

11. Child Support Frameworks

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Summary

11.1 This chapter provides an overview of the child support frameworks relevant to this Inquiry: the legal framework and the agencies that administer it, and the policy framework—including the objectives that underpin the child support scheme. The chapter then outlines the relevance of family violence in the child support system, and recommends reforms regarding the interpretative frameworks contained in child support policy—in particular, about including a definition of family violence and a statement of its nature, features and dynamics in the child support policy guide.

Child support

The child support scheme

11.2 The child support scheme was established in 1988 to enforce children’s rights to be supported by both their parents.¹ Before this, parents could obtain child support only through agreements or court orders. The legislative basis of the scheme is the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth).

11.3 The Department of Human Services (DHS) administers child support legislation through its Child Support Program, which was fully integrated into DHS on 31 October 2011.² In its interface with customers and the public, DHS uses the terminology ‘the Child Support Agency’ (CSA) to refer to the Child Support Program, and for accessibility, the ALRC also adopts this terminology.³ The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) develops, implements and monitors child support policy.⁴

11.4 Both parents of a child may apply for child support and, in certain circumstances, non-parent carers may also be eligible for child support.⁵ The CSA uses a legislative formula to assess how much child support a parent should pay. The assessment takes into account both parents’ income, the care arrangements, and the number of dependent children, including children from other relationships.⁶ Payees may choose to collect child support privately, or for the CSA to collect and transfer child support payments on their behalf.⁷

Legislative interactions

11.5 The child support scheme interacts with the family law and family assistance systems. By way of summary, in relation to the interaction with family law, parenting arrangements are the basis of a person’s child support eligibility or liability, and also affect the amount of the child support assessment. In this way, child support law governs the child support consequences of decisions made in the family law context. It is the family law system—not the child support system—which is set up to address family violence issues in the resolution of disputes between parents about parenting arrangements.⁸

1 Commonwealth, *Parliamentary Debates*, Senate, 17 February 1988, 165 (P Walsh—Minister for Finance).

2 DHS, *Correspondence* 14 November 2011. See, eg, DHS (Human Services Budget 2010–11: Portfolio Budget Statements—Portfolio Overview) <www.humanservices.gov.au> at 21 November 2011.

3 See, eg, Child Support Agency website <www.csa.gov.au> at 7 March 2011 (including forms available on this website); 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.

4 FaHCSIA, *Overview* <www.fahcsia.gov.au> at 21 July 2011.

5 The child support eligibility of non-parent carers is discussed in Ch 12.

6 *Child Support (Assessment) Act 1989* (Cth) pt 5.

7 *Child Support (Registration and Collection) Act 1988* (Cth) s 24A.

8 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).

11.6 The child support scheme also interacts with the primary family assistance payment, Family Tax Benefit (FTB) Part A,⁹ at two major points. The first is the ‘reasonable maintenance action’ requirement in family assistance legislation, which obliges eligible parents to apply for, and collect—or elect for the CSA to collect—child support. The second is an alignment in the legislative schemes regarding the ‘percentage of care’—a component of both child support and family assistance calculations. The reasonable maintenance action test and the percentage of care are described below.

Alternatives to child support assessments

11.7 Child support agreements registered with the CSA are an alternative to child support assessments by the CSA. As with an assessment, payees may choose to collect child support privately or through the CSA. Another alternative to a child support assessment, where payees receive not more than the base rate of FTB Part A, is ‘self-administration’ of child support.¹⁰ This refers to a private arrangement between parents that does not involve the CSA.

11.8 In *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) (Discussion Paper), the ALRC examined child support agreements and self-administration of child support in some detail.¹¹ In summary, the ALRC is of the view that legislative safeguards applicable to child support agreements appear adequate to protect family violence victims against financial exploitation.¹² However, self-administration of child support is likely to be unsuitable in many cases where family violence is present. Family violence victims may collect less child support than they are entitled to, or no child support at all, due to fear, pressure or coercion. Private arrangements may also provide a platform for continuing control or abuse.¹³

Scope of the Inquiry

Terms of Reference

11.9 The scope of this Inquiry is limited by the Terms of Reference, which direct the ALRC to consider improvements to legal frameworks to protect the safety of victims of family violence.¹⁴ Chapter 12 considers how the safety of victims of family violence may be improved by reforms in the area of child support.

