

6. Social Security—Relationships

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Summary

6.1 The ALRC has identified a number of issues relevant to the safety of victims of family violence in Commonwealth social security law and practice. This chapter considers how family violence may have implications in relation to how relationships are defined—for example, whether a person is considered to be a ‘member of a couple’ or ‘independent’.

6.2 As discussed in Chapter 5, a social security payment can only be made if the person is qualified and the payment is payable. Further, that a higher rate of payment is provided to singles than to a person who is a ‘member of a couple’ assumes that costs are shared between members of a couple and therefore it costs more for a person who is single. This principle forms part of the ‘bedrock’ of social security law in Australia.

6.3 Whether a person is a ‘member of a couple’ or ‘independent’ can affect a person’s qualification for a social security payment—for example, as an actual condition for qualification for Parenting Payment (Single) and Widow Allowance¹—and the rate of a social security payment.² Generally, being regarded as ‘single’ or ‘independent’ attracts a higher rate of payment in recognition that living costs are higher for a person living alone. A decision that a person is a ‘member of a couple’ may result in the refusal, cancellation or reduction of his or her social security payments. It may also lead to a debt being raised against a person which may be pursued through court proceedings.

1 *Social Security Act 1991* (Cth) s 408BA (Widow Allowance), s 500 (Parenting Payment).

2 Commonwealth Ombudsman, *Marriage-Like Relationships: Policy Guidelines for Assessment Under Social Security Law* (2007).

6.4 Family violence may be of particular relevance in determining whether a person is a ‘member of a couple’, ‘living separately and apart under one roof’, or ‘independent’. The way in which a decision about a person’s relationship status is made in the social security context, and the relevance of family violence in making that decision, is discussed below. The issue of family violence and debt is considered in Chapter 8.

6.5 The ALRC considers that relationships are inherently difficult to define, but recognises that the effect of family violence is not always considered in relationship decisions in the social security context. The ALRC therefore makes a number of proposals to ensure that the impacts of family violence are expressly considered in relationship decisions in social security law through amendment to the *Guide to Social Security Law*.

Member of a couple

Section 4 criteria

6.6 Section 4(2) of the *Social Security Act 1991* (Cth) defines ‘member of a couple’ to include persons formally married and persons of the opposite sex who are, in the opinion of the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), in a ‘de facto relationship’—previously, a ‘marriage-like relationship’.³ There are exceptions. Section 4(2)(a) excludes people who are ‘living separately and apart’; and s 24 allows persons who otherwise would be treated as a ‘member of a couple’ to be considered ‘single’ for a ‘special reason’⁴—these are discussed separately below.

6.7 Section 4(3) of the *Social Security Act* provides that, in deciding whether a person is a ‘member of a couple’, consideration is to be given to ‘all the relevant circumstances of the relationship’. In particular, regard must be had to a detailed range of criteria which include:

- the financial aspects of the relationship;⁵
- the nature of the household;⁶
- the social aspects of the relationship (including whether the persons hold themselves out as married to each other);⁷
- any sexual relationship between the persons;⁸ and

3 The reference to ‘de facto relationship’ replaced a ‘marriage-like relationship’ in November 2008. The test under s 4 remained the same. See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform Act) 2008* (Cth).

4 See also, *Social Security Act 1991* (Cth) s 4(6); L Sleep, K Tranter and J Stannard, ‘Cohabitation Rule in Social Security Law: The More Things Change the More They Stay the Same’ (2006) 13 *Australian Journal of Administrative Law* 135.

5 *Social Security Act 1991* (Cth) s 4(3)(a).

6 *Ibid* s 4(3)(b).

7 *Ibid* s 4(3)(c).

8 *Ibid* s 4(3)(d).

- the nature of the commitment to each other.⁹

6.8 These criteria are points for the decision maker to consider and give weight to.¹⁰ They are not a checklist of circumstances that must be met in all cases,¹¹ nor a balance test where a relationship has to satisfy the majority of criteria.¹² They provide a core of what needs to be investigated, but do not close off the circumstances of a relationship from investigation.

It is possible a decision-maker might decide that the individual is a member of the couple even though she does not satisfy all or even the majority of the criteria. Conversely, many of the indicia ... might be present yet the circumstances as a whole might justify the conclusion that the couple live separately and apart.¹³

6.9 Detail is provided in the *Guide to Social Security Law* as to what type of information may be relevant to each criterion in s 4(3). Relevantly, in relation to the criterion of the ‘nature of the commitment to each other’, the *Guide to Social Security Law* provides that information about ‘domestic violence’, such as ‘court documentation ... may indicate the absence of commitment and/or emotional support’.¹⁴

6.10 Some interpretative guidance is also provided by case law. In a case considering whether the Administrative Appeals Tribunal (AAT) failed to have regard to extensive violence when considering whether a person was ‘living separately and apart’ under s 4(3) of the *Social Security Act*, Riethmuller FM stated that:

Family violence must be a significant consideration when determining whether parties are members of a couple: it strikes at the very heart of the concept of ‘companionship and emotional support’ to each other. It is difficult to conceive of a case involving significant family violence, that would not require such violence to be carefully considered in the context of determining the nature of the parties’ commitment to each other, and in particular the nature of their emotional support.¹⁵

6.11 As discussed in Chapter 5, the *Guide to Social Security Law* is updated regularly to reflect changes in government policy and legislative interpretation. However, the decision in *Kozarova* is yet to be incorporated.

6.12 Some scholars have noted that the criteria in s 4(3) and its interpretation by decision makers can lead to a ‘nebulous account of a de facto relationship’ due to the broad criteria and their flexible application.¹⁶ The Commonwealth Ombudsman has also noted that it is not unusual for a decision maker’s own experiences and values to

⁹ Ibid s 4(3)(e).

¹⁰ Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.5.10] (Determining a De Facto Relationship); *Re Secretary, Department of Family & Community Services and Bell* [2000] AATA 252.

¹¹ *Re Pill and Secretary, Department of Family and Community Services* (2005) 81 ALD 266, 272.

¹² *Stauton-Smith v Secretary, Department of Social Security* (1991) 25 ALD 27.

¹³ *Re Cahill and Secretary, Department of Family and Community Services* [2005] AATA 1147 at [22].

