

7. Social Security—Proof of Identity, Residence and Activity Tests

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Summary

7.1 As discussed in Chapter 5, certain requirements must be met before a person is qualified for a social security payment or entitlement. Once a person is qualified, however, it may not be payable unless certain additional criteria are met—known as ‘payability’ criteria. Family violence is relevant to various qualification and payability requirements—such as proof of identity, residence, and activity and participation requirements attached to certain social security payments—in a number of ways.

7.2 First, accessing proof of identity documents or tax file numbers may place the safety of a victim of family violence in jeopardy if required to return to a violent home or to contact the person using family violence.

7.3 Secondly, residence requirements may mean that certain visa holders or newly arrived residents are unable to access independent financial assistance through the social security system and therefore may not have adequate financial support to enable them to leave a violent relationship.

7.4 Thirdly, requirements such as activity tests, participation requirements and other administrative requirements may be too onerous for a victim of family violence to meet. In addition, if a person does not meet these requirements, it may result in his or her social security payment or entitlement being suspended, and therefore excluded from any independent financial assistance. Activity tests and participation requirements therefore need to be flexible and responsive to an individual job seeker's needs—including if experiencing family violence—and exemptions available where a victim of family violence is unable to meet their activity or participation requirements.

7.5 In this chapter, the ALRC considers how the qualification and payability requirements could be improved to protect the safety of victims of family violence. In doing so, the ALRC is seeking to balance the integrity of the social security system with the need to enhance the safety of victims of family violence. The ALRC therefore makes proposals in relation to residence requirements—ensuring that where appropriate, certain subclasses of visas are able to access Special Benefit. The ALRC also seeks guidance from stakeholders as to what other reforms may be necessary to residence requirements to maintain this balance.

7.6 Finally, the ALRC makes a number of proposals to ensure that a person's experience of family violence is adequately considered in:

- the negotiation and revision of a person's requirements for activity-tested social security payments; and
- the granting of exemptions from such requirements.

Proof of identity

7.7 Section 8 of the *Social Security (Administration) Act 1999* (Cth) seeks to ensure that abuses of the social security system are minimised.¹ One way in which the social security system aims to do this is by requiring claimants and recipients to prove their identity when making new claims, or when renewing or altering claims.² To be qualified for a social security payment, a low income health care card, or a

1 *Social Security (Administration) Act 1999* (Cth) s 8(a)(v); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity).

2 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity).

Commonwealth senior's health card, a person must provide original proof of identity documents and, with limited exceptions, also provide a tax file number.³

7.8 Victims of family violence are not automatically exempt from providing original proof of identity documents. The *Guide to Social Security Law* states that all efforts must be made to obtain satisfactory proof of identity and that the onus for establishing proof of identity is on the claimant.⁴ However, the *Guide to Social Security Law* provides that a departmental form—'Questions for Persons with Insufficient Proof of Identity'—can be used if a person is unable to provide sufficient evidence as to identity. This form contains questions that, because of their personal nature, are not likely to be known to other people.⁵ 'Persons experiencing domestic violence' are among the list of persons able to use this alternate departmental form for proof of identity.⁶

Tax file numbers

7.9 Tax file numbers may be requested from a person who resides in Australia and makes a claim for, or receives, a social security payment.⁷ In addition, a person must provide the full name, date of birth, tax file number and income and asset details of any non-claimant partner, if requested.⁸

7.10 While a person cannot be compelled to provide a tax file number, the person's social security payment may cease if it is not provided.⁹

7.11 A person may be granted a tax file number exemption—including an indefinite exemption—from providing a tax file number of their partner, where the person can demonstrate a risk of violence to himself, herself, their children or dependants, or where other concerns for the health and safety of the person, their children or dependants exist.¹⁰

3 *Social Security (Administration) Act 1999* (Cth) ss 8, 75; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity); [8.1.3.20] (Providing TFN Information).

4 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity).

5 *Ibid.*, [2.2.1.40] (Persons Experiencing Difficulty with Identity Verification).

6 *Ibid.*, [2.2.1.40] (Persons Experiencing Difficulty with Identity Verification).

7 *Social Security (Administration) Act 1999* (Cth).

8 *Ibid.* ss 8, 75; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity); [8.1.3.20] (Providing TFN Information).

9 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [8.1.3.20] (Providing TFN Information).

10 *Social Security (Administration) Act 1999* (Cth) ss 76, 77; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [8.1.3.20] (Providing TFN Information).

7.12 This exemption does not cover cases where there is merely a refusal on the part of the partner to provide the information and there are no violence or health concerns, or if a person is claiming to receive payments in his or her own right.¹¹

Submissions and consultations

7.13 In *Family Violence and Commonwealth Laws—Social Security* (the Social Security Issues Paper),¹² the ALRC asked whether the current provisions regarding the requirements for original proof of identity documents and tax file numbers created barriers for victims of family violence, and whether further measures should be put in place to ensure that a victim of family violence who has had to leave his or her home because of family violence are not required to return to the home or contact an abusive family member.¹³

7.14 Most stakeholders who responded to this question agreed that the requirement to provide original proof of identity documents and tax file numbers can create a barrier for persons experiencing family violence to accessing social security payments and entitlements.¹⁴

Proof of identity

7.15 The Homeless Person's Legal Service raised concerns that:

A person who has been forced into unstable accommodation due to family violence may not have sufficient proof of identity in order to receive a social security payment, and may be exposed to risk of harm if they believe they are required to return to the home in order to obtain such proof of identity.¹⁵

7.16 Similarly, the National Children's and Youth Law Centre submitted that, for young people who have already left home, he or she 'may not wish to re-enter the violent home to locate the documents, or a parent may withhold these documents from the young person to stop them from leaving home'.¹⁶

7.17 However, the Welfare Rights Centre NSW stated that 'Centrelink officers are generally proactive in assisting young people at risk to gather the required proof of identity needed for a claim to be processed'.¹⁷

11 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [8.1.3.20] (Providing TFN Information).