11.10 Consequently, the ALRC will not examine a range of issues which—while they may affect victims of family violence—have relevance to a range of CSA customers and the operation of the child support scheme. Reforms to address these issues would be systemic, and wider than the Terms of Reference. Alternatively, recommending

9 Family Assistance Office website <www.familyassist.gov.au> at 16 February 2011. FTB Part A is described in Ch 14.

10 Child Support Agency, *Facts and Figures 08–09* (2009), [1.6].

11 Discussion Paper Ch 10.

12 *Child Support (Assessment) Act 1989* (Cth) ss 80C(2), 80E(2)(b) provides such safeguards.

13 Discussion Paper Ch 10.

14 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

narrower reforms that address the effect of these issues solely on victims of family violence would introduce a two-tiered operation to aspects of the child support scheme.

11.11 The ALRC rejects as inappropriate a two-tiered system that would subject victims of family violence to substantially different practices and procedures than other CSA customers. It would compromise the integrity of the child support scheme, and may disadvantage the general CSA customer base.¹⁵

11.12 Systemic issues that are beyond the Terms of Reference are identified below. Stakeholders have also raised numerous compelling issues of a systemic nature in their submissions.¹⁶

Matters outside the Inquiry

Avoidance of child support obligations

11.13 Some payers may avoid their child support obligations by minimising the income that is factored into the child support assessment.¹⁷ Payers may also avoid child support by paying child support late or irregularly, paying less child support than the assessment, or not paying at all. These issues may be particularly prevalent where payees collect privately. Where the CSA collects child support, it has a range of coercive powers to effect payment, discussed in Chapter 12.

11.14 Avoiding child support obligations may be linked with family violence. It has been identified as ‘part of an ongoing attempt to maintain power and control’,¹⁸ and an extension of other forms of family violence.¹⁹ It may also, in itself, constitute economic abuse.

11.15 Avoiding child support obligations is also an issue that affects a broad range of payees, including those who may not be victims of family violence. The systemic reforms that would be required to address this issue are beyond this Inquiry’s Terms of Reference.²⁰ The ALRC does, however, consider reforms to protect victims of family violence who, due to fear of or coercion by the person who has used family violence, opt for private collection of child support—and are, therefore, more vulnerable to non-payment or underpayment of child support.²¹

The percentage of care

11.16 The ‘percentage of care’ is the amount of time a parent or carer provides care for a child. A person must provide at least 35% of a child’s care to be eligible for both

15 See discussion of ‘system integrity’ in Ch 2.

16 See, eg, Commonwealth Ombudsman, *Submission CFV 54*.

17 See, eg, H McKenzie and K Cook, ‘The Influence of Child Support and Welfare on Single Parent Families’ (2007) 45 *Just Policy* 13, 15.

18 R Patrick, K Cook and A Taket, ‘Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners’ (2007) 45 *Just Policy* 21, 23.

19 *Ibid*, 26.

20 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

21 See Ch 12.

child support payments and FTB.²² The percentage of care also affects the amount of child support and family assistance entitlements. This is an area where child support and family assistance laws intersect with each other, and with family law.

11.17 The ALRC has broadly identified two systemic issues in relation to the percentage of care. First, it is possible that parents may seek parenting orders or agreements under the *Family Law Act 1975* (Cth) that will affect the child support assessment under the *Child Support (Assessment) Act*, or FTB under *A New Tax System (Family Assistance) Act 1999* (Cth). Parents may wish to increase their care percentage to reduce their child support liability or, conversely, resist a reduction in their care percentage to maintain their child support entitlements.²³ Maintaining or increasing family assistance may also provide such motivation.

11.18 Manipulation of care arrangements to alter the child support assessment may affect victims of family violence, as well as a broader range of CSA and Family Assistance Office (FAO) customers. Reforms to child support and family assistance legislation to address the issue would be systemic in nature, affecting the child support formula and the rules for determining FTB. In addition, reforms to ensure family violence is suitably considered in determining parenting arrangements should be—and have been—aimed at the family law system.

11.19 The second systemic issue concerns the rules for determining the percentage of care. Both the percentage of care rules, and stakeholders' concerns about the rules, were described in more detail in the Discussion Paper.²⁴

11.20 By way of background, since amendments to child support and family assistance legislation came into effect on 1 July 2010, the FAO and the CSA determine percentages of care in the same way. Percentage of care determinations are based on the actual care that is occurring, and each agency will apply a percentage of care determined by the other agency.²⁵ Prior to 1 July 2010, the CSA generally made care percentage determinations in accordance with oral or written agreements, parenting

22 *Child Support (Assessment) Act 1989* (Cth) ss 5(3), 7B(1); *A New Tax System (Family Assistance) Act 1999* (Cth) s 25. FTB is described in Ch 14.

