

12. Child Support—Issues Management and Informal Carers

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Introduction

12.1 This chapter addresses two key issues in the child support context: improving the safety of family violence victims within the child support scheme; and the child support eligibility of informal carers—in particular, where they care for children who have experienced family violence (including abuse) in their parents’ or legal guardians’ home.

12.2 The recommended reforms in this chapter are presented in two sets. The first set focuses on appropriate management by the Child Support Agency (CSA) of child support cases involving customers with family violence-related safety concerns. The recommended reforms relate primarily to providing referrals to, and consulting with, customers who have disclosed family violence at certain key points (intervention points) in a child support case. Intervention points for screening, ‘risk identification’,

or other methods of identifying safety concerns, are also considered. These recommendations complement those in Chapter 4 regarding identification of safety concerns and information sharing.

12.3 The second set of reforms aims to remove legislative barriers to child support faced by informal carers (often grandparents), especially where children are in informal care as a result of family violence. The ALRC recommends that the Australian Government consider repealing the limitation on informal carers' child support eligibility. If the limitation is not repealed, the ALRC recommends that the Australian Government should broaden the eligibility criteria for child support in cases where informal carers are caring for children who have experienced family violence in their parents' or guardians' home.

Issues management

Family violence and child support scheme participation

12.4 Appropriate issues management in the child support context should take into account ways in which family violence may affect participation in the child support scheme. As discussed in Chapter 11, a parent who is a victim of family violence may fear continued interaction with the other parent and avoid situations that provide opportunities for continuing control. Additionally, CSA-initiated actions against a person who has used violence may inflame, create or reignite conflicts, and open up possibilities for pressure and coercion.

12.5 In some cases, it will be necessary for victims of family violence to opt out of the child support scheme by obtaining exemptions from the 'reasonable maintenance action' requirement, thereby forgoing child support payments.¹ However, the ALRC considers that appropriate issues management may, in many cases, increase the ability of victims to participate in the child support scheme.

12.6 At the time of writing, the Department of Human Services (DHS) is running a pilot program regarding family violence 'risk identification' and is also trialling a new service delivery approach called 'Case Coordination' to provide integrated and intensive support to customers 'facing disadvantage or complex challenges'. DHS stated:

The support and assistance offered will vary depending on customers' needs, from simple referrals to services such as training programs or information about other services, to intensive support involving multiple coordinated appointments with non-government and local community services, such as for homelessness issues associated with family violence.²

12.7 As discussed in Chapter 4, the ALRC uses the term 'issues management' in this Report to refer to the customer interface of the CSA (and other agencies). However, the ALRC's recommended reforms may complement, or form part of, DHS Case Coordination service delivery.

1 As discussed in Chs 11 and 13.

2 DHS, *Submission CFV 155*. More information about these programs is provided in Ch 4.

Referrals and consultation

12.8 ALRC recommendations aim to improve the safety of family violence victims within the child support scheme through appropriate management of child support cases. There are two key strategies underpinning these reforms. First, the CSA should consult with victims of family violence, and consider their concerns, prior to initiating significant action against the other party. Secondly, the CSA should refer payees to Centrelink social workers, or other expert service providers, when payees have disclosed family violence, and make requests or elections in their child support case that may indicate ongoing pressure or coercion, or fear of the other party. This complements Recommendation 4–3, which provides that customers should be provided with referrals when they disclose family violence to an agency.

12.9 The ALRC considers that this two-pronged approach would improve safety by:

- facilitating the CSA’s existing policy aim to ‘avoid, as far as possible, actions which could contribute to family violence’;³ and
- giving family violence victims opportunities to access supports, through suitable referrals, that assist them to take protective steps, or otherwise address safety concerns.

12.10 A consequent benefit of this two-pronged approach is that, by improving safety, the accessibility of the child support scheme should also be improved. Victims of family violence may be more likely to participate in the scheme if they are aware that they will be consulted, and have time to take necessary protective measures, prior to significant CSA-initiated action against the other party.

12.11 Referrals to expert service providers may also assist a payee to continue to participate in the child support scheme, for example, by assisting to secure protection that enables continued participation. This should improve the financial position of these payees and their children. Centrelink social workers and other expert service providers may provide information and support to enable payees to make informed decisions about their child support case. They may also grant, or assist an application for, exemptions from the reasonable maintenance action requirement, when it is unsafe for victims to receive child support payments.⁴

12.12 Particular intervention points when the CSA should consult customers, provide referrals, or identify safety concerns—for example, through screening or risk identification, are discussed in detail below. The ALRC has ensured that the lists of particular intervention points contained in recommendations are non-exhaustive, so that further intervention points may be added, perhaps informed by the risk identification pilot.⁵ Some stakeholders have suggested other possible intervention

3 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].

4 See Chs 11 and 13 regarding the reasonable maintenance action requirement and exemptions from this requirement.

5 DHS has stated that this pilot may help identify such points: DHS, *Submission CFV 155*.

points.⁶ However, in making these recommendations, the ALRC has been mindful that ‘multiple risk assessments could be frustrating for customers and resource intensive for the department’.⁷

12.13 Generally, the ALRC considers that the CSA should consult with customers who have disclosed family violence, and consider their concerns, prior to initiating the following actions against the other party: change of assessment (or ‘departure’) determinations; court actions to recover child support debt; and departure prohibition orders (DPOs).⁸ This approach attracted support from most stakeholders who commented on it, including National Legal Aid (NLA), Women’s Information and Referral Exchange (WIRE), and Women Everywhere Advocating Violence Elimination (WEAVE).⁹ NLA commented that Legal Aid staff have experienced

clients becoming anxious because they have become aware that some action is occurring but they are not sure of the nature of that action. If victims are notified sufficiently in advance of any intended action, then it might allay any concerns, and also provide an opportunity for them to take any extra precautions in relation to the safety of themselves and their children.¹⁰

12.14 DHS observed that:

certain actions taken by DHS as part of its administration of the child support scheme can represent family violence trigger points for some customers. The benefit of risk identification and information provision at these points is that the Child Support program may in some cases be able to consider alternative forms of action.¹¹

12.15 The ALRC also considers that CSA staff should refer payees who have disclosed family violence to Centrelink social workers or other expert service providers when the payee makes an election or request that may indicate family violence-related safety concerns, including where a payee elects or requests: to end a child support assessment (case); to end CSA collection of child support or arrears; or that the CSA terminate, or not commence, enforcement action or DPOs. These intervention points should be in addition to the provision of referrals when customers disclose family violence-related safety concerns.¹² Referrals at the point of disclosure are provided for in the DHS internal procedural resource, *Common Module—Family Violence*.¹³ In Chapter 4 of this Report, it is recommended that *The Guide: CSA’s Online Guide to the*

6 For example, Women’s Information and Referral Exchange, *Submission CFV 94*; National Legal Aid, *Submission CFV 81*; Commonwealth Ombudsman, *Submission CFV 54*.

7 DHS, *Submission CFV 155*.

8 This reflects Proposal 9–5 of the Discussion Paper, which proposed that this practice should be articulated in the *Child Support Guide*.

9 National Legal Aid, *Submission CFV 164*; Women’s Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*, WEAVE, *Submission CFV 85*. ADFVC stated that ‘expert case managers should be brought in to assist when family violence is disclosed’: ADFVC, *Submission CFV 104*. The Lone Fathers Association stated that this approach, and others the ALRC has made regarding issues management, ‘require careful safeguards’: Lone Fathers Association Australia, *Submission CFV 109*.