¹⁴ Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.5.10] (Determining a De Facto Relationship).

¹⁵ *Kozarova v Secretary, Department of Education, Employment and Workplace Relations* [2009] 888 888.

¹⁶ L Sleep, K Tranter and J Stannard, ‘Cohabitation Rule in Social Security Law: The More Things Change the More They Stay the Same’ (2006) 13 *Australian Journal of Administrative Law* 135.

weigh into the decision-making process.¹⁷ As stated by French J in *Pelka v Department of Family and Community Services*:

The judgment to be made is difficult and, once out of the range of obvious cases falling within the core concept of ‘marriage-like’, will be attended by a degree of uncertainty. Indeed, it may be that different decision-makers on the same facts could quite reasonably come up with different answers.¹⁸

Submissions and consultations

6.13 In the *Family Violence and Commonwealth Laws Issues Paper—Social Security Law*, Issues Paper 39 (2011) (Social Security Issues Paper), the ALRC noted concerns that had been expressed about possible underlying assumptions of a decision maker that may disregard family violence and its potential impact on a victim’s decisions, such as:

- economic abuse may obviate consent to the ‘significant pooling of financial resources’;
- patterns of violence and lack of alternative accommodation may mean that a person has no choice but to remain in the same house;
- secrecy associated with family violence may mean that a person continues to hold themselves out as a member of a couple;
- violence in a relationship may negate consent for ‘any sexual relationship between the people’; and
- there may be a correlation between the length of the relationship and the degree of violence.¹⁹

6.14 The ALRC asked whether the criteria in s 4(3) of the *Social Security Act* for determining whether a person is a ‘member of a couple’ should be amended to take into account the existence and effect of family violence.

6.15 Most stakeholders supported amending the criteria in s 4(3) of the *Social Security Act* to take account of the existence and effect of family violence.²⁰ In doing so, stakeholders expressed a range of concerns with the current criteria in s 4(3) and their application by decision makers.

17 Commonwealth Ombudsman, *Marriage-Like Relationships: Policy Guidelines for Assessment Under Social Security Law* (2007).

18 *Re Pelka and Secretary, Department of Family and Community Services* [2006] FCA 735.

19 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011); P Eastal and D Emerson-Elliott, ‘Domestic Violence and Marriage-Like Relationships’ (2009) 34(3) *Alternative Law Journal* 173; T Carney, ‘Women and Social Security/Transfer Payments Law’ in P Eastal (ed), *Women and the Law in Australia* (2010) 424.

20 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

Concerns with s 4 criteria

6.16 An overarching concern raised by the North Australian Aboriginal Justice Agency (NAAJA) related to the principle that different rates of payment are available for couples and singles.²¹

6.17 Other concerns specific to the s 4(3) criteria included concerns in relation to the ‘pooling of financial resources’. One stakeholder considered that due to the ‘high incidence of economic abuse in family violence’, the ‘automatic treatment of financial resources in a couple as pooled should not occur’, but rather the assumption should be ‘reversed in instances of family violence’.²²

6.18 Further concerns were expressed in relation to the criteria concerning the ‘nature of the commitment to each other’. The Council of Single Mothers and their Children (CSMC) and the Homeless Persons Legal Service submitted that the current reference in the *Guide to Social Security Law* to consider evidence of domestic violence as an indication of the absence of commitment and/or emotional support, ‘does not give adequate weight to the existence of family violence in determining whether a person is a member of a couple’.²³

6.19 The Welfare Rights Centre NSW and NAAJA also raised concerns that information about family violence—such as police reports—have been used to demonstrate the existence of a couple relationship, rather than finding that one did not exist.²⁴ The following case study demonstrates this concern:

Case Study

Jessica had four children to her ex-partner Trevor. They had never lived together, and her relationship with Trevor was one marred by violence and fear. She was afraid of him because he had been violent and because he was a regular drug user who she did not trust alone around her children. For this reason she usually went to Trevor’s house herself with the children when he wanted to see them.

In March 2010 Jessica’s Parenting Payments were cancelled on the basis that she and Trevor were members of a couple from November 2000. Debts were raised of Parenting Payment and Family payments totalling \$127,000. She appealed the decision about her membership of a couple to an Authorised Review Officer.

The Authorised Review Officer’s decision listed a number of aspects of the relationship that indicated that Jessica and Trevor were not members of a couple, including their own statements, Department of Housing information, employer information with no reference to one another, and loan applications and financial documents indicating separate finances. The decision then listed other aspects of the relationship which indicated that Jessica and Trevor were members of a couple, including:

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- 21 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.
 22 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.
 23 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.
 24 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

- ‘the descriptions by the attending officers of your relationship with Trevor provided in the police reports during the period 2000 to 2009 which describe you as being in a long term de facto relationship.
- the information you and Trevor provided to the police in relation to the incidents which resulted in the police reports being made.’
- Jessica appealed the decision to the Social Security Appeals Tribunal, who examined the nature of the disagreements as referred to in the police reports which suggested that they were living together, for example:
- ‘the POI [person of interest] returned intoxicated. The POI began to argue with the victim as she had called him twice while he was at the pub to remind him to pick up milk.’
- ‘the victim told police arguments were about small and petty things for example her spending too much time in the bathroom.’

The SSAT found that on the total picture of the relationship, Jessica and Trevor were living as members of a couple from 2000 onwards. The Tribunal referred to the extensive police reports documenting the couple’s relationship as being one of six factors that persuaded them as to the existence of a relationship.²⁵

Legislative amendment

6.20 In a joint submission, Professor Patricia Easteal and Professor Derek Emerson-Elliott considered that the *Social Security Act* should be amended to require the decision maker to be ‘satisfied that both members have a reasonable equality of power in the partnership, or that if it is a dominant/submissive partnership the submissive member retains the capacity to validly consent to the partnership’.²⁶

6.21 On the other hand, the Welfare Rights Centre Inc Queensland considered it more appropriate and effective to amend s 24 of the *Social Security Act* in relation to the discretion to decide that a person is not a ‘member of a couple’. The Welfare Rights Centre Inc Queensland argued that, while ‘section 4 provides a definition of what a member of a couple is, section 24 allows for a decision maker to state what a member of a couple is not’.²⁷ However, as discussed below, Easteal and Emerson-Elliott considered that any amendment to s 24 would only be a ‘band-aid solution’.²⁸