23 AIFS have considered whether child support is relevant to positions adopted by parents in relation to parenting arrangements under the *Family Law Act*: Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 222. The Summary Report notes, of this type of bargaining, that 'further work is needed to determine whether the prevalence has actually increased and if so to what extent': Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), 13.

24 Discussion Paper Ch 11.

25 *Child Support (Assessment) Act 1989* (Cth) ss 50(3), 54K; *A New Tax System (Family Assistance) Act 1999* (Cth) ss 35B(3), 35T. Actual care is generally based on the number of nights a person has cared for a child over a 12-month period: *Child Support (Assessment) Act 1989* (Cth) s 54A (1); *A New Tax System (Family Assistance) Act 1999* (Cth) s 35J(1); 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, [2.2.1]; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.C.100].

plans or court orders (where in place).²⁶ The FAO based the percentage of care on the child's 'living arrangements'.²⁷

11.21 The shift to percentage of care determinations based on actual care would, on the face of it, appear to benefit customers in cases where actual care does not correspond to court orders or previous agreements. Evidence regarding the pre-July 2010 child support system suggests that parents were reluctant to update court orders or agreements—particularly where they had experienced family violence—and accepted the often detrimental child support consequences of having assessments based on outdated care orders or agreements.²⁸

11.22 However, an unfortunate consequence of care percentages based on actual care is that it may financially benefit, or even encourage, parents who contravene court orders. On the other hand, the interim determination provisions in the child support and family assistance legislation, discussed below, may operate to discourage contravention of orders.²⁹

11.23 Stakeholders also raised concerns about the availability of interim determinations.³⁰ The CSA and FAO may make interim determinations about percentage of care in certain circumstances where written agreements, parenting plans and court orders are not being complied with.³¹ However, there is no legislative avenue for parties to obtain interim determinations where there are no court orders or agreements in place, even when a party disrupts an established care pattern.

11.24 Aspects of the CSA and FAO procedure for determining percentages of care, when parents dispute the care that is occurring, also appear problematic. When parents cannot resolve disputes about the care that is occurring, the agencies make a determination based on evidence provided by the parents.³² Such reliance on parents to provide evidence to establish care patterns may be burdensome and intrusive, as discussed below in relation to CSA investigations.

11.25 *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme (Child Support Guide)* provides that, when conflicting evidence cannot be reconciled, the CSA will determine the percentage of care on the balance of

26 *Child Support (Assessment) Act 1989* (Cth) s 49, amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth).

27 'Living arrangements' was not defined in the legislation. *A New Tax System (Family Assistance) Act 1999* (Cth) s 22(6D), amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth).

28 See Discussion Paper, Ch 11; Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 228–29.

29 The Commonwealth Ombudsman reported that while it had received complaints that the emphasis on actual care encourages contravention of court orders, the interim care determination provisions may discourage non-compliance: Commonwealth Ombudsman, *Submission CFV 54*.

30 Discussion Paper Ch 12. See AASW (Qld), *Submission CFV 46*; WRC Inc (Qld), *Submission CFV 43*.

31 *Child Support (Assessment) Act 1989* (Cth) s 54C; *A New Tax System (Family Assistance) Act 1999* (Cth) pt 3 div1 subdiv E.

32 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, [2.2.1]; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.1.1.30].

probabilities. In the ‘rare circumstances’ the CSA cannot reach a conclusion, it assumes that the state of affairs at the time of the assessment is continuing, and the percentage of care will not change.³³ It is unclear how the CSA makes a determination where there has not been a prior assessment. Further, the practice of reverting to previous care percentage determinations appears unsatisfactory. The *Family Assistance Guide* does not outline the applicable procedure for the FAO in these circumstances. However, given that the family assistance rules and child support rules are aligned regarding percentage of care, it is likely that FAO procedures are similar to CSA procedures in this regard.