10 National Legal Aid, *Submission CFV 81*.

11 DHS, *Submission CFV 155*.

12 Rec 4–3.

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

Administration of the New Child Support Scheme (Child Support Guide) set out the procedure regarding referrals upon disclosure of safety concerns.¹⁴

12.16 In *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) (Discussion Paper), the ALRC proposed that referrals of CSA customers who disclose family violence-related safety concerns should be to Centrelink social workers.¹⁵ This approach was supported by a number of stakeholders.¹⁶ WIRE submitted that the customer should not be obligated to receive services.¹⁷ The Australian Domestic and Family Violence Clearinghouse (ADFVC) considered that referrals should be made with the customers' agreement.¹⁸ The ALRC agrees that customers should be encouraged, but not obliged, to receive services from expert service providers to whom they are referred, and this appears consistent with current CSA practice in relation to referrals.

12.17 Some stakeholders stressed the importance of referrals to service providers other than Centrelink social workers. The Aboriginal and Torres Strait Islander Women's Legal Services NQ (ATSIWLSNQ) considered that Indigenous women should 'be given the benefit of culturally appropriate referrals including referral to legal support where appropriate'.¹⁹ NLA stated that:

in such circumstances customers should also be referred for legal advice to ensure that they are able to understand their options and make informed choices; including in relation to obtaining protective orders and other measures that may be appropriate in the particular circumstances.²⁰

12.18 DHS stressed the importance of referrals to professional or highly skilled workers, stating that the role of unqualified staff should be 'limited to containment and immediate referral'.²¹ It also submitted that referrals should not be confined to Centrelink social workers:

It is not correct to presume that every customer who presents with or identifies a family violence issue requires a higher level of intervention through a social worker. In some circumstances lower level responses, such as information provision, may be appropriate, and in some situations customers may be receiving suitable assistance through other organisations in the family violence sector and only financial assistance is sought from DHS.²²

12.19 DHS also stated that, whatever the referral option, 'risk identification' (that is, screening, or a screening-like procedure) should be 'accompanied by the immediate availability of someone qualified to carry out a more complex screening and assessment, and to provide support and advocacy'. In the child support context, DHS

14 Rec 4–3.

15 Discussion Paper, Proposal 9–3.

16 National Legal Aid, *Submission CFV 164*; ADFVC, *Submission CFV 104*; Women's Information and Referral Exchange, *Submission CFV 94*; WEAVE, *Submission CFV 85*.

17 Women's Information and Referral Exchange, *Submission CFV 94*.

18 ADFVC, *Submission CFV 104*.

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

20 National Legal Aid, *Submission CFV 164*.

21 DHS, *Submission CFV 155*.

22 Ibid.

stated that customers are offered immediate referral to an ‘expert service, including external professional counsellors’.²³

12.20 The ALRC considers that it is appropriate to refer customers who have disclosed family violence at the identified intervention points to expert service providers—including, but not limited to, Centrelink social workers.²⁴ Customers should, however, be referred to Centrelink social workers when they take certain actions—including actions that constitute intervention points—that may affect their compliance with the reasonable maintenance action requirement and their Family Tax Benefit (FTB) Part A.²⁵ This appears to be existing practice—as discussed below, certain Procedural Instructions and sections of the *Child Support Guide* provide that the CSA should refer customers to Centrelink social workers in such circumstances.

Identifying safety concerns

12.21 In order for the CSA to act on family violence-related safety concerns, such concerns must first be identified. Recommended reforms regarding referral and pre-action consultation therefore require complementary measures. In Chapter 4, the ALRC recommends that the CSA and other agencies should take steps to identify customers’ safety concerns upon or following applications for child support, social security or family assistance. As discussed in that chapter, steps to identify safety concerns may take the form of, for example, screening, ‘risk identification’ (a screening or screening-like procedure currently being piloted by DHS), or other methods to prompt or promote disclosure. Chapter 4 provides more information about methods for identifying safety concerns and the DHS Risk Identification Pilot.²⁶

12.22 The ALRC considers that the CSA should identify safety concerns about family violence at other points in child support cases, as well as at the initial application for child support. These intervention points can generally be characterised as: upon payee actions that may indicate family violence-related safety concerns; and prior to significant action initiated by the CSA. Identifying safety concerns at these intervention points directly facilitates the recommended approach in relation to referrals and pre-action consultation.

12.23 Events that may indicate family violence-related safety concerns are when a payee requests to: end a child support assessment (child support case); or end CSA collection of child support or arrears. Significant CSA-initiated actions which may prompt family violence-related safety concerns include: change of assessment determinations, court actions to recover child support debt and DPOs.

23 Ibid.

24 This issue is also discussed in Ch 4.

25 See Chs 11 and 13 for discussion of the reasonable maintenance action requirement and the interaction of child support and Family Tax Benefit Part A. Ch 13 describes the role of Centrelink social workers in this context.

26 As discussed in Ch 4, although the ALRC proposed ‘screening’ at these points, DHS has submitted that it would not define the model proposed by the ALRC as ‘screening’, as it did not include questioning customers regarding the existence of family violence. The ALRC does not make a recommendation regarding the precise form of safety concern identification.

12.24 Stakeholders supported screening at these points.²⁷ DHS also considered that screening should be part of a risk assessment framework that considers:

- ‘customer responses or behaviour which might indicate family and domestic violence’; and
- ‘screening questions at certain key administrative events linked to greater risk of family and domestic violence’.²⁸

12.25 This approach corresponds with the intervention points for safety concern identification recommended by the ALRC in this chapter.

Safety concern flags

12.26 Recommendation 4–4, regarding interagency information sharing about ‘safety concern flags’, also complements recommendations contained in this chapter. The existence of a safety concern flag should inform the CSA of whether a customer has previously disclosed family violence to an agency. Safety concern flags thereby facilitate recommendations in this chapter about providing referrals, and pre-action consultation, to victims of family violence.²⁹

Targeting recommendations

12.27 In the Discussion Paper, the ALRC framed its proposals about safety concern identification, referrals and pre-action consultation with reference to the *Child Support Guide*, rather than the DHS Procedural Instructions, an internal electronic resource for CSA staff. In part this was because Procedural Instructions are not publicly available. In its submission, DHS responded that the Procedural Instructions

already include information and consideration of family violence trigger points, which will be revised as appropriate to reflect the changes in the definition of family violence and new practices around family violence. Procedural instructions and training are considered effective tools to outline these requirements rather than the *Child Support Guide*.³⁰

12.28 While information may be more easily updated and is perhaps more usefully situated for staff in Procedural Instructions, in the ALRC’s view these matters affect the personal safety of family violence victims. Such significant information should be contained in publicly-articulated policy—that is, the *Child Support Guide*—rather than contained in one or more Procedural Instructions.

27 Including National Legal Aid, *Submission CFV 164*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Women’s Information and Referral Exchange, *Submission CFV 94*; WEAVE, *Submission CFV 85*.

28 DHS, *Submission CFV 155*.

29 The CSA’s existing Sensitive Issues Indicators—described in Ch 4—may also fulfil this role. Sensitive Issues Indicators are more limited than the recommended safety concern flag, insofar as they record disclosures made to the CSA only. The ALRC has recommended that DHS should consider implementing information sharing regarding the safety concern flag between DHS programs and agencies: Rec 4–4.