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

13 Ibid, Question 24.

14 ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

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

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

7.18 Some stakeholders recommended an automatic exemption for victims of family violence from providing original proof of identity documents,¹⁸ while others considered that information about the availability of the exemption should be provided to persons experiencing violence.¹⁹

Tax file numbers

7.19 In relation to the requirement to provide a partner's tax file number, the Multicultural Disability Advocacy Association submitted that, because control is often a common feature of family violence,

any provision that requires providing a partner's tax file number will inevitably prevent a victim from leaving violent relationships. All steps should be taken to encourage victims to leave violent relationships and avenues for exemptions should be explicit, accessible and automatic ... No one should be refused services or entitlements because a third party refuses to provide personal information.²⁰

7.20 The Council of Single Mothers and their Children (CSMC) submitted that if the refusal of a partner to provide a tax file number prevents a victim of family violence from accessing payments he or she would otherwise be entitled to, such refusal constitutes a form of financial abuse.²¹

7.21 Rather than requiring a victim of family violence to provide a partner's tax file number, some stakeholders suggested that Centrelink use its powers under s 192 of the *Social Security (Administration) Act* to require the production of information, such as a partner's tax file number.²²

Contact details

7.22 Some stakeholders also raised concerns about people who are experiencing family violence and who are in a state of transition between residences and not able to provide an address.²³ In particular, concerns were raised regarding mail being sent to the old address until a new address had been provided, thus potentially enabling the person using family violence to know the victim's affairs.²⁴

ALRC's views

7.23 The ALRC recognises the need to balance the tension between establishing the identity of a social security recipient or claimant in order to ensure the integrity of—and minimise abuse of—the social security system, with the need to ensure the safety

18 ADFVC, *Submission CFV 71*, 11 May 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

19 ADFVC, *Submission CFV 71*, 11 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

20 Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

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

22 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

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

24 Ibid.

of victims of family violence through access to social security payments and entitlements. However, the ALRC considers that some improvements may be made to the requirements for original proof of identity and tax file numbers and exemptions.

Questions for persons with insufficient proof of identity

7.24 The ALRC recognises the tension between ensuring the integrity of the system through proof of identity requirements and the need to protect the safety of victims of family violence. In the ALRC's preliminary consideration, the alternate Centrelink form—'Questions for Persons with Insufficient Proof of Identity'—aims to address this tension by providing an alternate form for people experiencing family violence. However, there is little detail provided in the *Guide to Social Security Law* as to what the form requires. The ALRC is therefore interested in stakeholder comment as to whether this form creates a sufficient alternative for victims of family violence to provide proof of identity.

7.25 The ALRC also considers that, as a mechanism available to people experiencing family violence, information about the alternate proof of identity form should be included in Proposal 4–8 to improve awareness of its existence.

Tax file number exemption

7.26 The ALRC considers that details about the indefinite tax file number exemption are suitably placed in the *Guide to Social Security Law*. However, the exemption somewhat narrow, insofar as it refers to a risk of 'violence', rather than 'family violence'. The *Guide to Social Security Law* should expressly refer to family violence in order to capture a broader range of conduct that is violent, threatening, controlling, coercive or engenders fear. This proposed reform is complemented by Proposals 3–1 and 5–1, which would set out a definition of family violence in the *Social Security Act* and the *Guide to Social Security Law*.

7.27 In addition, as an indefinite exemption from providing a partner's tax file number may protect a person's safety, information about the exemption should be included in Proposal 4–8.

Section 192 Social Security (Administration) Act

7.28 Section 192 of the *Social Security (Administration) Act* confers a general power on the Secretary of FaHCSIA to require a person to give information or a document in a person's custody or control where it is relevant to whether a person is qualified for a social security payment or a social security payment is payable.²⁵

7.29 The ALRC is interested in comment as to whether s 192 of the *Social Security (Administration) Act* could and should be used to obtain a partner's tax file number in circumstances of family violence.

25 *Social Security (Administration) Act 1999* (Cth) s 192.

Change of address

7.30 The ALRC also notes that submissions raised an additional administrative concern regarding change of address and is interested in hearing whether current administrative arrangements for change of address are adequate for victims of family violence.

Question 7–1 In practice, is the form, ‘Questions for Persons with Insufficient Proof of Identity’, sufficient to enable victims of family violence to provide an alternate means of proving identity?

Proposal 7–1 The *Guide to Social Security Law* should be amended expressly to include family violence as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

Question 7–2 Section 192 of the *Social Security (Administration) Act 1999* (Cth) confers certain information-gathering powers on the Secretary of FaHCSIA. In practice, is s 192 of the *Social Security (Administration) Act 1999* (Cth) invoked to require the production of tax file numbers or information for the purposes of proof of identity? If not, should s 192 be invoked in this manner in circumstances where a person fears for his or her safety?