Use of investigatory powers

11.26 Child support legislation empowers the CSA to conduct investigations; however the CSA is not required to conduct any inquiries or investigations in making administrative assessments.³⁴ The ALRC understands that, in practice, the CSA does not usually actively investigate cases. This means that parents may need to collect evidence, or investigate the other parent’s circumstances, themselves. Where parents are unable to do this, they may be financially disadvantaged.³⁵

11.27 Stakeholders have expressed concern about the lack of CSA investigations in the context of percentage of care determinations—both where levels of care are, and are not, in dispute.³⁶ They have indicated that reliance on parents to provide confirmation regarding levels of care, or evidence about levels of care, has the potential to put victims of violence and their children at risk,³⁷ and disadvantage parents who are scared to challenge the other parent’s word, unwilling to involve third parties, or ashamed to disclose their situation to friends and family.³⁸

11.28 Another context in which concerns about the lack of CSA investigations have arisen is change of assessment (or ‘departure’) determinations. A parent or carer may apply to the CSA for a change to their child support assessment in ‘special circumstances’.³⁹ The CSA or a court may change the assessment, if satisfied that one or more grounds, as specified in the legislation, exist; it is ‘just and equitable’ for the child, the payer and the payee; and it is ‘otherwise proper’.⁴⁰ The CSA may also initiate a change of assessment on limited grounds, as discussed in Chapter 12.

33 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, [2.2.1].

34 *Child Support (Assessment) Act 1989* (Cth) ss 29, 66D, 160, 161, 162A; *Child Support (Registration and Collection) Act 1988* (Cth) ss 120, 121A.

35 See H McKenzie and K Cook, ‘The Influence of Child Support and Welfare on Single Parent Families’ (2007) 45 *Just Policy* 13, 15; R Patrick, K Cook and A Taket, ‘Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners’ (2007) 45 *Just Policy* 21, 24.

36 Discussion Paper, Ch 11. See Commonwealth Ombudsman, *Submission CFV 54*; AASW (Qld), *Submission CFV 46*; National Council of Single Mothers and their Children, *Submission CFV 45*. See also National Legal Aid, *Submission CFV 81*; Council of Single Mothers and their Children, *Submission CFV 44*; Bundaberg Family Relationship Centre, *Submission CFV 04*.

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

38 Commonwealth Ombudsman, *Submission CFV 54*.

39 *Child Support (Assessment) Act 1989* (Cth) ss 98B, 98C(1), 117.

40 *Ibid* ss 98C(1), 117.

11.29 The *Child Support (Assessment) Act* provides that the CSA may, but is not required to, conduct inquiries and investigations in making change of assessment determinations.⁴¹ In practice, the ALRC understands that the CSA does not actively investigate these cases, which may disadvantage parents who may not have the capacity or resources to investigate the financial circumstances of the other parent themselves. Victims of family violence, in particular, may be ill-equipped to investigate the assets and income of persons who have used violence against them.

11.30 The degree to which CSA uses its investigatory powers is a wide-ranging issue in relation to the child support scheme, and is beyond the Terms of Reference for this Inquiry.⁴² However, the ALRC considers that a broader review of the CSA's investigatory role may be timely, particularly given the 2010 legislative changes regarding the rules for determining percentages of care.

Legal and policy framework

Objectives of the child support scheme

11.31 Associate Professor Bruce Smyth has described the policy 'backbone' of the child support scheme as being designed to ensure that:

- (a) children of separated or divorced parents receive adequate financial support;
- (b) both parents contribute to the cost of supporting their children according to their respective capacities to do so; and
- (c) government expenditure is restricted to the minimum necessary to attain these objectives. The design of the Scheme also seeks to avoid work disincentives for parents, and to be 'simple, flexible, efficient' and non-intrusive in its operation.⁴³

11.32 Some of these design aims are reflected in the child support legislation. The object provisions in the two Acts differ. The *Child Support (Assessment) Act* identifies its principal object as ensuring 'that children receive a proper level of financial support from their parents'.⁴⁴ The Act also lists particular objects non-exhaustively, including that:

- the amount of child support provided by parents is determined
 - 'according to their capacity', and
 - 'in accordance with the costs of children';
- carers are able to have the amount of child support 'readily determined without the need to resort to court proceedings'; and

41 Ibid ss 98H(1)(b), 98Q(1)(b); 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.

42 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

43 B Smyth, 'Child Support Policy in Australia—Back to Basics?' (2004) (67) *Family Matters* 42, 43.

44 *Child Support (Assessment) Act 1989* (Cth) s 4(1).