30 DHS, *Submission CFV 155*.

12.29 The ALRC also considers that including this information in the *Child Support Guide* would improve transparency about CSA management of issues and cases with respect to family violence. It should also improve general awareness, among customers and their advocates, about measures in place to protect the safety of victims of family violence, including existing measures within the child support scheme. Improving awareness of these measures is an important component of increasing the overall accessibility of the child support scheme for victims.

12.30 However, the ALRC does not consider it necessary for the *Child Support Guide* to contain detailed procedural information about these matters. Detailed procedural information may be more appropriately situated in Procedural Instructions and other internal resources, which may complement more general information contained in the *Child Support Guide*.

Intervention points: actions taken by payee

Ending a child support assessment

12.31 In limited circumstances, payees may end a child support assessment (child support case). Victims of family violence may be pressured or coerced to end a child support assessment. The CSA has identified family violence as a common reason for a payee to end an assessment.³¹

12.32 Although payees may end a child support assessment pursuant to the *Child Support (Assessment) Act 1989* (Cth), the CSA cannot accept this election without Centrelink approval when payees receive more than the base rate of FTB Part A.³² Centrelink does not generally approve elections to end assessments when payees receive more than the base rate of FTB Part A, except where it grants payees exemptions from the reasonable maintenance action requirement.³³ Generally, an election to end an assessment cannot be reversed, but payees may make new applications for a child support assessment.³⁴

12.33 The Procedural Instruction, *Ending Assessments*, provides that payees receiving more than the base rate of FTB Part A, who elect to end child support assessments, should be referred to Centrelink, and, where they disclose family violence, actively referred for an appointment with a Centrelink social worker.³⁵ Similarly, the *Child Support Guide* provides that payees receiving more than the base rate of FTB Part A, who are considered at risk of family violence, should be referred to Centrelink social

31 DHS, *PI—Ending Assessments*, 5 July 2011, [2.1]

32 *Child Support (Assessment) Act 1989* (Cth) ss 151, 151A; 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, [2.10.2], [6.10.1], FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.6.40]. Generally, a payee's election to end an assessment cannot be reversed, but he or she may make a new application for an assessment of child support.

33 See Chs 11 and 13 for discussion of exemptions from the reasonable maintenance action test and the interaction of child support and FTB Part A.

34 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, [2.10.2].

35 DHS, *PI—Ending Assessments*, 5 July 2011, [2.1.1].

workers for risk assessments.³⁶ However, the *Child Support Guide* and *Ending Assessments* do not provide guidelines to refer payees who do not receive more than the base rate of FTB Part A, when they end child support assessments due to family violence.³⁷

12.34 The ALRC considers that the *Child Support Guide* and relevant procedural resources should provide that *all* payees who have disclosed family violence—including payees who receive no, or no more than the base rate of, FTB Part A—should be provided with referrals to Centrelink social workers, or other expert service providers, upon a request or election to end an assessment.

12.35 Payees' elections to end assessments, when they receive no, or no more than, the base rate of FTB Part A, do not affect government expenditure in the form of increased family assistance. However this recommendation would have other significant benefits. As discussed above, Centrelink social workers and other expert service providers may provide supports, and further referrals, to assist payees to improve their safety, and to remain within the child support scheme—where appropriate. Expert service providers may also advise victims that, if their safety concerns are addressed or diminish over time, they may apply for a new child support assessment.

12.36 The ALRC considers that a request or election to end a child support assessment should also be an intervention point for safety concern identification for all payees. This should facilitate referrals to Centrelink social workers and expert service providers where family violence is disclosed.

Electing private collection

12.37 Payees may choose to collect child support payments from the payer privately, or to have the CSA collect and transfer payments. The ALRC considers that in family violence cases, CSA collection of child support payments may be the more suitable method, as it minimises both the need for direct inter-party contact about child support, and payers' opportunities for non-compliance with their child support obligations.

12.38 Payees choose CSA collection or private collection when they apply for child support.³⁸ As discussed below, payees may also elect to change collection methods. The CSA encourages private collection. In its 2007–2008 annual report, DHS noted that the 'CSA is committed to encouraging and supporting parents to manage their child support responsibilities independently through private collection arrangements'.³⁹ The Procedural Instruction, *Opting Out and/or Discharge Arrears*, states that the CSA

encourages private collection arrangements between parents where possible. The benefits of private collection are:

36 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].

37 Ibid [6.10.1]; DHS, *PI—Ending Assessments*, 5 July 2011, [2.1.1].

38 Child Support Agency website <www.csa.gov.au> at 7 March 2011, 'Application for Child Support Assessment'. See also *Child Support (Registration and Collection) Act 1988* (Cth) s 24A. If the applicant is the payer, the CSA will not register the assessment for collection by the CSA.

39 DHS, *Annual Report 2008–2009*, pt 3.

- greater customer control and responsibility over their child support
- greater flexibility in payment type, method and frequency
- less cost to the community
- encouraging greater co-operation and communication between parents.⁴⁰

12.39 Private collection may be suitable for many parents, particularly those in low-conflict cases. DHS reports that:

CSA research undertaken in 2007–08 clearly indicates that parents using private collection arrangements are more satisfied with the child support system. For parents who are able to cooperate on parental decisions, private collection provides the most flexibility and satisfaction.⁴¹

12.40 Some stakeholders expressed the view that CSA collection of child support payments is more suitable than private collection, and should be encouraged, in family violence cases.⁴² There are two key reasons for CSA collection in these circumstances.

12.41 First, collection methods used by the CSA can minimise payers' ability to avoid child support obligations. Child support avoidance, in the family violence context, may be linked with ongoing control and economic abuse.⁴³ The CSA's methods of collecting child support payments include deductions from: salaries and wages; tax refunds; social security pensions and benefits; and family tax benefits.⁴⁴

12.42 Secondly, where the CSA collects child support, victims avoid direct contact about child support payments with persons who have used family violence. Participants in one study reported that they were able to 'reduce contact and increase safety' once the CSA collected child support.⁴⁵ By minimising inter-party contact about child support, CSA collection may improve the safety of victims of family violence.

12.43 Further, victims may elect to collect privately due to fear of, or coercion by, a person who has used violence. As a result of fear or coercion, victims may also collect less child support than they are entitled to—or no child support at all. Statistics of such cases may be 'hidden' as the CSA will consider them to be successful private collection cases, in the absence of any information to the contrary.⁴⁶ This may lead to financial disadvantage for payees and their children.

12.44 The Commonwealth Ombudsman expressed concern about reports 'that some payees with private collect arrangements acquiesce to payers' coercion and agree to

40 DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [Overview].

41 Department of Human Services, *Annual Report 2008–2009*, pt 3.

42 See National Legal Aid, *Submission CFV 81*; AASW (Qld), *Submission CFV 46*; Council of Single Mothers and their Children, *Submission CFV 44*.

43 The link between avoidance of child support and family violence is discussed in Ch 13.

44 *Child Support (Registration and Collection) Act 1988* (Cth) ss 43,72,72AA, 72AB.