Question 7–3 When a person does not have a current residential address, what processes are currently in place for processing social security applications?

Residence**Australian resident**

7.31 A general principle of Australia’s social security system is that, to qualify for a social security payment or entitlement, a person must be an Australian resident.²⁶ In other words, a person must reside in Australia and be either:

- an Australian citizen;
- a holder of a permanent visa; or
- a protected Special Category visa holder.²⁷

26 *Social Security Act 1991* (Cth) s 7(2); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.4.10] (Verifying Residence/Citizenship).

27 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [2.2.4.10] (Verifying Residence/Citizenship).

7.32 Exceptions to this principle are limited to Special Benefit, Crisis Payment and family payments.

7.33 To qualify for Special Benefit or Crisis Payment, a person must be either an Australian resident or the holder of a specified subclass of visa.²⁸ For family payments, there are no residential requirements.

7.34 The Minister of FaHCSIA has power to make determinations to allow the holders of particular temporary visas to meet the residence requirements for Special Benefit and, consequently, Crisis Payment. Currently, determinations are in force for ten types of temporary visa.²⁹ However, this power cannot be used on an individual or case-by-case basis. Exceptions can only be made for an entire class, or subclass, of visa by ministerial determination.³⁰

7.35 Accordingly, a person who is neither an Australian resident nor the holder of a specified subclass of visa, does not qualify for Special Benefit or Crisis Payment.

Protected Special Category visa holders

7.36 New Zealand citizens may enter Australia as holders of Special Category visas, or as holders of permanent visas under the migration program. A Special Category visa is granted to a New Zealand citizen who does not hold a visa on arrival in Australia, and who presents his or her New Zealand passport.

7.37 Before 26 February 2001, holders of Special Category visas could meet the definition of an Australian resident under social security law if they were residing in Australia, and likely to remain permanently. However, from that date, holders of Special Category visas no longer satisfy the definition of an Australian resident for social security purposes, unless they belong to a ‘protected’ group.

7.38 The protected groups include Special Category visa holders who:

- were in Australia on 26 February 2001;
- had been in Australia for at least 12 months in the two years immediately before 26 February 2001 and returned to Australia after that day;
- were residing in Australia on 26 February 2001 but were temporarily absent on that day; or

28 *Social Security (Administration) Act 1999* (Cth) ss 29, 30; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.7.1.10] (Qualification for SpB); [3.7.4.10] (Qualification for CrP—General Provisions).

29 Subclass 309—Partner (Provisional); Subclass 309—Spouse (Provisional); Subclass 310—Interdependency (Provisional); Subclass 447 (Secondary Movement Offshore Entry (Temporary)) (Class XB); Subclass 451—Secondary Movement Relocation (Temporary)) (Class XB); Subclass 785—Temporary Protection; Subclass 786 (Class UO) Temporary (Humanitarian Concern); Subclass 820—Extended eligibility (Partner); Subclass 820—Extended eligibility (Spouse); Subclass 826—Interdependency (Provisional) *Social Security (Class of Visas—Qualification for Special Benefit) Determination 2009*.

30 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

- commenced (or recommenced) residing in Australia within three months of that day.³¹

Qualifying Australian residence

7.39 In addition to the legislative requirement to be an Australian resident at the time of making a claim, some social security payments—generally, the ‘pension’ type payments that are intended as long-term support—require that a person has been an Australian resident for a certain period of time.³² This is called a ‘qualifying residence requirement’. The following qualifying residence requirements apply:

- Age Pension (10 years);
- Disability Support Pension (10 years);
- Widow Allowance (two years); and
- Parenting Payment (two years).

7.40 The effect of a qualifying residence period is that a person must have lived in Australia as a permanent resident for a specified period of time before they qualify for the social security payment. A person may, however, have a ‘qualifying residence exemption’.

7.41 The categories of people who have a qualifying residence exemption vary from payment to payment. Generally, refugees and former refugees and their family members have a qualifying residence exemption.³³ Holders of a visa of a subclass determined by the Minister of FaHCSIA are also exempt.³⁴

Newly Arrived Resident’s Waiting Period

7.42 Although a person may meet the residential criteria to qualify for a payment, the payment may not be payable if the person is subject to a waiting period—called a ‘Newly Arrived Resident’s Waiting Period’ (the waiting period). The waiting period applies to persons who have not been Australian residents but have resided in Australia for a period of, or periods totalling, 104 weeks (two years).³⁵ Generally, the

31 *Social Security Act 1991* (Cth); Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

32 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

33 *Social Security Act 1991* (Cth) ss 7(6), 7(6AA).

34 *Ibid* s 7(6AA); *Social Security (Class of Visas—Qualifying Residence Exemption) Determination 2009* (Cth); 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.Q.35] (Qualifying Residence Exemption). At the time of writing, these included the following subclasses of visas: Subclass 100—Spouse; Subclass 100—Partner; Subclass 110—Interdependency; Subclass 801—Spouse; Subclass 801—Partner; Subclass 814—Interdependency; Subclass 832—Close ties; and Subclass 833—Certain Unlawful Non-Citizens.

35 From March 1997, the Newly Arrived Resident’s Waiting Period was extended from 26 weeks to 104 weeks and the range of payments to which the waiting period applies was also extended.