6.22 An alternative submitted by one stakeholder was that research be conducted to ‘investigate and document the ways in which economic/financial abuse interact with income security, in particular in the Australian context’.²⁹

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

26 P Easteal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

28 P Easteal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

29 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

Amendment to the Guide to Social Security Law

6.23 Most stakeholders who responded to this question also agreed that further guidance should be provided in the *Guide to Social Security Law* about how the existence of family violence may affect each of the criteria in s 4(3).³⁰

6.24 In particular, the Welfare Rights Centre NSW submitted that such guidance ‘may be supported by reference to the principles enounced in *Kosarova*’ and should provide that the decision maker ‘consider the impact of extreme violence on the nature of the household (s 4(3)(b)) and the nature of the parties’ commitment to each other (s 4(3)(e))’.³¹

ALRC’s views***Underlying premise***

6.25 In the ALRC’s report, *Equality Before the Law: Justice for Women* (ALRC Report 69), the ALRC considered that the assumption that couple relationships will provide equal financial support for the people in that relationship is inaccurate and that there is a need to address entitlement to income independently.³²

6.26 While concerns have been raised as to the underlying premise of ‘member of a couple’, it is beyond the ALRC’s Terms of Reference to consider this at large. The underlying notion of financial interdependence, and that singles require more money to enjoy the same living standard as couples, is systemic across the social security system. To reverse this assumption for victims of family violence and not for others would result in a two-tiered structure within the social security system.

Flexibility versus consistency

6.27 In any decision-making process, the ALRC considers that it is important that there is flexibility—to ensure that law and policy is responsive to individual circumstances (the theme of self-agency and autonomy described in Chapter 2)—but also consistency, to provide a level of certainty that like circumstances will be considered in a like manner.

6.28 It is inherently difficult to define, in precise terms, what constitutes a relationship. Some relationships, while unpleasant, do not necessarily involve family violence.

30 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

32 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, Report 69 (1994), [12.17].

6.29 The criteria contained in s 4AA of the *Family Law Act 1975* (Cth) and s 22C of the *Acts Interpretation Act 1901* (Cth) for defining a ‘de facto relationship’ are similar to those in s 4(3) of the *Social Security Act*, thereby providing a level of consistency in the interpretation of ‘de facto relationships’ across Commonwealth laws.

6.30 While the current criteria in s 4 for determining a couple relationship can lead to ‘nebulous’ results, it also allows flexibility in decision-making by providing a non-exhaustive list of criteria, with no fixed determination as to the weight to be placed on each criteria, and the circumstances of the whole relationship still to be considered.

6.31 The current criteria do not preclude consideration of family violence, but rather it is a question of practice and guidance provided to decision makers in applying s 4(3) to a particular set of circumstances. Yet, despite this flexibility, the ALRC agrees with stakeholders that the criteria in s 4(3) need to reflect more accurately the nature and effect of family violence on the criteria used to determine couple relationships. The ALRC is concerned that decision makers are not expressly directed as to how family violence may be relevant to the criteria in s 4(3) of the *Social Security Act*, which may, in turn, lead to decisions that do not reflect the true nature of the relationship. This is of particular concern in circumstances of economic abuse where the victim of family violence is prevented from accessing shared finances yet cannot access the higher ‘single’ rate of payment, which may enable the victim to leave a violent relationship.

System integrity

6.32 A tension also exists between reflecting the true nature of a relationship and ensuring unintended consequences do not flow from changing the criteria on which a couple relationship is determined—the theme of ‘fairness’, discussed in Chapter 2. The ALRC envisages that amending the criteria in s 4(3) may lead to unintended consequences for both the victim of family violence and the social security system.

6.33 For example, for victims of family violence, a determination that a person is not a member of a couple in social security law may arguably be used in other areas of law such as child support, under Commonwealth law and intestacy, under state and territory law.

6.34 Amending the s 4(3) criteria may also create an incentive for false or manipulated claims of family violence, thereby detracting from the overall purpose of social security law—to provide for those in genuine need. In other words, if claiming family violence is seen as a way of claiming a ‘single’ rate of payment, some may seek to falsify a claim of family violence. Accordingly, the ALRC considers that the level of verification of family violence in ‘member of a couple’ decisions should be appropriately high—as discussed in Chapter 5.

6.35 The ALRC therefore does not propose to amend the criteria contained in s 4(3) of the *Social Security Act*. To do so may lead to unintended consequences, diminish flexibility in decision-making and create inconsistencies with other Commonwealth laws. Rather, the ALRC’s preliminary consideration is that it is more appropriate to provide additional guidance to decision makers through further information about the effect of family violence on ‘member of a couple’ decisions in the *Guide to Social*

Security Law. By directing decision makers to consider how family violence affects a victim's decisions, actions and inactions, will improve the way in which family violence is considered in 'member of a couple' decisions. The ALRC makes further proposals in relation to s 24 of the *Social Security Act*, considered below.

Proposal 6–1 The *Guide to Social Security Law* should be amended to reflect the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

Proposal 6–2 Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

Separation under one roof

6.36 A person is considered not to be a 'member of a couple' where 'living separately and apart' from the other person on a permanent or indefinite basis.³³ Where a person is assessed as 'living separately and apart', a person is deemed to be single and paid a single rate of income support.³⁴

6.37 Generally, a physical separation as well as an emotional separation of the couple is required.³⁵ They must establish that: they are living apart either permanently or indefinitely, and there has been an 'estrangement or breakdown in their relationship'.³⁶ The *Guide to Social Security Law* recognises that there may be instances where a person is 'living separately and apart under one roof',³⁷ but one or both parties must 'form the intention to sever or not to resume that relationship and act on that intention'.³⁸

6.38 Neither the *Social Security Act* nor the *Guide to Social Security Law* provides family violence as an example of where people may be 'living separately and apart under one roof'. Rather, a decision maker is directed to consider the five criteria in s 4(3) of the *Social Security Act* to determine whether a person is in a couple relationship or separated under one roof.³⁹

6.39 The *Guide to Social Security Law* provides, however, that the consideration of the criterion of 'the nature of the commitment to each other' and the degree they have

33 *Social Security Act 1991* (Cth) ss 4(3), 4(3A); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.5.20] (Determining Living Separately & Apart).