45 I Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (2007), 34.

46 *Ibid.*, 33. The availability of partial exemptions, where victims privately collect less than the assessed amount of child support, is discussed in Ch 13.

hide the fact that they are not collecting their full entitlement to child support'.⁴⁷ The Sole Parents' Union stated that some victims

elect to collect child support privately as a way to avoid child support altogether. Because of the requirement to take reasonable maintenance action, they are then forced into the situation where they either have to lie about the child support collected, or they settle for minimum family tax benefit.⁴⁸

12.45 An ADFVC study also identified the issue of victims collecting privately—and not collecting the full assessed amount—as an issue of concern.⁴⁹

12.46 NLA suggested that an election to collect privately, or to end collection by the CSA, should, of itself, prompt family violence screening, and that appropriate referrals should be made when screening leads to concern regarding the appropriateness of private collection.⁵⁰

12.47 In the ALRC's view, child support collection is a CSA-provided service, and information about its relevance in family violence cases should be provided to customers at the application stage, in accordance with Recommendation 4–2. The recommendations contained in this chapter and Chapter 4, about identifying family violence-related safety concerns and providing referrals, also provide opportunities for targeted delivery of this information at the initial application stages of child support cases, and at other relevant points.

12.48 Given the Chapter 4 recommendations, it is unnecessary to recommend further intervention points to provide for:

- safety concern identification when payees elect to collect privately in their child support application; and
- referrals to expert service providers when payees who have disclosed family violence elect to collect privately in their child support application.

Safety concern identification and referrals when a payee lodges a child support application are provided for in Recommendations 4–1 and 4–3.

12.49 However, as these recommended measures apply at the initial application stage, they do not capture circumstances where payees change from CSA collection to private collection. These circumstances are discussed below.

Ending CSA collection

12.50 In cases involving family violence, payees may end CSA collection due to fear or coercion by the other parent. Payees who have previously elected for CSA collection of child support may elect to change to private collection, and vice versa.⁵¹ Payees may

47 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

48 Sole Parents' Union, *Submission CFV 52*.

49 ADFVC, *Submission CFV 53*.

50 National Legal Aid, *Submission CFV 81*.

51 *Child Support (Registration and Collection) Act 1988* (Cth) ss 25, 38, 38A. This is discussed in more detail in the Discussion Paper at Ch 11.

also elect for the CSA not to collect unpaid amounts of child support (arrears) when they end CSA collection, after they end CSA collection, or when they are no longer eligible for child support.⁵² When CSA collection of child support payments is ongoing, payees cannot elect for the CSA to end collection of arrears.⁵³

12.51 Victims of family violence may end CSA collection of child support payments and arrears for the same reasons they may choose to collect privately at an initial point. The Australian Association of Social Workers Queensland Branch (AASW (Qld)) stated that a victim may end CSA collection (or choose private collection initially) in acquiescence to the demands of person who uses violence ‘as an act of protection for herself and her children in order to contain the violence’.⁵⁴ The ADFVC also indicated that ending CSA collection was an issue of concern.⁵⁵

12.52 The Procedural Instruction, *Opting Out and/or Discharge Arrears* also recognises that family violence is a ‘risk point’ when payees end CSA collection of child support payments and when payees end collection of child support arrears.⁵⁶ In the ALRC’s view, payees ending CSA collection—including collection of arrears—should be an intervention point for identification of safety concerns and referral.

12.53 *Opting Out and/or Discharge Arrears* addresses referrals. When an election to end CSA collection has been made by a FTB-receiving payee, the CSA must encourage further discussions with Centrelink about the effects of the election, to support them in making an ‘informed choice’.⁵⁷ Where CSA staff determine that family violence is an issue

and/or the payee is being coerced into making an election for private collection, ask if they would like to discuss their options of gaining an exemption from taking the reasonable maintenance action with a Centrelink Social Worker.⁵⁸

12.54 In relation to a payee’s election to end CSA collection of arrears, the *Child Support Guide* and *Opting Out and/or Discharge Arrears* also emphasise the importance of referring payees to Centrelink for advice regarding the consequences for FTB payments.⁵⁹

52 Ibid s 38A; 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, [5.6.1]; DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [3.1.2]. Conversely, payees who elect to change from private collection to CSA collection may apply for the CSA to collect arrears accumulated in the three-month period preceding the election, up to a nine-month period in ‘exceptional circumstances’: *Child Support (Registration and Collection) Act 1988* (Cth) s 28A. See also the Discussion Paper, Ch 9.

53 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, [5.7.1].

54 AASW (Qld), *Submission CFV 46*.

55 ADFVC, *Submission CFV 53*.

56 DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [1], [3], [3.2].

57 Ibid, [3.2].

58 Ibid, [3.2].

59 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, [5.6.1]; DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [4].

12.55 Although the CSA must accept a payee's election to end CSA collection,⁶⁰ *Opting Out and/or Discharge Arrears* provides that where family violence is identified, staff should 'consider if it is appropriate to proceed with the private collect application'.⁶¹

12.56 NLA has submitted that an election to collect privately, or end collection by the CSA, should, of itself, prompt family violence screening. It also stated that appropriate referrals should be made when screening leads to concern regarding the appropriateness of private collection.⁶²

12.57 The ALRC agrees, and also considers that existing CSA procedure regarding referrals to Centrelink social workers when payees end CSA collection of child support payments and arrears is appropriate. The ALRC recommends that this approach should be extended so that payees who receive no, or no more than the base rate of, FTB Part A are also referred to Centrelink social workers or other expert service providers. Expert service providers, in addition to providing the supports described above, may ensure payees understand that they have the option to re-elect CSA collection of child support when their safety concerns are addressed.

12.58 The ALRC also recommends that the CSA should take steps to identify family violence-related safety concerns when payees elect to end CSA collection. This should facilitate referrals to appropriate services where payees end, or consider ending, CSA collection of child support payments or arrears, as a result of safety concerns.

Intervention points: actions taken by the CSA

CSA-initiated change of assessment

12.59 As discussed in Chapter 11, a 'change of assessment' (referred to in the *Child Support (Assessment) Act* as 'departure determination') may be initiated on the application of a party to the case, or by the CSA. A CSA-initiated change of assessment has the potential to compromise safety when it is initiated against a person who has used family violence.

12.60 The CSA may initiate a change of assessment due to 'special circumstances',⁶³ where the assessment results in 'an unjust and inequitable' determination of child support due to 'the income, earning capacity, property and financial resources of either parent'.⁶⁴ The CSA must be satisfied that it is 'just and equitable' and 'otherwise proper' to make the change of assessment determination.⁶⁵ The CSA refers to this process as 'Capacity to Pay' (CTP).

60 *Child Support (Registration and Collection) Act 1988* (Cth) s 38A.

61 DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [1].

62 National Legal Aid, *Submission CFV 81*.

63 *Child Support (Assessment) Act 1989* (Cth) s 98K. Change of assessments applications initiated by parents is discussed in Ch 11.

64 *Ibid* s 98L.

65 *Ibid* s 98L(1).