‘allowance’ type payments, which are intended as shorter-term income support, have a waiting period, including:

- Carer Payment;
- Youth Allowance;
- Austudy Payment;
- Newstart Allowance;
- Sickness Allowance;
- Special Benefit;
- Partner Allowance;
- Mobility Allowance;
- Pensioner Education Supplement;
- Commonwealth Seniors Health Care Card; and
- Health Care Card.

7.43 Crisis Payment does not have a Newly Arrived Resident’s Waiting Period.

Exemptions

7.44 A person may be exempt from the waiting period if they have a ‘qualifying residence exemption’, discussed above. In addition, certain people are exempt from the waiting period, including:

- current and former holders, and their family members, of a permanent refugee visa or a specified subclass of special humanitarian visa;
- current and former holders of a visa Subclass 832 and 833—that is, young people who have lived in Australia in their formative years and are granted permanent residence when they reach 18 years of age;
- former holders of spouse and interdependency provisional visas (Subclasses 309, 310, 820 and 826), once they hold a permanent visa;
- a person whose migration is approved on the basis that he or she will act as a carer for a disabled relative; and
- Australian citizens and their immediate family members, and family members of a permanent resident who has at least two years of residence in Australia.³⁶

36 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

7.45 A ‘family member’ includes the person’s partner or their dependent child or another person who, in the opinion of the Secretary of FaHCSIA, should be treated for the purposes of this definition as a family member.³⁷

Special Benefit

7.46 Exemption from the Newly Arrived Resident’s Waiting Period is slightly different for Special Benefit. A person is exempt from the waiting period for Special Benefit if he or she:

- has suffered a substantial change in circumstances beyond their control;³⁸
- holds, or is the former holder of, a visa of a subclass exempted from the waiting period;³⁹ or
- is an Australian citizen or a member of their immediate family, or a family member of a permanent resident who has at least two years of residence in Australia.

7.47 A holder of a temporary spouse visa, who is still in a relationship with his or her spouse, is generally automatically exempted from the waiting period as a family member of an Australian citizen or long term resident and therefore could receive Special Benefit immediately upon arrival in Australia.

7.48 However, as of 1 January 2012, holders of Provisional Partner visas,⁴⁰ who would have been exempt from the waiting period as a family member, will be required to serve the waiting period before they can be eligible for income support unless they experience a substantial change in circumstances. As part of this measure, an Assurance of Support will no longer be required for some Provisional Partner Visa applicants.⁴¹

37 *Social Security Act 1991* (Cth) s 7(6D); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.1.2.70] (Exemptions from Waiting Periods).

38 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.7.2.20] (Substantial Change in Circumstances for SpB); [3.7.1.20] (Payability of SpB).

39 The following visa subclasses are exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit: Subclass 309—Partner (Provisional); Subclass 309—Spouse (Provisional); Subclass 310—Interdependency (Provisional); Subclass 820—Extended eligibility (partner); Subclass 820—Extended eligibility (spouse); Subclass 826—Interdependency (Provisional); Subclass 447 (Secondary Movement Offshore Entry (Temporary)) (Class XB); Subclass 451 (Secondary Movement Relocation (Temporary)) (Class XB); Subclass 785 (Temporary Protection); Subclass 786 (Class UO) Temporary (Humanitarian Concern); Subclass 832—Close ties; subclass 833—Certain unlawful citizens. *Social Security (Class of Visas—Newly Arrived Resident’s Waiting Period for Special Benefit) Determination 2009* (Cth).

40 Temporary Partner visa Subclasses 309, 310, 820 or 826.

41 Department of Human Services, *Budget 2011–12: Provisional Partner Visa Holders—Entitlement to Special Benefit* (2011); *Social Security and Other Legislation Amendment Bill 2011* (Cth).

Substantial change in circumstances

7.49 The Newly Arrived Resident's Waiting Period also does not apply to Special Benefit if the person has suffered a 'substantial change in circumstances beyond his or her control'.⁴² A sponsored resident is considered to have a substantial change in circumstances if he or she had arrived in Australia and was:

- a victim of domestic violence; and
- the abuse is substantiated by documentary evidence from police, an apprehended violence order (AVO) or a medical report.⁴³

7.50 The *Guide to Social Security Law* notes that many changes in circumstances apply equally to non-sponsored and sponsored residents.⁴⁴

Submissions and consultations

7.51 In the Social Security Issues Paper, the ALRC asked what reforms, if any, should be considered in relation to qualifying residence requirements and the Newly Arrived Resident's Waiting Period, for victims of family violence.⁴⁵

7.52 In response, stakeholders noted concerns with the residence requirements for victims of family violence in relation to the definition of 'Australian resident', qualifying residence requirements, and the waiting period. Concerns were also raised in *Family Violence and Commonwealth Laws—Immigration Law* (the Immigration Law Issues Paper)⁴⁶ in relation to the limited ability for temporary visa holders to access social security payments and entitlements.⁴⁷

7.53 For example, Domestic Violence Victoria and others in a joint submission submitted that, in their experience:

Access to health, counselling, family violence and sexual assault services is variable and changeable for women on temporary visas. Each visa category carries different entitlements and these entitlements change regularly. ... [T]he lack of housing options, ineligibility for public and community housing and lack of income support all limit the capacity of family violence services to support women without residency rights.⁴⁸

42 *Social Security Act 1991* (Cth) s 739A(7).

43 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.7.2.20] (Substantial Change in Circumstances for Special Benefit).

44 *Ibid.*, [3.7.2.20] (Substantial Change in Circumstances for SpB).