34 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.5.20] (Determining Living Separately & Apart).

35 *Ibid.*, [2.2.5.20] (Determining Living Separately & Apart).

36 *Ibid.*, [2.2.5.20] (Determining Living Separately & Apart).

37 *Ibid.*, [2.2.5.30] (Determining Separation Under One Roof).

38 *Ibid.*, [2.2.5.30] (Determining Separation Under One Roof).

39 *Ibid.*, [2.2.5.30] (Determining Separation Under One Roof).

made to distance themselves physically and emotionally, includes whether there has been a withdrawal of intimacy, companionship and support to the other party.⁴⁰

6.40 The *Guide to Social Security Law* also indicates that in circumstances of ‘domestic violence’, different ‘evidentiary’ requirements may apply.⁴¹ This is discussed further in Chapter 5.

Submissions and consultations

6.41 In the Social Security Issues Paper, the ALRC asked whether, in practice, family violence is adequately considered in determining separation under one roof and, if not, how family violence should be taken into consideration.⁴²

6.42 Most stakeholders who responded to this question indicated that determination of separation under one roof was not made consistently.⁴³ Stakeholders provided examples of difficulties faced by victims of family violence in proving separation under one roof such as:

- where a person has obtained an Apprehended Violence Order (AVO) and the person using family violence breaches the AVO and returns to the home;⁴⁴
- lack of refuge accommodation and the desire to give children some stability can mean it is hard to leave and the fear that if they leave the relationship, and do not have stable accommodation, they may lose custody of their children to the person using family violence;⁴⁵ and
- dependency by people with disability on their partner for physical and financial assistance may lead to a finding that they are still in a relationship.⁴⁶

6.43 In addition, the Sole Parents’ Union submitted that victims of family violence were not always aware that a person could be separated under one roof and that it can be difficult to prove, ‘particularly given the element of control by the perpetrator’:

Every time I tried to leave he’d threaten that he’d take the kids away from me. He told me that no court would award me custody if I didn’t have somewhere to live and there was no way he was going to leave the house. I didn’t even know you could be separated if you were still living together.⁴⁷

40 Ibid, [2.2.5.30] (Determining Separation Under One Roof).

41 Ibid, [2.2.5.30] (Determining Separation Under One Roof).

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

43 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

44 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

45 Ibid.

46 ADFVC, *Submission CFV 71*, 11 May 2011.

47 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

6.44 Consequently, most stakeholders submitted that family violence should be considered when determining separation under one roof,⁴⁸ and in particular:

the impacts of family violence on victims, including financial abuse, and other environmental and social factors that may prevent a victim from leaving, such as the extreme public housing shortage in some locations and the high cost of private rental.⁴⁹

ALRC's views

6.45 As discussed above, the criteria in s 4(3) of the *Social Security Act* are reflected in other Commonwealth laws, enable flexibility in decision-making and, if amended, may lead to unintended consequences. For the reasons stated above, the ALRC does not propose to amend the criteria in s 4(3). However, because of difficulties faced by victims of family violence in proving separation under one roof, the ALRC considers that decision makers need more guidance on how family violence may affect determinations that a person is living separately and apart under one roof.

6.46 At the time of writing, s 4(3A) of the *Social Security Act* does not provide any examples of when a person is living separately and apart. This detail is provided in the *Guide to Social Security Law*. Again, this provides flexibility in decision-making and—on its face—does not preclude a decision maker from considering family violence. If s 4(3A) included family violence as an example, other examples would also need to be included. It may also lead to inflexible decision making and create an incentive to claim family violence in order to access a higher 'single' rate of payment.

6.47 Accordingly, the ALRC proposes that further guidance be provided to decision makers in the *Guide to Social Security Law* to ensure that family violence is adequately considered in determining whether a person is living separately and apart under one roof. As discussed previously, such an amendment would provide direction to decision makers as to how family violence affects a victim's decision to stay or leave a violent relationship such as financial abuse and other social and economic factors that may prevent a victim from leaving a violent relationship.

6.48 The ALRC is also concerned that some victims of family violence may be unaware of the ability to claim 'living separately and apart under one roof'. As such, the ALRC considers that information about this should be included in Proposal 4–8.

Proposal 6–3 The *Guide to Social Security Law* should be amended expressly to include family violence as a circumstance where a person may be living separately and apart under one roof.

48 ADFVC, *Submission CFV 71*, 11 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

49 ADFVC, *Submission CFV 71*, 11 May 2011.

‘Special reason’

6.49 The Secretary of FaHCSIA has a discretion, under s 24 of the *Social Security Act*, to rule that, for a ‘special reason’ in the particular case, a person should not be treated as a ‘member of a couple’. The *Guide to Social Security Law* states that s 24 is intended to be an ‘option of last resort and should only be applied when all other reasonable means of support have been explored and exhausted’.⁵⁰ When the discretion under s 24 is applied and a person is determined not to be a member of a couple, the person is: treated as a ‘single’ person for all purposes of the *Social Security Act*; paid the single rate of payment; and ‘only their individual income and assets are included in the assessment of the rate of their payment’.⁵¹

Unusual, uncommon or exceptional

6.50 The *Guide to Social Security Law* states that the ‘special reason’ must be ‘unusual, uncommon or exceptional’—that is, there must be something unusual or different to take the matter the subject of the discretion out of the ordinary course.⁵² The discretionary power must also be exercised for the purpose for which it was conferred—that is, to make provision for those who are in genuine need.⁵³

6.51 The *Guide to Social Security Law* directs the decision maker to consider three questions while also looking at the full circumstances of the case:

- Is there a special reason to be considered in this couple’s circumstances?
- Is there a lack of being able to pool resources for the couple as a result of the circumstances?
- Is there financial difficulty as a result of the couple’s circumstances?

6.52 While the *Guide to Social Security Law* considers some common scenarios,⁵⁴ it does not provide family violence as an example of where the discretion might be exercised. However, a number of cases demonstrate how family violence has been considered by decision makers in exercising the discretion under s 24.