- children ‘share in changes in the standard of living of both their parents, whether or not they are living with both or either of them’.⁴⁵

11.33 The *Child Support (Registration and Collection) Act* identifies two ‘principal objects’, which are that:

- ‘children receive from their parents the financial support that the parents are liable to provide’; and
- periodic amounts of child support are paid on ‘a regular and timely basis’.⁴⁶

11.34 Both Acts state that Australia should be positioned to give effect to its international obligations.⁴⁷ The objects of the Acts do not refer to family violence. However, the *Child Support Guide* states that the ‘CSA operates in a sensitive environment and must avoid, as far as possible, actions which could contribute to family violence’.⁴⁸

11.35 In the report, *Delivering Quality Outcomes: Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program*, David Richmond noted that the philosophy of the CSA has changed, in particular over the period 2006–2009:

The Program has shifted from one focused primarily on collection and transfer of child support for the benefit of children, to a more holistic approach aimed at not only ensuring the financial support for children in separated families but to supporting separated parents to receive emotional, financial and legal assistance to enable them to meet the emotional and financial needs of their children.⁴⁹

Policy and procedural resources

11.36 The legislative framework of the child support scheme is accompanied by the CSA’s policy guide—referred to in this Report as the *Child Support Guide*.⁵⁰ The CSA’s Policy Advice section produces and edits the *Child Support Guide*.⁵¹ CSA staff are expected to follow the *Child Support Guide*;⁵² and it is accessible to the public online. Policies and guides are not legally binding, but they are a relevant consideration for decision makers and may be taken into account in reviews of CSA decisions.⁵³

45 Ibid s 4(2)

46 *Child Support (Registration and Collection) Act 1988* (Cth) s 3(1).

47 *Child Support (Assessment) Act 1989* (Cth) s 4(e); *Child Support (Registration and Collection) Act 1988* (Cth) s 3(c).

48 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].

49 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.1.6].

50 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.

51 Ibid, [The Guide Home].

52 Ibid, [The Guide Home].

53 See *Re Confidential and Social Security Appeals Tribunal* (2010) 118 ALD 620, [6]–[7].

11.37 The *Child Support Guide* is complemented by Procedural Instructions—step-by-step guides for CSA staff.⁵⁴ Procedural Instructions are internal, electronically controlled, and subject to ongoing updates.⁵⁵

Interactions with family assistance

11.38 Child support cannot be discussed in isolation from family assistance.⁵⁶ As the Ministerial Taskforce on Child Support (Ministerial Taskforce) remarked, the

operation of the Child Support Scheme cannot be fully understood without understanding its interaction with the income support system and payments to help families with the costs of children.⁵⁷

11.39 Parents eligible for child support who receive more than the base rate of FTB Part A, are generally required to apply for a child support assessment and to collect—or opt for CSA to collect—the full assessed amount of child support.⁵⁸ This is known as the ‘reasonable maintenance action’ requirement. Exemptions are available, including in cases of family violence. Exemptions are discussed in more detail in Chapter 13.

11.40 Another connection between child support and family assistance is the ‘maintenance income test’, which reflects that an individual’s FTB Part A calculation takes into account estimated child support income. Under this test, a person’s FTB Part A is reduced by 50 cents for every dollar of child support, above an exempted amount, until the base rate of FTB Part A is reached.⁵⁹

11.41 The Ministerial Taskforce noted that the reasonable maintenance action requirement and the maintenance income test

are central to the objective of limiting Commonwealth expenditure to the minimum necessary for ensuring that children’s needs are met, and shifting the primary responsibility of supporting children back to separated parents.⁶⁰

11.42 Centrelink administers family assistance payments on behalf of the FAO. In this role, it ensures that persons eligible for more than the base rate of FTB Part A ‘take

54 A number of other internal ‘staff support tools’ are listed in D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [7.14].

55 The following Procedural Instructions and electronic resources have been provided to the ALRC: DHS, *PI—Update Customer and Assessment Information*, 5 July 2011; DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011; DHS, *PI—Ending Assessments*, 5 July 2011; DHS, *PI—Change of Assessment*, 5 July 2011; DHS, *PI—SSAT*, 5 July 2011; DHS, *Security Incident Management*, 5 July 2011; DHS, *PI—Capacity to Pay*, 7 June 2011; DHS, *Common Module—Family Violence*, 7 June 2011.

56 Family assistance legislation is discussed in more detail in Ch 14.

57 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4].

58 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 cl 10. FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.30]. See also [3.1.6.70].

59 See Centrelink, *Maintenance Income Test* <www.centrelink.gov.au/> at 22 July 2011.

60 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4.2.2].

reasonable action to obtain child support’, and it adjusts the FTB payments of people receiving child support payments.⁶¹

11.43 A further point of interaction between child support and family assistance legislation is the determinations of percentages of care, discussed above.