45 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 25.

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

47 Confidential, *Submission CFV 36*, 12 April 2011; Confidential, *Submission CFV 35*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

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

7.54 These concerns were captured in a case study provided in the submission from Women Everywhere Advocating Violence Elimination (WEAVE):⁴⁹

Case Study

A woman and her children came to Australia as secondary holders of her partner's temporary, regional skilled visa. The child protection authorities removed her and the children from the family home due to his physical and sexual abuse of the children. The woman and her children were placed in domestic violence accommodation. Whilst there she received a letter from the Immigration Department telling her she was in breach of her visa conditions that could lead to her deportation. Further trauma on top of her and her children's devastating experience.

This woman had no access to the family violence provisions because of her visa type.

The option of paying for a visa in her own right was not possible given the financial cost (\$2,000) of making such an application. She had no access to Medicare, income support, Red Cross or NGO emergency moneys.

She had to rely on the support of the local domestic violence service. Not all domestic violence services have the resources to provide such long term financial and accommodation services to such women. It was only after an appeal, and many years living under such conditions, that she was granted a protection visa and became eligible for Centrelink support.

Definition of 'Australian resident'

7.55 In their study—*Seeking Security*—the Australian Domestic and Family Violence Clearinghouse (ADFVC) found that many migrant women had experienced significant financial hardship while waiting to qualify for residence periods:

In particular, women who were unable to access the Special Benefit and unable to work due to visa restrictions were placed in extremely vulnerable situations, entirely reliant on family (if they had any in Australia) or on charities and services. A lack of income leaves many of these women unable to access accommodation provided by refugees.⁵⁰

7.56 A case study provided by the Welfare Rights Centre NSW explained the difficulties experienced by some New Zealand citizens in Australia who experienced family violence:⁵¹

Case Study

Etera came to Australia in 2003 when he was 11 from New Zealand. As a New Zealand citizen arriving after 26 February 2001, he could not receive social security payments in Australia. Etera grew up in an extremely violent environment and his family had severe problems with alcoholism and domestic violence, mainly from his father but also from his older brother. In both New Zealand and Australia he witnessed his mother experience extreme violence at the hands of his father. He had memories of witnessing his father break the door of their house and cut his mother's throat, causing her to be hospitalised for lengthy periods.

49 WEAVE, *Submission CFV 31*, 12 April 2011.

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

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

In Australia, Etera lived with initially his father, and then his mother. When his mother formed a new relationship, this resulted in Etera's losing all contact with his father. Etera's mother was again the victim of domestic violence at the hands of her new partner. Etera again witnessed his mother receiving physical assaults from her partner and came into conflict with his mother's new partner. When he was 14 his mother's new partner kicked him out of home. ...

Welfare Rights confirmed that Etera was not eligible for payments from New Zealand while in Australia as he does not meet the qualification for payments under the International agreement. Etera obtained immigration advice which confirmed that there is no prospect of his obtaining permanent residency in Australia as he has none of the requisite family ties or employment history.

Welfare Rights wrote to the Department of Finance seeking act of grace payments for Etera on the grounds the requiring him to live in a different country to the only family member he identifies as being close—namely his mother—is unreasonable.

The Centre suggested periodical payments equivalent to Youth Allowance for two years would be appropriate to give Etera the opportunity to obtain housing and qualify for employment. This application was refused. Etera remains in Australia without income support or housing.

7.57 To address such concerns, the Welfare Rights Centre Inc Queensland supported the removal of the distinction between permanent residents, citizens and Special Category (non-protected) visas in situations where there is family violence.⁵² However, the Centre cautioned that any exemption or waiver of residence requirements could lead to abuse of the system and claims of family violence being falsified or manipulated in order to obtain social security payments and entitlements.⁵³

Qualifying residence requirements

7.58 Some stakeholders indicated that the 10 year qualifying residence requirement for Disability Support Pension is too long, particularly because it is known that people with disability experience higher rates of family violence.⁵⁴

7.59 The Multicultural Disability Advocacy Association (MDAA) referred to its report—*Violence Through Our Eyes*—which found that the effect of denying the Disability Support Pension resulted in the inability to access other services, such as equipment such as Post-School Options Programs, Home and Community Care and the Program of Appliances for Disabled People.⁵⁵

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

53 Ibid.

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

55 Multicultural Disability Advocacy Association of NSW, *Violence Through Our Eyes: Improving Access to Services for Women from non-English Speaking Backgrounds with Disability and Carers Experiencing Violence Project Report* (2010), 14–15.

7.60 The MDAA also noted that the qualifying residence period for Disability Support Pension becomes more complicated if the person is in Australia on a dependant visa because the person is dependent on the ‘abusive partner for residence, communication, housing and financial support’.⁵⁶

7.61 Both the ADFVC and the MDAA supported streamlining, and making the qualifying residence period for Disability Support Pension and Age Pension comparable to other Centrelink social security payments.⁵⁷

Newly Arrived Resident’s Waiting Period

7.62 Some stakeholders suggested that the two year waiting period may be too long for victims of family violence⁵⁸ and recommended that it should either be abolished,⁵⁹ or minimised,⁶⁰ in circumstances of family violence.

ALRC’s views

7.63 As discussed previously, a two stage process must generally be satisfied for residence requirements. First, a person must be an ‘Australian resident’ and have satisfied any ‘qualifying residence requirement’ and secondly, a person must have satisfied the waiting period (where applicable).