6.53 In *Perry and Department of Family and Community Services*, the AAT found that a longstanding history of family violence did not amount to a ‘special reason’ under s 24, as the applicant was not prevented by some external force from separating from the person using family violence.⁵⁵

50 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011 [2.2.5.50] (Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason).

51 *Ibid.*, [2.2.5.50] (Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason).

52 *Boscolo v Secretary, Department of Social Security* [1999] FCA 106.

53 *Re Secretary, Department of Social Security and Porter* (1997) 48 ALD 343.

54 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.5.50] (Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason).

55 *Perry and Department of Family and Community Services* [2001] AATA 282 (9 April 2001).

6.54 Similarly, in *Lynwood and Secretary, Department of Education, Employment and Workplace Relations*, the applicant was seen to have suffered from family violence over a long period from her husband. While her husband did not help in any way with the raising of 11 children, this was not seen as ‘something unusual or different to take the matter the subject of the discretion out of the ordinary course’.⁵⁶ Other cases have been determined in a similar manner.⁵⁷

6.55 On the other hand, in *Rolton v Department of Education, Employment and Workplace Relations*, the AAT found that, while the person was a member of a couple under s 4 of the *Social Security Act*, her circumstances, ‘namely, her being in an abusive and controlling relationship, and the nature and severity of her mental condition, amount[ed] to a special reason within the meaning of section 24(2)’.⁵⁸

Submissions and consultations

6.56 In the Social Security Issues Paper, the ALRC asked whether family violence was adequately taken into consideration in the exercise of the discretion under s 24 of the *Social Security Act* not to treat a person as a member of a couple. The ALRC asked further whether the s 24 discretion should be amended expressly to require the existence and effect of family violence to be taken into account.⁵⁹

Concerns

6.57 Some stakeholders indicated that family violence was not adequately taken into consideration by the decision maker in exercising the discretion in s 24.⁶⁰ The Commonwealth Ombudsman noted anecdotal instances where Centrelink has determined that a customer is a member of a couple, even where it appears the ‘relationship’ may have only continued as a result of duress or financial abuse.

It is unclear whether this has resulted from decision makers believing that the criteria in s 4 of the *Social Security Act 1991* do not allow them to find the customer was not a member of a couple, or whether the facts of the individual cases were not sufficiently strong to overcome those criteria which did point to the existence of a relationship.⁶¹

56 *Lynwood and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 213 (30 March 2011).

57 *Bruce and Secretary, Department of Social Security* [1995] ATA 341 (22 November 1995); *Williams and Secretary, Department of Social Security* [1997] AATA 228 (2 July 1997); *Scheibel and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 282 (21 January 2011).

58 *Rolton v Department of Education, Employment and Workplace Relations* AAT No 2008/3542.

59 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 16, 17.

60 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

6.58 The Welfare Rights Centre NSW submitted that the discretion under s 24 not to treat a person as a member of a couple is rarely used for victims of family violence and that people who may benefit from its use are not made aware of it as an option.⁶²

Reform options

6.59 Stakeholders recommended that family violence should be taken into account expressly in considering the special reason discretion in s 24 of the *Social Security Act*,⁶³ in particular to ‘require recognition by the decision maker of the disempowering effects of family violence and “battered women’s syndrome”’.⁶⁴

6.60 Eastael and Emerson-Elliott identified that the ‘real problem arises from the fact that women living with, or having lived with, serious family violence are unable to consent to a marriage-like relationship in the first place’ likening such relationships to ‘master/slave relationships, where the battered woman does not consent to what is happening but has no power—in fact no will—to change or even challenge the circumstances in which she finds herself’.⁶⁵

6.61 Similarly, the CSMC noted that, due to abuse experienced by victims of family violence and threats made against them if they leave, victims may have no choice but to remain in a violent situation. ‘In these circumstances they are not part of a ‘couple’ by any usual definition—there is no equality or sharing in that situation’.⁶⁶

6.62 Eastael and Emerson-Elliott submitted that, as a result of the decision in *Rolton*, ‘consideration is being given to amending section 24 of the Act to specifically recognise circumstances such as those in *Rolton*’.⁶⁷ However, they also submitted that while liberalising the discretion in s 24 of the Act would be welcome ‘it would only be a band-aid solution to the problem’.⁶⁸

6.63 The Welfare Rights Centre Inc Queensland recommended the addition of a new subsection to s 24 to provide that a victim of family violence should not be treated as a member of a couple. The Welfare Rights Centre Inc Queensland raised concerns about the potential for such a provision to be abused, but considered that the definitions surrounding duress at both common law and in statute would, to some extent, guard against such abuse.

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

63 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; P Eastael and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

65 P Eastael and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

66 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

67 P Eastael and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

68 *Ibid.*

6.64 The Welfare Rights Centre NSW considered that the *Guide to Social Security Law* should direct a decision maker expressly to consider family violence in the exercise of the s 24 discretion and any previous decisions should be backdated, where appropriate.⁶⁹

6.65 The Welfare Rights Centre Inc Queensland raised an additional concern about the use of modifying words, like ‘extreme’, ‘special’ or ‘exceptional’ and submitted that they have

dealt with many cases where a decision maker has agreed that a circumstance prevents a victim from living in their place of residence, however due to this situation being quite normal in the victim’s life, the requirement is not met.⁷⁰

ALRC’s views

6.66 Section 24 of the *Social Security Act* is a discretionary area of law. As discussed above, a number of cases indicate that decision makers may not place sufficient weight on the existence of family violence. However, as noted by the Commonwealth Ombudsman, it is unclear whether this has resulted from decision makers believing that the criteria in s 4 of the *Social Security Act* do not allow them to find the customer was not a member of a couple, or whether the facts of the individual cases were not sufficiently strong to overcome those criteria which did point to the existence of a relationship.

6.67 Section 24 does not preclude family violence from being taken into consideration by a decision maker. In fact, as the cases outlined above demonstrate, family violence has been taken into consideration. However the ALRC is concerned that there may be insufficient guidance and training for decision makers about how family violence can affect a person’s decisions. The ALRC considers that further guidance as to how family violence may constitute a ‘special reason’ should be included in the *Guide to Social Security Law*.