Interactions with family law

11.44 As noted above, the family law system, rather than the child support system, is set up to address family violence issues in regulating disputes about parenting arrangements. Child support legislation governs the child support consequences of arrangements made in the family law context. It is essentially an administrative scheme.

11.45 Family violence is a significant factor in determining post-separation parenting arrangements under the *Family Law Act*. Parenting orders are based on the ‘best interests of the child’ above all other considerations.⁶² In determining a child’s best interests, the court must consider two ‘primary’ and 13 ‘additional’ considerations.⁶³ The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.⁶⁴

11.46 Family violence is also addressed in the additional considerations: the court must consider any family violence involving the child or a member of his or her family, as well as relevant family violence protection orders.⁶⁵ Further, when making a parenting order, a court must ensure that it does not expose a person to an unacceptable risk of family violence and is consistent with any protection order made under state and territory family violence legislation.⁶⁶

11.47 The consideration of family violence and parenting proceedings has been subject to active contemporary review: it has been considered in two 2009 reports and, to a more limited extent, in *Family Violence—A National Legal Response*.⁶⁷ At the time of writing, the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 is before the Senate. The Bill contains a number of amendments to the *Family Law Act*, aimed at improving protections for children and families at risk of

61 Child Support Agency, *Facts and Figures 08–09* (2009), [1.5.3].

62 *Family Law Act 1975* (Cth) s 60CA.

63 *Ibid* s 60CC.

64 *Ibid* s 60CC(2).

65 *Ibid* s 60CC(2)(j) and (k).

66 *Ibid* s 60CG.

67 R Chisholm, *Family Courts Violence Review* (2009); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010).

family violence and abuse.⁶⁸ This includes an amendment that provides that when there is inconsistency in the primary considerations, the court should give greater weight to protecting the child from harm as a result of abuse, neglect or family violence.⁶⁹

Other reviews

11.48 This Inquiry is one of a number of contemporary initiatives regarding child support and family violence. The CSA Family Violence Project has been working on a family violence response since 2008, including:

- a consistent approach to family violence that is aligned with other agencies in the Human Services Portfolio
- consistent application of process and support for customers across all areas of Service Delivery
- improved support for customers through clear options and informed choice consistent with the Customer Service Principles
- improved education for staff including training to better understand family violence
- integration of processes to support customers into Procedural Instructions, the Guide and the development of a common module
- system support to identify customers where there are orders in relation to family violence, and
- improved referrals to services that can provide support—building on existing processes and enhanced web support for customers.⁷⁰

11.49 In 2010, MyriaD Consulting delivered a report on family violence and the CSA: *Final Evaluation Report in the CSA Family Violence Project*. This report is not publicly available.⁷¹

Child support and family violence

Conceptual framework

11.50 In the child support context, family violence may have an impact in a number of ways. A parent who has experienced family violence may fear continued interaction with the other parent and avoid all occasions of contact or opportunity for continuing control. This may influence their participation in the child support scheme—prompting

68 Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth), 1; Commonwealth *Parliamentary Debates*, House of Representatives, 24 March 2011, 3140 (R McClelland—Attorney-General), 3140.

69 Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 para 60CC(2)(2A).

70 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.8.6].

71 Other reports on the child support scheme mentioned in the Discussion Paper are the 2010 review by Richmond on CSA decision making and quality-assurance processes, and the Ministerial Taskforce’s 2005 report, *In the Best Interests of Children—Reforming the Child Support Scheme*, which prompted fundamental reforms to the child support scheme: *Ibid*; Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005).

decisions to, for example, not seek child support, end child support, change collection methods, or accept insufficient child support. Further, CSA-initiated actions may endanger victims by inflaming conflicts and opening up possibilities for pressure and coercion.

11.51 The overarching objective of this Inquiry is to increase safety by improving legal frameworks. This goal complements the CSA's existing aim of 'avoid[ing] actions which could contribute to family violence', as set out in the *Child Support Guide*.⁷² The ALRC's proposed reforms aim to increase the CSA's ability to fulfil this policy goal.

11.52 The primary way in which the current system accounts for family violence is by exempting individuals from the reasonable maintenance action requirement (that is, allowing them to receive the full amount of FTB Part A, even though they have not applied for child support).⁷³ This ensures that a victim of family violence does not have to interact with the person who has used violence regarding child support issues, which can be critical in ensuring the victim's safety. The ALRC's recommended reforms should make exemptions more accessible, by ensuring that CSA customers are aware of them, and increasing the likelihood that the CSA or Centrelink will identify persons eligible for them.