7.64 Concerns were raised by stakeholders in relation to both the qualification requirement—that is, to be an Australian citizen, permanent resident or a protected Special Category visa holder and satisfy any qualifying residence requirement—and payability requirements—that is, to serve the waiting period.

Australian resident requirements

7.65 To maintain the integrity of the social security system, residence requirements are necessary before a person qualifies for a social security payment or entitlement. In addition, the ALRC recognises that the Minister of FaHCSIA may make a determination that certain Special Category visa holders are considered to be an ‘Australian resident’ for the purposes of social security law.⁶¹ This power to make a determination exists in relation to Special Category visas—that is, New Zealand citizens who arrived after 26 February 2011. This may be seen as an example of the theme of ‘fairness’ discussed in Chapter 2—to ensure that Australia’s resources are

56 Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

57 ADFVC, *Submission CFV 71*, 11 May 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

58 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

59 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

60 P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

61 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

fairly distributed to those in genuine need. For Special Benefit, and consequently Crisis Payment, the Minister of FaHCSIA has the power to make a determination that persons on a ‘specified subclass of visa’ are an ‘Australian resident’ for the purposes of those payments.

7.66 However, some victims of family violence, who have lived in Australia for a length of time, may be unable to access any social security support—thus jeopardising his or her safety. This is particularly so for Special Benefit, which is intended as a safety net payment, and Crisis Payment, intended to provide assistance in circumstances of crisis such as family violence.

7.67 In Chapter 20, the ALRC makes a proposal to create a new temporary visa for holders of Prospective Marriage (Subclass 300) visas who are victims of family violence.⁶² The purpose of this temporary visa is to enable such visa holders to make arrangements to leave Australia, or to apply for a different class of visa.

7.68 To ensure that persons holding this new temporary visa have access to independent financial assistance through income support, the ALRC considers that it may be appropriate to include these new temporary visas as a ‘specified subclass of visa’ to enable them to access either Special Benefit or Crisis Payment.

7.69 However, victims of family violence who hold other types of visas may not be able to meet the ‘Australian resident’ requirement and will not fall under a ‘specified subclass of visa’. While there is a genuine need to ensure that social security payments are limited by certain residence requirements, there is also a genuine need to ensure that victims of family violence are able to access independent financial assistance to enable them to leave a violent relationship. The ALRC therefore seeks stakeholder comment as to whether other visa holders should be included as a specified subclass of visa for Special Benefit, or alternatively, what other mechanisms might be used to ensure that the safety of other visa holders who are experiencing family violence is protected.

Qualifying residence requirements

7.70 The purpose of the long residence requirements for Age and Disability Support Pensions reflects the theme of ‘fairness’ discussed in Chapter 2. That is, to ensure that these payments for the long-term contingencies of life are only granted to people who have a genuine, long-term connection with Australia and that this is considered necessary to protect Australian Government funds, which come from general revenue.⁶³

7.71 However, migrants with disability experiencing family violence may be unable to access Disability Support Pension because of the 10 year qualifying residence requirement and, as a result, he or she may have no option but to remain in the violent

62 Proposal 20–3.

63 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

relationship. The ALRC notes that people with disability are particularly vulnerable due to dependency on carers—who may be the person using family violence—and difficulties in accessing services and support.

7.72 One solution proposed by stakeholders would be to reduce the qualifying residence period for Disability Support Pension to two years in circumstances of family violence. This may, however, raise concerns of a two-tier system in that a similar provision does not also exist for other vulnerable migrants with disability. It may also provide an incentive to make a claim of family violence—possibly falsely—in order to gain early access to Disability Support Pension.

7.73 It may be that certain subclasses of visas should be exempt from the qualifying residence period for Disability Support Pension. The ALRC seeks stakeholder comment as to the best way not only to preserve the integrity of the social security system, but also to ensure that victims of family violence with disability are able to access Disability Support Pension to enable them to leave a violent relationship.

Newly Arrived Resident's Waiting Period—Special Benefit

7.74 Victims of family violence may be residentially qualified, but a social security payment is not payable due to the Newly Arrived Resident's Waiting Period. This may result in victims of family violence having to remain in violent relationships because they are unable to access independent financial assistance through income support to enable them to leave.

7.75 As discussed above, the ALRC makes a proposal in Chapter 20 to create a new temporary visa for holders of Prospective Marriage (Subclass 300) visas who are victims of family violence. To ensure that persons holding this new temporary visa have access to independent financial assistance, the ALRC considers that it may be appropriate to include these new temporary visas as a 'specified subclass of visa' that are exempt from the waiting period.

7.76 Victims of family violence who hold other types of visa may not be able to meet the Australian resident requirement and will not fall under a 'specified subclass of visa'. Family violence is not expressly referred to in the *Guide to Social Security Law* as a 'substantial change in circumstances' for non-sponsored residents. The ALRC considers that victims of family violence (whether sponsored or non-sponsored) should therefore be able to access Special Benefit due to a substantial change in circumstances and makes a proposal to amend the *Guide to Social Security Law* to that effect.

7.77 However, care must be taken to ensure that, where family violence is disclosed to access social security payments, 'the disclosure of violence and loss of relationship does not also result in loss of residency'.⁶⁴ This may occur, for example, where a person who is on a visa within a specified class for Special Benefit, claims family violence as a 'substantial change in circumstances'.