6.68 While the Welfare Rights Centre Inc Queensland expressed concern that the reference to ‘special’ in ‘special reason’ was unsuitable, the ALRC notes that this terminology is repeated throughout the *Social Security Act*, for example in relation to waiver of debt in ‘special circumstances’ (considered in Chapter 7). The ALRC therefore considers that to remove the word ‘special’ from the ‘special reason’ discretion, would be beyond the scope of the ALRC’s Terms of Reference for this Inquiry, as it would also affect other customers—not only those experiencing family violence.

Verification of family violence

6.69 There are also concerns about maintaining the integrity of the system—to ensure that the addition of family violence as a consideration for ‘special reason’ is not abused by people claiming family violence when they are not in fact experiencing it. The ALRC’s preliminary consideration is that this potential for abuse could be minimised

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

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

by requiring the level of verification of family violence to be rigorous for the exercise of the discretion. Verification of family violence in relation to social security payments and entitlements is considered in detail in Chapter 5.

Access to the s 24 discretion

6.70 The ALRC notes further that if reliance is to be placed on the discretion in s 24 for persons experiencing family violence, it needs to be adequately accessible. In particular, the ALRC queries whether its use as an ‘option of last resort’ presents a barrier to those experiencing family violence from accessing the discretion.

6.71 Stakeholders mentioned that s 24 was rarely used for family violence and victims were unaware that they could raise this discretion. One reason for its disuse may be accessibility and knowledge of the discretion itself. The ALRC therefore proposes that information about the discretion be included in Proposal 4–8.

Proposal 6–4 The *Guide to Social Security Law* should be amended to direct decision makers expressly to consider family violence as a circumstance that may amount to a ‘special reason’ under s 24 of the *Social Security Act 1991* (Cth).

Question 6–1 With respect to the discretion under s 24 of the *Social Security Act 1991* (Cth):

- (a) is the discretion accessible to those experiencing family violence;
- (b) what other ‘reasonable means of support’ would need to be exhausted before a person could access s 24; and
- (c) in what ways, if any, could access to the discretion be improved for those experiencing family violence?

Independent

6.72 Whether a person is ‘independent’ can affect his or her qualification for, or rate of payment of, Youth Allowance, Disability Support Pension, Special Benefit and Pensioner Education Supplement.⁷¹ It can also affect whether a person is paid a social security payment directly or through a parent.⁷²

6.73 These payments may be assessed on the basis that the person is independent of, or dependent on, his or her parents. If a person is assessed as dependent, the parents’ income and assets are considered in determining eligibility. This is based on the

71 *Social Security Act 1991* (Cth) s 94 (Disability Support Pension), s 540 (Youth Allowance), s 739 (Special Benefit homeless person), s 1061PA (Pensioner Education Supplement).

72 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011 [3.2.3.20] (Payability of YA).

presumption that parents with sufficient resources will provide financial and material support to their children.⁷³

6.74 There are a number of circumstances in which a person may be considered ‘independent’. Of most relevance to victims of family violence is the provision for independence where it is ‘unreasonable to live at home’. To be considered independent in these circumstances, it must be unreasonable for the person to live at home and the person must not be receiving ‘continuous support’. These two criteria are discussed separately below.

Unreasonable to live at home

6.75 The *Social Security Act* provides that a person is regarded as ‘independent’ if he or she:

- (a) cannot live at the home of either or both of his or her parents:
 - (i) because of extreme family breakdown or other similar exceptional circumstances; or
 - (ii) because it would be unreasonable to expect the person to do so as there would be a serious risk to his or her physical or mental well-being due to violence, sexual abuse or other similar [exceptional or unreasonable] circumstances.⁷⁴

6.76 In addition, for Youth Allowance, Disability Support Pension and Special Benefit, a person is considered ‘independent’ if the person cannot live at the home of his or her parents:

- (iii) because the parent or parents are unable to provide the person with a suitable home owing to a lack of stable accommodation.⁷⁵

6.77 These three circumstances are considered separately below.

Extreme family breakdown

6.78 The *Guide to Social Security Law* states that family breakdown must be ‘extreme’, and the existence of ongoing conflict alone is insufficient grounds to consider a person independent under this criteria. Factors that may indicate extreme family breakdown are said to include evidence that the emotional or physical wellbeing of the person or another family member would be jeopardised if the person were to live at home.⁷⁶

6.79 Examples of other ‘similar exceptional circumstances’ include ‘severe neglect’, ‘criminal activity or substance abuse by the parents’, ‘extreme and abnormal demands’ on the young person, and refusal to permit the young person to work or study.⁷⁷ The

73 Employment Workplace Relations and Education Reference committee, Student Income Support Inquiry.

74 *Social Security Act 1991* (Cth) ss 1067A(9), 1061PL(7).

75 *Ibid* s 1067A(9).

76 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.2.5.40] (Assessment of Extreme Family Breakdown & Other Similar Exceptional Circumstances).

77 *Ibid*, [3.2.5.40] (Assessment of Extreme Family Breakdown & Other Similar Exceptional Circumstances).

Guide to Social Security Law also provides that where ‘parents refuse to allow the young person to live at home, this does not constitute “extreme family breakdown” unless there is evidence of extreme and enduring family conflict’.⁷⁸

Serious risk to physical or mental well-being

6.80 The *Guide to Social Security Law* provides that indicators of ‘serious risk’ to a young person’s physical or mental wellbeing include ‘sexual, physical or psychological abuse’. The Guide recognises that the claimant need not be the direct victim of abuse and that it would usually be accepted as unreasonable to expect the claimant to live in a home where other household members have been or are being subject to such abuse.⁷⁹

6.81 In a submission to the 2005 Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support, the University of Queensland Union submitted that ‘it is left up to policy and, in practice, subjective judgement, to define violence’ and that ‘despite the fact that policy makes reference to risk to mental wellbeing, including psychological abuse, in our experience, assessing officers/social workers can be reluctant to consider violence that is not overt and visible as serious enough to warrant qualification for independent YA [Youth Allowance]’. The University of Queensland Union raised further concerns that ‘Centrelink policy in this regard is endorsing an acceptance of “conflict” which is normal in our communities, and that this extends to conflict relating to sexual, political and religious choice. At the same time as accepting a level of conflict as “normal”’.⁸⁰