12.61 The *Child Support (Assessment) Act* provides that the CSA must notify the parties in writing that it is considering making the change of assessment determination, and serve on the parties a summary of the relevant information.⁶⁶ It must also inform the parties that they may reply to the summary and, if they do reply, serve a copy on the other party.⁶⁷ The parties may jointly elect that the CSA discontinue proceedings, but only where the payee does not receive an income-tested benefit, pension, or allowance.⁶⁸

12.62 Neither the legislation nor the *Child Support Guide* requires the CSA to consult with either party prior to providing written notification of CSA-initiated departure determination proceedings. The Procedural Instruction, *Capacity to Pay*, provides that the customer should be contacted by telephone in the initial stages of CSA-initiated assessment, and this contact should be followed up in writing as soon as possible.⁶⁹ It also provides that:

During initial case scrutiny or discussions with the customer [the financial investigator] may become aware of a potential family violence issue. It is important that we consider the possible implications a CTP investigation may have on customers.⁷⁰

12.63 DHS stated:

Change of Assessment teams regularly consult with customers prior to instigating any significant action against the other party. This contact is also used to inform the customer of any potential impact on their benefits, income etc. Where there is already an indication of family violence, these customers are contacted to discuss any possible exacerbation of the violence based on the likely outcome. This does not preclude an adverse finding against the violent party. The aim will be to provide extra time for the party at risk to take steps to minimize their risk by consulting with police or counselors.⁷¹

12.64 Such pre-action consultation appears appropriate, and the ALRC considers that the *Child Support Guide* should provide information about this approach, to improve awareness about, and transparency around, this practice. In particular, the *Child Support Guide* should provide that the CSA should consult customers who have disclosed family violence and consider their safety concerns prior to initiating change of assessment determinations. The ALRC also considers that the CSA should take steps to identify family violence-related safety concerns prior to initiating departure, so that cases where such action may compromise safety may be readily identified. The recommendations in Chapter 4 regarding identification of safety concerns and safety concern flags should also facilitate this consultative approach.

66 Ibid s 98M.

67 Ibid ss 98M, 98N.

68 Ibid s 98P.

69 DHS, *PI—Capacity to Pay*, 7 June 2011, [1.2.1], [1.2.1.1].

70 Ibid, [1.2].

71 DHS, *Submission CFV 155*.

Court enforcement

12.65 Enforcement action initiated by the CSA against child support payers is a relevant consideration in the family violence context for three key reasons. First, a number of stakeholders have linked CSA debt enforcement and risks to safety in family violence cases.⁷² For example, the Commonwealth Ombudsman commented that legal action, such as seizing and selling assets, may ‘inflare the situation and place the payee in danger’.⁷³ The ADFVC, which has conducted recent research on the impact of family violence on women’s financial security and safety, noted that:

some women in our study felt that any attempt to compel their ex-partner to pay child support would expose them to further abuse or give rise to increased claims for shared care parenting arrangements, accentuating their risk of harm.⁷⁴

12.66 A second and related issue is that CSA enforcement measures may, in family violence cases, create a barrier to the accessibility of the child support scheme. The Commonwealth Ombudsman commented that:

if the payee believes the CSA’s collection activity goes ‘too far’, he or she may be forced to consider leaving the child support system, either by moving to private collect, or even by ending the child support case altogether.⁷⁵

12.67 Finally, enforcement measures may prompt payers who use family violence to pressure or coerce payees to end CSA collection. As discussed above, payees may end enforcement of arrears by ending CSA collection of child support.

12.68 Child support payments in cases registered for CSA collection are ‘debts due to the Commonwealth’ and recoverable by the CSA.⁷⁶ The CSA may take action to pursue arrears in a number of courts, including state and territory magistrates courts, the Family Court or the Federal Magistrates Court.⁷⁷ The CSA is required, under s 47 of the *Financial Management and Accountability Act 1997* (Cth), to pursue recovery of all registered child support debts, unless the debt is ‘not legally recoverable’, or it is uneconomical to pursue its recovery.⁷⁸

12.69 Although the CSA takes these actions in its own right,⁷⁹ s 113(2) of the *Child Support (Registration and Collection) Act 1988* (Cth) provides that the CSA may take such steps it considers appropriate to keep a payee informed of CSA action to recover child support debts. Despite this provision, the Commonwealth Ombudsman reports that complaints it receives ‘from payees about CSA collection tend to reveal a pattern

72 Commonwealth Ombudsman, *Submission CFV 54*; ADFVC, *Submission CFV 53*; National Council of Single Mothers and their Children, *Submission CFV 45*; Council of Single Mothers and their Children, *Submission CFV 44*.

73 Commonwealth Ombudsman, *Submission CFV 54*.

74 ADFVC, *Submission CFV 53*.

75 Commonwealth Ombudsman, *Submission CFV 54*.

76 *Child Support (Registration and Collection) Act 1988* (Cth) ss 30(1), 113(1).

77 *Ibid* ss 113(1), 104. Parents may also take court action to enforce child support: *Child Support (Registration and Collection) Act 1988* (Cth) ss 113(1)(b)(ii), 113A.

78 See 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, [5.7.1]

79 *Child Support (Registration and Collection) Act 1988* (Cth) s 117(1).

of the CSA providing very little information to the payee about the steps taken to collect child support, for fear of breaching the payer's privacy'.⁸⁰ The Commonwealth Ombudsman submitted that the CSA should utilise s 113(2) to:

let payees know about particular collection activities, such as a [Departure Prohibition Order] or legal action, or the reasons for not pursuing such actions. While this information would be of particular concern to a victim of family violence, it also enables a payee to carefully consider whether it is in their interests to pursue collection from the payer through taking their own legal action. This would be of benefit to the general payee population.⁸¹

12.70 A recommendation to this effect would be beyond the Terms of Reference. The ALRC does, however, make the family violence-specific recommendation that the CSA should inform and consult with payees who have disclosed family violence of anticipated enforcement action. This enables the CSA to give effect to its policy aim to 'avoid, as far as possible, actions which could contribute to family violence'.⁸² For example, the CSA may defer enforcement action until the payee has taken protective steps to ensure his or her safety.

12.71 The ALRC also considers that referrals to a Centrelink social worker, or another expert service provider, should be made when a payee who has disclosed family violence elects to end CSA collection of child support arrears, as discussed above, or requests that the CSA terminate, or not begin, enforcement action. This may assist in ensuring that necessary supports and referrals are provided to the payee.

12.72 To complement these measures, the ALRC considers that the CSA should contact the payee to identify safety concerns before initiating court enforcement actions against the payer. Identifying safety concerns at this point, and on entry to the child support scheme, increases the likelihood that payees who may be put at risk by these actions are identified by the CSA.

12.73 Taken together, these measures should give payees at risk of family violence the opportunity to raise safety concerns, and to take necessary steps to protect their safety before enforcement action is initiated. These measures should also discourage victims from opting out of the child support scheme when they consider that CSA collection activity goes 'too far'.⁸³

12.74 The CSA may be unable to delay, terminate, or decide not to initiate recovery of debts in response to safety concerns due to the application of the *Financial Management and Accountability Act*. Nonetheless, the DHS submission reflects a level of flexibility in the administration of this provision:

Although there is a legal requirement to pursue collection, where family violence is an issue alternative action can be considered. In cases where family violence is identified, the Child Support program will contact the affected parent to advise them

80 Commonwealth Ombudsman, *Submission CFV 54*.

81 *Ibid.*

82 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].