11.53 Alongside measures to improve the accessibility of exemptions, the ALRC seeks to enhance the overall accessibility of the child support scheme for victims of family violence. Even though victims may be safer when they obtain an exemption, they may receive less overall income than if they received child support payments.⁷⁴ As noted in relation to social security in Chapter 5, safety refers not only to physical safety from harm, but also to financial security and independence.

11.54 Consequently, the ALRC considers that, along with improved access to exemptions, there must also be efforts to increase the ability of family violence victims to obtain child support if they choose to do so. The ALRC's recommendations aim, therefore, to ensure appropriate agency involvement to improve the safety of victims who participate in the child support scheme. This approach also serves the underpinning policy of the child support scheme, by facilitating the principal object that children receive proper financial support from both parents.

11.55 An important aspect of this goal is appropriate issues management of child support cases involving family violence.⁷⁵ A number of recommendations regarding issues management are set out in Chapter 4, including a key recommendation to give

72 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].

73 Family violence and exemptions are discussed in Ch 13.

74 See R Patrick, K Cook and H McKenzie, 'Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear' (2008) 42 *Social Policy and Administration* 749, 754; R Patrick, K Cook and A Taket, 'Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners' (2007) 45 *Just Policy* 21, 25.

75 See Ch 4 for a discussion of issues management. Also as discussed in that chapter, DHS is currently trialling 'Case Coordination' service delivery. The approach discussed in this chapter and Chapter 12 regarding family violence may complement, or form part of, Case Coordination service delivery.

customers information about how family violence is relevant to their child support matter. This should enable customers to make informed decisions about whether it is safe to apply for child support, and increase awareness of resources and services that can improve their safety should they do so, such as, for example, CSA collection of child support. Other key recommendations relevant to improving issues management are those regarding identification of family violence-related safety concerns (for example, through screening), staff training and interagency information sharing about safety concerns.

11.56 Equally important are Chapter 12's recommended reforms about consulting victims prior to CSA-initiated actions. Victims of family violence are likely best able to understand whether certain actions will place them at risk. The ALRC considers that the CSA should seek input from those experiencing family violence or who have safety concerns arising from family violence—and consider their concerns—prior to initiating such actions.

11.57 The overall effect of these recommendations should also minimise opportunities for coercion and other forms of family violence in the child support context—including as a result of minimising CSA-initiated actions which may ignite conflict and trigger coercive action.

11.58 These recommendations also contribute to self-agency—a theme of this Inquiry—by empowering and enabling victims of family violence to make informed choices about participation in the child support scheme, and to contribute to decisions that affect their safety. The recommendations also promote a seamless and effective approach by the CSA, Centrelink and the FAO, in particular, through responsive issues management and interagency information-sharing.

Issues management approach

11.59 The child support scheme primarily adopts an issues management approach to family violence, rather than an outcome-based approach, as in the family law system. In other words, family violence in the child support context generally affects the administration of cases, rather than decisions about parties' rights and entitlements.

11.60 An issues management approach to family violence should not affect the rights of the party who is alleged to have used family violence, as the context is not a forensic one. Where family violence is disclosed, cases should be managed to address potential safety risks—a response that should not affect the rights and entitlements of the person alleged to have used family violence.

11.61 The case-management response to family violence in the child support scheme has notable consequences. In the routine administration of child support cases, CSA staff should not be required to make judgements about whether family violence disclosures are true. The non-judgemental approach to family violence reflects existing policy, as described in the *Common Module—Family Violence*, which provides that staff dealing with customers experiencing family violence should:

- Adopt a non judgemental approach and actively listen to the customer.

- Respect the customer's perception of their situation, without asking probing questions on their specific involvement in family violence.
- Prioritise the customer's child support issues and offer appropriate referral services to assist them with matters that cannot be resolved by the [CSA].⁷⁶

11.62 Where the rights of the person alleged to have used family violence are not affected by family violence disclosures in the child support context, verification requirements should not be onerous. A case-management response that minimises risk should be accessible to victims and should not require high levels of proof, such as findings or orders in state and territory family violence jurisdictions.

11.63 The ALRC considers that this approach provides administrative answers to family violence. Such an approach should minimise opportunities for coercion, or other forms of family violence, in the child support context—including by minimising CSA-initiated actions which may ignite conflict and trigger coercion.