Parents unable to provide a home

6.82 The *Guide to Social Security Law* does not refer to family violence as a circumstance where it may be considered that a person’s parents are unable to provide a home. Rather, the *Guide to Social Security Law* states that a person may be considered independent where a parent is unable to provide a suitable home because the parent lacks stable accommodation.⁸¹

Continuous support

6.83 In addition, to be considered ‘independent’, the person must not be in receipt of ‘continuous support’ from a parent, guardian or income support (other than a social security benefit) from the Commonwealth, or a state or territory.⁸² Continuous support is defined in the *Guide to Social Security Law* as ‘regular and ongoing assistance to the

78 Ibid, [3.2.5.40] (Assessment of Extreme Family Breakdown & Other Similar Exceptional Circumstances).

79 Ibid, [3.2.5.50] (Assessment of Serious Risk).

80 University of Queensland Union, *Submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support* (2004).

81 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.2.5.60] (Parents Unable to Provide a Home (YA & DSP)).

82 *Social Security Act 1991* (Cth) ss 1067A(9), 1061PL.

young person's upkeep'.⁸³ The onus is on the applicant to provide relevant supporting information.

6.84 The Social Security Issues Paper referred to a case reviewed by the Commonwealth Ombudsman in which a young person—who had left her home due to family violence—was not found to be independent because she was receiving continuous support from her father, who resided interstate. Her Youth Allowance payment was later cancelled because she was unable to provide details of her father's income or assets. Consequently, she was left without income support for over two months.⁸⁴

6.85 The Ombudsman, in this case, found it unreasonable for Centrelink to put the onus solely on a young person to obtain income and asset details from a parent the young person is not residing with, or with whom the young person might have had minimal contact.⁸⁵

Submissions and consultations

6.86 In the Social Security Issues Paper, the ALRC asked whether the criteria for a person to be considered 'independent' adequately took into account the existence of family violence. The ALRC also asked in what ways, if any, the *Guide to Social Security Law* should be amended in relation to the 'continuous support' criteria to improve the safety of victims of family violence.⁸⁶

Unreasonable to live at home

6.87 Most stakeholders who responded to these questions suggested that family violence needs to be recognised expressly as a circumstance when it may be unreasonable for a person to live at home.⁸⁷ In doing so, stakeholders expressed the need to ensure that the decision maker takes into account other less visible forms of family violence, such as economic abuse.⁸⁸ Women Everywhere Advocating Violence

83 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [1.1.C.350] (Continuous support (YA, DSP)).

84 Commonwealth Ombudsman, *Centrelink: Payment of Independent Rate of Youth Allowance to a Young Person* (2008).

85 Ibid.

86 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 19, 22.

87 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

88 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

Elimination (WEAVE) and NCSMC considered that child abuse should be expressly considered.⁸⁹ For example, the Homeless Person's Legal Service considered that:

Unless express reference is made to family violence there is a risk that some of these elements of family violence [economic abuse, emotional abuse, stalking, deprivation of liberty, damage to property and causing a child to be exposed to violent or abusive behaviour] will not be considered by decision-makers as sufficiently extreme to be considered in the determination of whether a person is independent.⁹⁰

6.88 The Welfare Rights Centre NSW recommended that family violence should be a stand-alone criterion upon which independence may be established:

the existence of family violence should be an express criterion upon which independence may be established.⁹¹

6.89 Similarly, the Welfare Rights Centre Inc Queensland noted that, while legislation currently refers to violence, sexual abuse, or other similar [exceptional or unreasonable] circumstances, family violence has specific connotations and therefore should be expressly referred to in this context.⁹²

6.90 In addition, the National Children's and Youth Law Centre submitted that the 'test of independence in extreme family breakdown should be reviewed to accommodate situations where the child's parents refuse to allow the child to live at home' and that the test in relation to 'extreme family breakdown' should not be of such a high threshold'.⁹³

6.91 WEAVE submitted that the response by Centrelink staff is 'highly variable depending on whether the staff member carries a belief that young people make up family conflict to rot the system or a belief that young people can be victims of violent parents'.⁹⁴

Continuous support

6.92 In relation to the 'continuous support' requirement, stakeholders raised concerns that the bulk of the burden for establishing independence was placed on the young person⁹⁵ and that that the 'continuous support' criterion does not look to the adequacy of support.⁹⁶

89 WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

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

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

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

93 National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

94 WEAVE, *Submission CFV 58*, 27 April 2011.

95 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

96 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

6.93 The Welfare Rights Centre Inc Queensland submitted that the continuous support requirement can potentially act as a tool for further control of a victim where a legal guardian claims to be providing support, however according to the client, no such support exists.⁹⁷

6.94 Similarly, the Welfare Rights Centre NSW and the National Children's and Youth Law Centre submitted that a family breakdown may mean that a young person is unable to 'obtain information of parental income and assets to determine eligibility for a claim'⁹⁸ and that 'it may not be in the best interests of a young person to seek this information from parents when the nature of the domestic environment is openly hostile or violent'.⁹⁹

6.95 Accordingly, stakeholders who responded to this question agreed that the onus should not be placed on a young person to obtain details of a parent's income or assets in circumstances of family violence.¹⁰⁰ As a possible solution, stakeholders recommended that the onus of 'continuous support' should be shifted to the parents;¹⁰¹ or be disregarded in circumstances of family violence.¹⁰²

6.96 The Welfare Rights Centre Inc Queensland, who supported removing the requirement of continuous support for victims of family violence, considered that there is scope in the legislation surrounding fraudulent or misleading information as well as a general ability of the Commonwealth to recover monies paid when entitlements are claimed by such methods and that 'these provisions are strong enough to account for the potential of misuse if this onus were to be removed'.¹⁰³

6.97 Alternatively, the Welfare Rights Centre NSW suggested that Centrelink use its powers under s 192 of the *Social Security (Administration) Act* to get financial information from parents in circumstances of family violence. However, the Welfare Rights Centre NSW noted that 'Centrelink is reluctant to use the extensive powers in this section [192] for the benefit of income support recipients'.¹⁰⁴

ALRC's views

6.98 In order to be considered 'independent' because it is unreasonable for the person to live at home, a person must satisfy two criteria: that it is unreasonable to live at home and that the person is not in receipt of continuous support.