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

7.78 Information about exemptions from the waiting period for Special Benefit on the basis of ‘substantial change in circumstances’ should be included in Proposals 4–8 and 20–5 to ensure that victims of family violence are aware of the exemption.

Newly Arrived Resident’s Waiting Period—other payments

7.79 Those who are qualified for other social security payments and entitlements still face a barrier in relation to the waiting period. Special Benefit would not provide relief in such circumstances as it is only available to people who are not eligible for any other pension or allowance.

7.80 To create a waiver of the waiting period in circumstances of family violence would create concerns of a two-tier system and incentivisation. However, it may be necessary to create a waiver category for persons experiencing family violence to ensure that they are able to access financial assistance to leave a violent relationship and do not have to remain in a violent relationship for the length of the waiting period. The ALRC seeks stakeholder comment as to the best way to ensure that this balance is achieved.

Proposal 7–2 Proposal 20–3 proposes that the *Migration Regulations 1994* (Cth) be amended to allow holders of Prospective Marriage (Subclass 300) visas to move onto another temporary visa in circumstances of family violence. If such an amendment is made, the Minister of FaHCSIA should make a Determination including this visa as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit; and
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit.

Question 7–4 Should the Minister of FaHCSIA make a Determination including certain temporary visa holders—such as student, tourist and secondary holders of Subclass 457 visas—as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit?
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit?

Question 7–5 What alternatives to exemption from the requirement to be an Australian resident could be made to ensure that victims of family violence, who are not Australian residents, have access to income support to protect their safety?

Question 7–6 In what way, if any, should the *Social Security Act 1991* (Cth) or the *Guide to Social Security Law* be amended to ensure that newly arrived residents with disability, who are victims of family violence, are able to access the Disability Support Pension? For example, should the qualifying residence period for Disability Support Pension be reduced to 104 weeks where a person is a victim of family violence?

Proposal 7–3 The *Guide to Social Security Law* should be amended expressly to include family violence as an example of a ‘substantial change in circumstances’ for the Newly Arrived Resident’s Waiting Period for Special Benefit for both sponsored and non-sponsored newly arrived residents.

Question 7–7 What changes, if any, are needed to improve the safety of victims of family violence who do not meet the Newly Arrived Resident’s Waiting Period for payments other than Special Benefit?

Act of Grace payments

7.81 Where social security legislation produces an ‘anomalous or inequitable result’, an Act of Grace payment may be made where:

- the application of the legislation produces an unintended or unacceptable result; or
- there are circumstances which lead to the conclusion that there is a moral obligation on the Commonwealth to make payment.⁶⁵

7.82 The Welfare Rights Centre NSW noted that where social security is not available, because a person is not residentially qualified (such as Special Category visa holders), the only remaining option is an Act of Grace request to argue that the legislation has produced an ‘anomalous or inequitable result’.⁶⁶

7.83 The ALRC does not propose to expand the Act of Grace payment arrangements. It is outside the scope of the ALRC’s Terms of Reference to consider in detail the *Financial Management and Accountability Act 1997* (Cth). However, it may be useful to provide a case study such as the one provided by the Welfare Rights Centre NSW to inform decisions relating to Act of Grace payments.

Activity tests, participation requirements and Employment Pathway Plans

7.84 To qualify—and remain qualified—for certain social security payments, a person must satisfy an activity test or participation requirements.

7.85 Job seekers receiving Newstart Allowance, Youth Allowance, Special Benefit and Parenting Payment have an activity test or participation requirements.⁶⁷ The activity test is designed to ensure that unemployed people receiving income support payments are ‘actively looking for work and/or doing everything that they can to

⁶⁵ *Financial Management and Accountability Act 1997* (Cth) s 33.

⁶⁶ Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

⁶⁷ 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.A.40] (Activity test (NSA, YA (job seekers))).

become ready for work in the future'.⁶⁸ Participation requirements 'aim to ensure that a person looks for, and undertakes, 'paid work in line with their work capacity' in order 'to increase work force participation ... and reduce welfare dependency'.⁶⁹

7.86 Generally, job seekers must be 'actively seeking and willing to undertake any paid work that is not unsuitable'.⁷⁰ This usually requires job search, paid or voluntary work, study or other activities.

7.87 An activity test or participation requirement may include: a specified number of job searches; accepting all suitable work offers; attending all job interviews; attending interviews with Centrelink and a person's Job Services Australia (JSA) provider; attending training courses; never leave a job, training course or program without a valid reason; and entering into and complying with the terms of an Employment Pathway Plan (EPP).⁷¹ Job seekers may also have a specific work experience activity requirement, and may be required to undertake a work experience activity tailored to the needs of the individual job seekers.⁷² Other activities may include an approved program of work for unemployment payment (Work for the Dole), or courses or programs designed to help job seekers to look for and obtain work, such as vocational training or work experience.⁷³ Job seekers may also suggest activities themselves but they must be consistent with legislation and policy.⁷⁴

7.88 When a person registers with Centrelink as an unemployed job seeker, they will be required to register with a JSA provider of their choice unless it is determined that these services are not the most appropriate form of assistance for them.⁷⁵ Those claiming Newstart Allowance or Youth Allowance, are required to attend an interview with their JSA provider within two working days of initial contact—called 'RapidConnect'.⁷⁶ If a job seeker is required to register with a JSA provider, they must remain connected with the provider as part of the job seeker's requirement to look for work.⁷⁷

7.89 A person who does not meet their activity test or participation requirements may result in a 'failure' which may affect their social security payments. Failures are discussed below.