83 Commonwealth Ombudsman, *Submission CFV 54*.

of the intended action and advise them of the options available, for example, electing to end collection or seeking an exemption from Centrelink.⁸⁴

12.75 Inserting an additional ground in s 47 of the *Financial Management and Accountability Act*, to the effect that debts may not be pursued where doing so may cause risks to safety, may better enable the CSA to meet its policy aim of avoiding actions which could contribute to family violence. While amendment of the *Financial Management and Accountability Act* is not within the ambit of this Inquiry, the ALRC suggests that the Australian Government give consideration to such an amendment.⁸⁵

Departure prohibition orders

12.76 The CSA may also make a departure prohibition order (DPO) against a child support debtor, preventing him or her from leaving Australia.⁸⁶ Such orders may be issued when a person owes child support, has not made arrangements for it to be paid, and has ‘persistently and without reasonable grounds’ failed to make payments.⁸⁷ A person may apply for a ‘Departure Authorisation Certificate’ to authorise him or her to leave the country.⁸⁸

12.77 Like CSA-initiated court action to recover child support debt, DPOs have the potential to increase risks for victims of family violence. In family violence cases, DPOs have the potential to inflame conflict and compromise safety. The Commonwealth Ombudsman has commented that it has received

at least one complaint about the CSA’s refusal to inform a payee whether it has issued a DPO. We consider that it is important for payees to be aware if a DPO has been issued so that, in cases of family violence, they can take measures to protect themselves.⁸⁹

12.78 Further, while there is no apparent mechanism for a payee to elect that a DPO be revoked, payers who have used violence may coerce or threaten a victim to request the CSA to revoke the DPO.

12.79 The ALRC therefore considers that the approach recommended above in relation to court recovery of debt is appropriate for cases in which DPOs may be, or have been, made against a payer. That is, the ALRC recommends that the CSA should:

- identify family violence-related safety concerns prior to initiating DPOs;
- consult with payees who have disclosed family violence, and consider concerns regarding the risk of family violence, prior to initiating DPOs;

84 DHS, *Submission CFV 155*.

85 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>.

86 *Child Support (Registration and Collection) Act 1988* (Cth) s 72D.

87 *Ibid* s 72D(c).

88 *Ibid* s 72K.

89 Commonwealth Ombudsman, *Submission CFV 54*.

- refer payees who have disclosed family violence to Centrelink social workers or other services providers when they request that the CSA terminate, or not commence, DPOs.

CSA-initiated private collection

12.80 Child support legislation provides that, in certain circumstances, the CSA may require payees to collect privately. This CSA-initiated action differs from others described in this chapter, as the *Child Support Guide* indicates that this provision will not be applied in cases involving family violence. This eliminates the need for pre-action consultation in cases where customers have disclosed family violence. The ALRC considers, however, that the existing policy safeguards to prevent the application of this provision in family violence cases may be improved.

12.81 Section 38B of the *Child Support (Registration and Collection) Act* provides that the CSA may require parents to collect privately where the payer has a 'satisfactory payment record' which is 'likely to continue'. The CSA must also be satisfied that a decision to end collection by the CSA is 'appropriate in relation to the liability'.⁹⁰ The *Child Support Guide* provides that it is inappropriate to require private collection where there has been a 'history of family violence', and where a person has 'previously been exempted from having to take reasonable maintenance action'.⁹¹ It is unclear how victims of family violence are identified where they have not previously obtained an exemption.

12.82 The Commonwealth Ombudsman stated that this provision has been 'used sparingly' by the CSA since its 1999 introduction, and that:

If the provision is currently being used, or if the CSA intends to use it in the future, we recommend that it only be considered after detailed discussion with the payee to identify any possible concerns about family violence and the practicality of a private collect arrangement.⁹²

12.83 Although the CSA-initiated private collection provision may be used rarely, while the legislative provision is in place, the ALRC considers that further measures are required to ensure that the CSA identifies payees who have experienced violence or have safety concerns. Recommendations regarding the identification of safety concerns at the initial stage of a child support case (and at other intervention points) and 'safety concern flags' partially address this issue as the CSA may check this status before initiating private collection.

12.84 The ALRC also considers that payees should be granted the opportunity to raise 'a history of family violence' and any family violence-related safety concerns with the CSA, before it initiates private collection. The ALRC therefore recommends that the CSA should take steps to identify family violence-related safety concerns prior to

90 *Child Support (Registration and Collection) Act 1988* (Cth) s 38B(1).

91 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, [5.6.2].

92 Commonwealth Ombudsman, *Submission CFV 54*.

requiring a payee to collect child support privately pursuant to s 38B(1) of the *Child Support (Registration and Collection) Act*.⁹³

Recommendation 12–1 The *Child Support Guide* should provide that the Child Support Agency should identify family violence-related safety concerns through screening, ‘risk identification’ or other methods, when a payee:

- (a) requests or elects to end a child support assessment; or
- (b) elects to end Child Support Agency collection of child support and/or arrears.

Recommendation 12–2 The *Child Support Guide* should provide that the Child Support Agency should refer a payee who has disclosed family violence, including a payee who receives no, or no more than, the base rate of Family Tax Benefit Part A, to a Centrelink social worker or expert service provider when he or she:

- (a) requests or elects to end a child support assessment;
- (b) elects to end Child Support Agency collection of child support; or
- (c) requests that the Child Support Agency terminate, or not commence, enforcement action or departure prohibition orders.

Recommendation 12–3 The *Child Support Guide* should provide that the Child Support Agency should contact a customer to identify family violence-related safety concerns through screening, ‘risk identification’ or other methods, prior to initiating significant action against the other party, including:

- (a) change of assessments (‘departure determinations’ under the *Child Support (Assessment) Act 1989* (Cth));
- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

Recommendation 12–4 The *Child Support Guide* should provide that, where a customer has disclosed family violence, the Child Support Agency should consult with the customer regarding his or her safety concerns, prior to initiating significant action against the other party, including:

- (a) change of assessments (‘departure determinations’ under the *Child Support (Assessment) Act 1989* (Cth));
- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

93 The ALRC proposed this in the Discussion Paper: Proposal 9–6.

Recommendation 12–5 The *Child Support Guide* should provide that the Child Support Agency should identify family violence-related safety concerns through screening, ‘risk identification’ or other methods, prior to requiring a payee to collect privately pursuant to s 38B of the *Child Support (Registration and Collection) Act 1988* (Cth).

Informal carers

Child support eligibility

12.85 Child support legislation limits the child support eligibility of carers who are not parents or legal guardians (‘informal carers’).⁹⁴ This limitation may be undesirable, and also potentially inconsistent with the objects set out in the child support legislation.⁹⁵ The ALRC recommends that the Australian Government should consider repealing the limitation that applies to informal carers’ child support eligibility.

12.86 Generally, parents and legal guardians are eligible for child support if they provide at least 35 % of care (‘shared care’) for a child. For a legal guardian who is not a parent, the CSA will rely on a court order providing that a child is to live with a non-parent carer to determine whether the carer is eligible for child support.⁹⁶ This rule applies to family law orders, and state and territory child protection orders where the carer is a relative of the child.⁹⁷

12.87 Pursuant to s 7B(2) of the *Child Support (Assessment) Act*, where an informal carer cares for a child without the consent of the parent or legal guardian, that person is not an eligible carer for child support purposes, unless it is unreasonable for a parent or legal guardian to care for the child. Section 7B(3) states that it is unreasonable for a parent or legal guardian to care for a child if the Registrar is satisfied that there is:

- (a) ‘extreme family breakdown’; or
- (b) ‘a serious risk to the child’s physical or mental wellbeing from violence or sexual abuse in the home of the parent or legal guardian concerned’.