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

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

99 National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

100 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

101 WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

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

103 Ibid.

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

Unreasonable to live at home

6.99 The ALRC considers that it may be appropriate for the *Guide to Social Security Law* to expressly refer to family violence to ensure that all forms of family violence are captured either as a circumstance of ‘extreme family breakdown’ or ‘serious risk to physical or mental well-being’.

6.100 Family violence, child abuse and neglect are not expressly included as a ‘serious risk to a person’s physical or mental well-being’ in the *Social Security Act*. The provision currently takes into account sexual, physical and psychological abuse of a child through interpretation in the *Guide to Social Security Law*. While the *Guide to Social Security Law* states that ‘severe neglect’ may be a ‘similar exceptional circumstance’ of ‘extreme family breakdown’, a similar provision is not made for as a ‘serious risk to a person’s physical or mental well-being’. The *Guide to Social Security Law* does provide, however, where allegations of child abuse or serious risk of abuse or neglect, referral should be made to a social worker.¹⁰⁵

6.101 In the ALRC’s preliminary view, the term ‘violence’ should be replaced by ‘family violence’. Proposal 3–1, which sets out a definition of family violence for social security legislation, complements this approach. ‘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 which may not be caught by ‘violence’ include psychological or emotional abuse, deprivation of liberty, and exposing a child to family violence.

6.102 In the ALRC’s view, the existing interpretation in the *Guide to Social Security Law* are too limited, and should be amended to include child abuse and neglect.

Serious risk to physical or mental well-being

6.103 For it to be considered unreasonable for a person to live at home, the decision maker must be satisfied of a ‘serious risk’ to a person’s ‘physical or mental well-being’. This requires judgment as to whether there is a risk of harm to a person’s wellbeing, and whether such a risk is ‘serious’. The ALRC considers that the requirement for such judgment is unsuitable; and implies that family violence, child abuse and neglect may not harm a person’s physical or mental wellbeing in some cases. This is inconsistent with contemporary evidence about the effects of these factors on child developmental and health outcomes.

6.104 In the ALRC’s preliminary consideration, the very fact of family violence, child abuse or neglect should enable a decision that it is unreasonable for a person to live at home, without the need to prove that such conduct had a certain effect on the person.

Continuous support

6.105 The ALRC has identified three main concerns with the ‘continuous support’ requirement from stakeholder comments. First, the requirement may put a victim of

¹⁰⁵ Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.2.5.50] (Assessment of Serious Risk).

family violence at risk of further violence, or the person may decide not to claim the independent rate due to fear of further violence. Secondly, despite reporting receipt of continuous support, a victim of family violence may not be receiving the support due to economic abuse. Thirdly, that the amount of continuous support is not taken into account and therefore may not be adequate.

6.106 Potential solutions provided by stakeholders included waiver or exemptions from the continuous support requirement, shifting the onus onto parents or legal guardians to provide evidence of continuous support or that Centrelink use its powers under the *Social Security Act* to collect such information.

6.107 In relation to the amount of continuous support, the ALRC considers that this is an overarching concern that would affect not only victims of family violence and therefore does not make a proposal about this matter.

Waiver

6.108 Some stakeholders recommended that the requirement to demonstrate whether or not a person was receiving continuous support should be waived in its entirety for victims of family violence. The ALRC understands that the requirement that a person is not in receipt of continuous support works to ensure that people who are not in need of support do not gain support—reflecting the theme of ‘fairness’ discussed in Chapter 2. In addition, to waive the requirement for victims of family violence only may also raise concerns of a two-tiered system. The ALRC therefore considers that there is still need for the ‘continuous support’ requirement rather than waiving the requirement for victims of family violence.

Parents to provide details

6.109 To require parents to provide their own details of any continuous support would not remedy the issue of whether or not a young person actually receives the support. In addition, a parent may refuse to do so. The ALRC therefore considers that shifting the onus onto a parent to provide information about continuous support would not address stakeholder concerns.

Centrelink powers

6.110 Centrelink’s powers under ss 192–195 of the *Social Security (Administration) Act* allow Centrelink to collect internal and external evidence about a customer’s circumstances and are primarily used to collect information to establish an individual’s eligibility or correct entitlements.¹⁰⁶ The ALRC considers that the use of such powers may be the best way to collect information about continuous support in circumstances of family violence. However, DEEWR and Centrelink may be able to determine alternative strategies.

6.111 In the Social Security Issues Paper, the ALRC also raised the issue of receiving payment directly. Payment of Youth Allowance is made to the person unless under 18 years of age and not independent, in which case, the payment is paid to a parent of

106 Australian National Audit Office, *Centrelink Fraud Investigations* (2010).

the young person.¹⁰⁷ The ALRC considers that if improvements are made to ensure that victims of family violence are considered independent for Youth Allowance and other payments, then a person will be paid directly under the current legislative framework.

Proposal 6–5 The *Guide to Social Security Law* should be amended expressly to refer to family violence, child abuse and neglect as a circumstance in which it may be ‘unreasonable to live at home’ under the provisions of ‘extreme family breakdown’—*Social Security Act 1991* (Cth) ss 1067A(9)(a)(i), 1061PL(7)(a)(i); and ‘serious risk to physical or mental well-being’—*Social Security Act 1991* (Cth) ss 1067A(9)(a)(ii), 1061PL(7)(a)(ii).

Question 6–2 Should the *Social Security Act 1991* (Cth) also be amended expressly to refer to family violence, child abuse and neglect as an example of circumstances when it is ‘unreasonable to live at home’?

Question 6–3 Should ss 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) of the *Social Security Act 1991* (Cth) be amended:

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

Proposal 6–6 DEEWR and Centrelink should review their policies, practices and training to ensure that, in cases of family violence, Youth Allowance, Disability Support Pension and Pensioner Education Supplement, applicants do not bear sole responsibility for providing specific information about:

- (a) the financial circumstances of their parents; and
- (b) the level of ‘continuous support’ available to them.

¹⁰⁷ Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 23; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [8.4.1.30] (Payments to a Third Party).