Common interpretative framework

Definition of family violence

11.64 The ALRC considers that the *Child Support Guide* should be amended to provide a definition of family violence consistent with that recommended for child support legislation and other Commonwealth legislation, as well as certain state and territory legislation.⁷⁷ The child support legislation does not currently include a definition of family violence—as discussed in Chapter 3. However, the *Child Support Guide* provides a broad definition of family violence, as well as definitions of behaviours that may be involved in family violence, such as: physical abuse; sexual abuse; emotional abuse; verbal abuse; social abuse; economic abuse; and spiritual abuse.⁷⁸

11.65 The ALRC has recommended that a similar and consistent definition of family violence—adapted as suitable for the various legislative schemes—be included in the *Child Support (Assessment) Act*, the *Child Support (Registration and Collection) Act*, and other Commonwealth legislation.⁷⁹ The ALRC considers that this recommendation should be complemented by a consistent definition in the *Child Support Guide*. Most submissions responding to the Discussion Paper supported this approach.⁸⁰

⁷⁶ DHS, *Common Module—Family Violence*, 7 June 2011.

⁷⁷ 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), the ALRC and the NSW Law Reform Commission recommended that the consistent definition of family violence be adopted in the *Family Law Act 1975* (Cth), state and territory family violence laws and, in limited circumstances, state and territory criminal laws: Recs 5–1, 6–1, 6–4.

⁷⁸ 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].

⁷⁹ Rec 3–1, 3–2.

⁸⁰ The ALRC proposed this amendment to the *Child Support Guide* in the Discussion Paper at Proposal 9–1(a). It was supported by the following stakeholders: ADFVC, *Submission CFV 104*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*; Women's Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*. See also National Legal Aid, *Submission CFV 164*; WEAVE, *Submission CFV 85*.

11.66 The ALRC considers that this should enhance consistency across the policy and legislative bases of the child support scheme, and across jurisdictions. This should provide victims with clarity and the certainty that family violence will be recognised and treated similarly in different legal and administrative contexts. It also provides a consistent training-basis for staff—particularly those who work across legislative regimes, such as Centrelink social workers. Further, consistent and similar definitions across legislation and guidelines may foster a shared understanding across agencies, jurisdictions, courts and tribunals.

Nature, features and dynamics

11.67 The ALRC considers that the *Child Support Guide* should contain a statement regarding the nature, features and dynamics of family violence, as discussed in Chapter 3. This reform is consistent with the recommendations of *Family Violence—A National Legal Response*. In that report, the ALRC and the New South Wales Law Reform Commission recommended that provisions regarding the nature, features and dynamics of family violence should be contained in state and territory family violence legislation. The Commissions also recommended that the *Family Law Act* should be amended to include a similar provision.⁸¹

11.68 The ALRC does not consider that such a provision is necessary in the child support legislation—as discussed above, prevention of family violence is not the primary purpose of child support legislation. However, the ALRC considers that there is value in including such a statement in the *Child Support Guide*—a measure generally supported by stakeholders who commented on this issue.⁸² DHS stated that

there are sections of the community that are more vulnerable to family violence due to power imbalances based on Indigenous status, culture, sexuality, disability or age. The department agrees that a clear understanding of the features, dynamics and experience of family and domestic violence is crucial for customer service staff and that this information should be included in policy documents, procedures and training materials.⁸³

11.69 A joint submission by Domestic Violence Victoria and others submitted 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’.⁸⁴

11.70 Including a statement of the nature, features and dynamics of family violence in the *Child Support Guide* would serve an important educative function—

81 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 7–3. Ch 3 sets out the form of this statement.

82 The ALRC proposed this amendment to the *Child Support Guide* in the Discussion Paper at Proposal 9–1(b). It was supported by the following stakeholders: National Legal Aid, *Submission CFV 164*; ADFVC, *Submission CFV 104*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Women’s Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*. See also WEAVE, *Submission CFV 85*.

83 DHS, *Submission CFV 155*.

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

complementing recommendations in relation to training in Chapter 4—and provide a contextual basis for issues management and safety concern identification. Such a measure also complements recommendations regarding definitions in Chapter 3, by establishing a common interpretative framework around family violence across agencies and legal frameworks. As discussed in Chapter 3, the form of the statement should be altered to best suit the presentations of family violence, and the particular risks victims may face, in each particular legal framework.

Recommendation 11–1 The *Child Support Guide* should include:

- (a) the definition of family violence in Recommendation 3–2; and
- (b) information about the nature, features and dynamics of family violence including the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse background; those from the lesbian, gay, bisexual, trans and intersex communities; older persons; and people with disability.