94 This Report refers to non-parent carers and non-legal guardian carers as ‘informal carers’. This terminology is used within the family assistance framework, although it has slightly different meanings across different contexts.

95 The objects are set out in Ch 11.

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, [2.1.2].

97 *Child Support (Assessment) Act 1989* (Cth) s 26A provides that non-parent carers with care of a child under child protection legislation—that is foster carers or ‘formal’ carers—may only be eligible for child support where they are related to the child. Carers who care for children in accordance with child protection orders of South Australia, Western Australia, Norfolk Island, Christmas Island, or the Cocos (Keeling) Islands are not eligible carers: *Child Support (Assessment) Act 1989* (Cth) s 22; *Child Support Assessment Regulations 1989* (Cth) reg 4; 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, [2.1.2].

12.88 The *Child Support Guide* provides that the CSA will be satisfied that informal carers are eligible for child support when they establish that they have at least shared care of the child, unless the parent or legal guardian advises the CSA that they do not consent to the care arrangement.⁹⁸ When a parent or legal guardian advises of non-consent, the CSA will investigate to determine whether the informal carer is an eligible carer. The *Child Support Guide* states that the legislation implies that ‘if the parent does not agree to the care arrangements they must be prepared to provide care for the child’.⁹⁹

12.89 The *Child Support Guide* provides further details about when the CSA will be satisfied that there has been extreme family breakdown or serious risk to the child’s wellbeing. In relation to extreme family breakdown, the *Child Support Guide* provides the following broad criteria:

- the child has never lived with the parent; or
- there has been a substantial period since the parent has provided care for the child; or
- other circumstances indicate extreme family breakdown.¹⁰⁰

12.90 In relation to serious risk to a child’s wellbeing from violence or sexual abuse, the CSA will consider ‘the individual circumstances of each case, including any evidence provided’.¹⁰¹ It lists examples of evidence that may assist to substantiate a claim: police statements and reports; protection orders and applications for protection orders; and medical reports.¹⁰²

12.91 The *Child Support Guide* does not list neglect as an example of violence that may cause serious risk to a child, nor is it listed as a factor in determining ‘extreme family breakdown’.¹⁰³

The nature of informal care

12.92 Informal carers are usually relatives, and most commonly grandparents.¹⁰⁴ Indigenous children may live in informal kinship care arrangements,¹⁰⁵ and most

98 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, [2.1.1].

99 Ibid, [2.1.1].

100 Ibid, [2.1.1].

101 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, [2.1.1].

102 Ibid, [2.1.1].

103 Ibid, [2.1.1].

104 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, iv. The definition of informal carers used here captures carers who do not have child protection orders in place. These carers may or may not have family law orders. See also B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77.

105 See D Higgins, L Bromfield and N Richardson, *Enhancing Out-of-Home Care for Aboriginal and Torres Strait Islander Young People* (2005), prepared for the Australian Institute of Family Studies.

studies ‘indicate that the majority of informal kinship carers are grandparents’.¹⁰⁶ Other informal kinship carers may be aunts, uncles, older siblings and unrelated friends.¹⁰⁷

12.93 The Australian Bureau of Statistics (ABS) notes that, in 2009–2010, there were 16,000 Australian families in which grandparents were raising children 17 years and younger.¹⁰⁸ However, the number of non-parent carers in the child support scheme is relatively small: in December 2010 there were approximately 3,900 non-parent carers out of around 1,330,500 payers and payees in the scheme at that time.¹⁰⁹

12.94 There are a number of reasons why children may be in their grandparents’ care, including: family violence; drug or alcohol misuse; child abuse or neglect; incarceration or death of a parent; and problems arising from mental or physical illness or intellectual disability.¹¹⁰ In some instances, several of these factors may be interrelated. Consequently, some children in informal care are particularly vulnerable, and may ‘exhibit a range of traumatised behaviour problems’, or have health problems.¹¹¹

12.95 Where parents cannot care for their children, there are benefits to relatives such as grandparents caring for children. These benefits have been described as ‘reducing separation trauma, providing greater stability, preserving significant attachments, reinforcing cultural identity, and preserving the family unit’.¹¹²

12.96 However, caring for children has a significant impact on grandparents—including financially. Emma Baldock notes that this

puts stress on families who may already be on a low income. When grandparents take over the care of children they will have additional expenses—clothing, bedding, home modifications and perhaps even extensions.¹¹³

12.97 Grandparents may spend their retirement savings and superannuation on raising their grandchildren, and may find their ‘employment and retirement plans thrown into chaos’.¹¹⁴ They may be forced to give up work to look after the children, or conversely, may need to keep working beyond their planned retirement date due to a lack of financial assistance from the government and the parents.¹¹⁵ Limited financial

106 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, vii.

107 *Ibid.*, vi.

108 Australian Bureau of Statistics, *Family Characteristics, Australia*, 4442.0 (2009–10).

109 FaHCSIA, *Correspondence*, 14 April 2011.

110 E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ (2007) (76) *Family Matters* 70; B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77; Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [3.3.1], [5.3], [6.5.2].

111 Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.3.2], [6.5.4].

112 B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77.

113 E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ (2007) (76) *Family Matters* 70, 75.

114 Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.2.2].

115 *Ibid.*, [6.2.2].

resources and high legal costs may impede them from obtaining court orders regarding children's care arrangements.¹¹⁶

The limitation may be unjustified and undesirable

12.98 The limitation on child support eligibility may disadvantage informal carers, and also appears inconsistent with the principal object of the *Child Support (Assessment) Act*, which provides that children should receive a proper level of financial support from their parents.¹¹⁷ It is also arguably inconsistent with other objects of the Act, including that carers should have levels of financial support for children 'readily determined without the need for court proceedings'.¹¹⁸ A recommendation to repeal the limitation is beyond the scope of this Inquiry. However, the ALRC recommends that the Australian Government consider such a repeal.

12.99 Prior to 2001, parent and legal guardian consent was not required for a child support assessment in favour of an informal carer. The limitation on non-parent carers' child support eligibility was introduced by the *Child Support Legislation Amendment Act 2001* (Cth). The Explanatory Memorandum expressed the following rationale for the change:

The child support scheme should not be seen to condone or assist the breakdown of families. Accordingly, this measure will generally provide that carers who are not parents or legal guardians of a child cannot be eligible carers, and therefore cannot get child support, if a parent or legal guardian has not consented to the arrangement. However, if it is unreasonable for the child to live at home because of extreme family breakdown or because of a serious risk to the child's physical or mental wellbeing from violence or sexual abuse at home, the carer can be an eligible carer.¹¹⁹

12.100 The Commonwealth Ombudsman, referring to the Explanatory Memorandum, has suggested that the legislative limitation on informal carers' entitlement is an exception to the principal object of the *Child Support (Assessment) Act*, as it is:

a measure enacted to give a parent a veto right over a child being cared for by a non-parent carer in some circumstances, rather than one intended to ensure that the safety of a child would be paramount, or to ensure that a parent would continue to contribute to a child's support irrespective of where the child resides. While it could be argued that this would reduce the incentive for a child to leave home against his or her parent's (reasonable) wishes, it nevertheless means that a parent will not be required to contribute to the child's support while the child lives elsewhere.¹²⁰

116 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, 71: 'Grandparents who do pursue permanency through the courts often find that the process is enormously expensive'.

