act 1991* (Cth);
- (b) *Social Security (Administration Act) 1999* (Cth);
- (c) *Child Support (Assessment) Act 1989* (Cth);
- (d) *Child Support (Registration and Collection) Act 1988* (Cth);
- (e) *A New Tax System (Family Assistance) Act 1999* (Cth);
- (f) *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth);
and
- (g) *Migration Regulations 1994* (Cth).

Recommendation 3–2 For the purposes of Recommendation 3–1, 'family violence' should be defined by reference to:

- (a) a core definition of conduct that is violent, threatening, coercive or controlling, or intended to cause the family member to be fearful; and
- (b) a non-exhaustive list of examples of physical and non-physical conduct.

¹³⁴ See eg, Law Institute of Victoria, *Submission CFV 157*; Migration Institute of Australia, *Submission CFV 148*; IARC, *Submission CFV 149*; Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*; DIAC, *Submission CFV 121*. As noted above, other relevant conduct, such as the 'threat of deportation' or threat to remove a person from a visa permanent visa application could also be considered.

Recommendation 3-3 The following guidelines and material should provide for a consistent definition of family violence as proposed in Recommendation 3-2:

- (a) Department of Education, Employment and Workplace Relations and Job Services Australia Guidelines, Advices and Job Aids;
- (b) Fair Work Australia material;
- (c) Fair Work Ombudsman material;
- (d) Safe Work Australia Codes of Practice and other material; and
- (e) other similar material.

Recommendation 3-4 Where relevant and appropriate, all Australian Prudential Regulation Authority, Department of Human Services, Australian Taxation Office and superannuation fund material, should provide for a consistent definition of family violence as set out in Recommendation 3-2.