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

118 *Ibid* s 4(2)(c). See also s 4(2)(d).

119 Explanatory Memorandum, *Child Support Legislation Amendment Bill 2001* (Cth), sch 9.

120 Commonwealth Ombudsman, *Submission CFV 54*. See also National Legal Aid, *Submission CFV 81* and Bundaberg Family Relationship Centre, *Submission CFV 04*. The Ombudsman also stated that it is confusing to have two sets of rules for determining child support eligibility—the rules regarding informal carers do not apply in the family assistance framework, so informal carers who are not entitled to child support may receive FTB for a child.

12.101 In the Discussion Paper, the ALRC proposed that the limitation on the child support eligibility for non-parent carers should be repealed. In its response, DHS expressed concern that repealing the limitation

could potentially allow individuals who are not providing any real care to apply for a child support assessment, for example, when children are older their friends could attempt to apply as their carers.¹²¹

12.102 DHS also expressed the view that the limitation is consistent with the objects of the legislation—and of the scheme as settled by DHS and FaHCSIA. It noted that one of these objects is to ‘emphasise parental responsibility (not limited to financial) where there is no risk to the child’.¹²² This object is not listed amongst the objects of the child support legislation.

12.103 As noted above, a recommendation to repeal the limitation is beyond the scope of this Inquiry. While such legislative change may affect informal carers of children who have experienced family violence, it would also affect a broader population of informal carers. Indeed, it is likely to be most relevant to those providing informal care for reasons unrelated to family violence, as family violence cases may already be captured by the ‘serious risk’ exception in s 7B(3) of the *Child Support (Assessment) Act*. Whether s 7B(3) adequately captures cases where children experience family violence in their parents’ home is another issue, and is considered below.

12.104 Although the ALRC does not make a recommendation to repeal the limitation, there may be merit in doing so. The limitation may be generally undesirable, given that evidence suggests that informal care is usually provided for by relatives—grandparents in particular—and that, when parental care breaks down, children benefit significantly by being raised by relatives. Further, the limitation may further disadvantage informal carers already facing financial disadvantage caused or compounded by unplanned-for child-raising. There is also an apparent discrepancy between the limitation and the principal object of the *Child Support (Assessment) Act*. For these reasons, the ALRC recommends this issue should be further considered by the Australian Government.¹²³

121 DHS, *Submission CFV 155*. Generally, with the exception of the Commonwealth Ombudsman, this approach did not attract support in submissions: Commonwealth Ombudsman, *Submission CFV 54*.

122 DHS, *Submission CFV 155*.

123 A relevant factor in making this recommendation is that the reasonable maintenance action requirement, discussed in Chs 11 and 13, does not apply to informal carers: FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.60]. The ALRC considers that application of the reasonable maintenance action requirement to informal carers may also contribute to financial disadvantage.

Broader criteria for eligibility

12.105 If the limitation is to be maintained in the legislation, the criteria in s 7B(3)(b) of the *Child Support (Assessment) Act* require amendment.¹²⁴ The threshold provided by the s 7B criteria—in the absence of parent or legal guardian consent to the care or ‘extreme family breakdown’—is inappropriately high. Several stakeholders have commented that this is a barrier to child support for informal carers.¹²⁵ For example, NLA stated that the requirements of ‘serious’ risk and ‘extreme’ family breakdown may present ‘too high a barrier’ to child support for informal carers, leaving them ‘the very challenging option of either withdrawing their support for the child or suffering financial hardship’.¹²⁶

12.106 In the ALRC’s view, the term ‘violence’ should be accompanied by ‘family violence’ in s 7B(3)(b). ‘Family violence’ captures a wider range of conduct than ‘violence’, insofar as that conduct is violent, threatening, controlling, coercive or engenders fear. Examples of conduct contained in the family violence definition that may not be caught by ‘violence’ include psychological or emotional abuse, deprivation of liberty, and exposing a child to family violence. This approach is complemented by Recommendations 3–1 and 3–2, which set out a definition of family violence for child support legislation.

12.107 The section is also too limited in relation to child abuse and neglect of a child, which are not expressly included in s 7(3)(b). The provision takes into account physical abuse of a child—caught by ‘violence’—and sexual abuse. The ALRC considers this section should be amended to expressly include child abuse and neglect.

12.108 The ALRC also considers that the ‘serious risk’ element of s 7B(3) is inappropriate. For an informal carer to be eligible for child support on the basis of violence or sexual abuse in the parents’ or legal guardians’ home, the CSA must also be satisfied that this puts a child’s wellbeing at serious risk of harm. This requires judgment as to whether there is risk of harm, and whether such a risk is serious. The requirement for such judgment implies that child abuse, family violence and neglect may not harm children’s physical or mental wellbeing in some cases. In the ALRC’s view, the very fact, or risk, of child abuse, family violence and neglect, should trigger child support eligibility for the child’s new carers, without the need to prove that such conduct had a certain effect on the child.

12.109 The ALRC therefore recommends that s 7B(3)(b) should be amended to:

- expressly take into account circumstances where there has been, or there is a risk of, family violence, child abuse and neglect; and

124 The form of the amendments recommended by the ALRC were supported by WEAVE and NLA: National Legal Aid, *Submission CFV 164*; WEAVE, *Submission CFV 85*. See also FaHCSIA, *Submission CFV 162*. The Lone Fathers Association cautioned that the provisions should be ‘handled with care’: Lone Fathers Association Australia, *Submission CFV 109*. DHS preferred this approach to the repeal of the limitation on informal carers’ child support eligibility: DHS, *Submission CFV 155*.

125 National Legal Aid, *Submission CFV 81*; Sole Parents’ Union, *Submission CFV 52*; Bundaberg Family Relationship Centre, *Submission CFV 04*.

126 National Legal Aid, *Submission CFV 81*.

- remove the requirement for the Registrar to be satisfied of ‘a serious risk to the child’s physical or mental wellbeing’.

12.110 NLA submitted that the CSA should provide legal referrals for carers in these circumstances.¹²⁷ The ALRC agrees that such referrals are appropriate. The recommendations in Chapter 4 should facilitate the identification of family violence, when informal carers apply for child support, and the provision of appropriate referrals when family violence is disclosed.

Recommendation 12–6 Section 7B(2)–(3) of the *Child Support (Assessment) Act 1989* (Cth) limits child support eligibility to parents and legal guardians, except in certain circumstances. The Australian Government should consider repealing s 7B(2)–(3) of the *Child Support (Assessment) Act 1989* (Cth).

Recommendation 12–7 The *Child Support (Assessment) Act 1989* (Cth) provides that, where a parent or legal guardian of a child does not consent to a person caring for that child, the person is ineligible for child support, unless the Registrar is satisfied of ‘extreme family breakdown’ (s 7B(3)(a)); or ‘serious risk to the child’s physical or mental wellbeing from violence or sexual abuse’ in the parent or legal guardian’s home (s 7B(3)(b)). The Australian Government should amend s 7B(3)(b) of the *Child Support (Assessment) Act 1989* (Cth) to:

- (a) expressly take into account circumstances where there has been, or there is a risk of, family violence, child abuse and neglect; and
- (b) remove the requirement for the Registrar to be satisfied of ‘a serious risk to the child’s physical or mental wellbeing’.

127 National Legal Aid, *Submission CFV 164*.