68 Ibid, [1.1.A.40] (Activity Test (NSA, YA (job seekers))).

69 Ibid, [3.5.1.160] (When are EPPs Required? (PP)).

70 Ibid, [3.2.9.20] (Job Search Overview); [1.1.U.55] (Unsuitable work (NSA, YA)).

71 Ibid, [3.2.9.10] (Activity Testing for NSA/YA Job Seekers—Suitable Activities—Overview); [3.2.8.20] (Who Does Activity Testing Apply To?).

72 Ibid, [3.2.10.10] (Work Experience Activities—Overview).

73 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

74 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

75 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

76 Ibid, [1.1.R.05] (RapidConnect (NSA, YA)).

77 Ibid, [3.2.9.20] (Job Search Overview).

7.90 Different requirements may apply for job seekers who have a partial capacity to work, early school leavers, those who are principal carers, and those aged 55 or over.⁷⁸

Partial capacity to work

7.91 Most job seekers with a partial capacity to work⁷⁹ will be required to satisfy the activity test by undertaking suitable work of 15 hours a week or, alternatively, by looking for work or by engaging in a suitable program of assistance recommended by an Employment Services Assessment (ESAt) or Job Capacity Assessment (JCA).⁸⁰

7.92 However, some job seekers with a temporarily reduced, or partial, capacity to work will be able to satisfy the activity test by attending a quarterly interview with Centrelink and not be required to work, look for work, or engage in any suitable program of assistance recommended by the ESAt or JCA.⁸¹

7.93 Quarterly interviews aim to keep people who are unable to work due to illness, injury or disability, connected to the labour market by informing them about the benefits of work and services available to help them to find work.⁸²

Determining capacity to work

7.94 Several tools and processes are in place to determine a person's capacity to work or barriers to work and to recommend the content of a person's activity test or participation requirements. These include the Job Seeker Classification Instrument (JSCI); referrals to an Employment Services Assessment (ESAt) or Job Capacity Assessment (JCA), and Comprehensive Compliance Assessments (CCA).

Job search

7.95 Job search activities will be the primary activity for most job seekers. Both Centrelink and JSA providers have a role in setting a reasonable number of job search contacts for job seekers.⁸³ The number of job contacts required by a job seeker is reviewed when the job seeker makes Centrelink aware of major changes in their personal circumstances. The *Guide to Social Security Law* provides that factors to be considered in varying a job seeker's search requirements include 'domestic violence or family breakdown'.⁸⁴

7.96 Job seekers must provide information about their job search efforts to obtain work. Centrelink uses tools such as the application for payment form; job seeker diaries and employer contact certificates to monitor job search effort.

78 *Social Security Act 1991* (Cth) s 16B; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.2.9.20] (Job Search—Overview).

79 *Social Security (Administration) Act 1999* (Cth) s 16B.

80 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.2.9.190] (Suitable Activity—Quarterly Interview).

81 *Ibid.*, [3.2.9.190] (Suitable Activity—Quarterly Interview).

82 *Ibid.*, [3.2.9.190] (Suitable Activity—Quarterly Interview).

83 *Ibid.*, [3.2.9.30] (Job Search—Setting Job Search Requirements—General).

84 *Ibid.*, [3.2.9.30] (Job Search—Setting Job Search Requirements—General).

Job Seeker Classification Instrument

7.97 A JSCI is used by Centrelink at first contact when a job seeker registers for activity tested income support. A JSCI is used to determine a job seeker's relative level of disadvantage in the labour market, and therefore, their likely difficulty in obtaining employment.

7.98 The content of the JSCI is discussed in detail in Chapter 15, however, as the JSCI is often administered by Centrelink, its administration by Centrelink is considered in this chapter. In some instances JSA providers may administer the JSCI, where a job seeker registers directly with the provider or as part of a change of circumstances reassessment. Administration by JSA providers is considered in Chapter 15. Chapter 15 also discusses the manner in which a JSCI is administered, for example, in person or by telephone interview.

Employment Services Assessments and Job Capacity Assessments

7.99 An ESAt or JCA is used to, among other things, determine a person's capacity to work and identify barriers to employment.⁸⁵ The assessment also informs the kinds of activities that a person will be required to undertake to improve their capacity to meet activity test requirements⁸⁶ and, in some circumstances, whether a person may be eligible for an exemption.⁸⁷ The ESAt and JCA process and the determination of a person's capacity to work and barriers to employment are discussed in detail in Chapter 15. The referral process by Centrelink and the recommendations from an ESAt or JCA about access to services and measures which may assist the job seeker, such as variations to a person's EPP are considered in this chapter.

Referral by Centrelink

7.100 A job seeker may be referred for an ESAt or JCA in a number of circumstances, including where a person:

- is applying for Disability Support Pension or having a medical review of Disability Support Pension;
- is in receipt of Newstart Allowance or Youth Allowance and applying for an activity test exemption;
- registers directly with a job services provider; or
- informs Centrelink or their job services provider of a significant change in their circumstances that affects their work capacity and/or employment assistance needs.⁸⁸

85 Ibid, [3.2.1.10] (Qualification for NSA); [1.1.J.10] (Job Capacity Assessment (JCA)).

86 Ibid, [3.2.1.10] (Qualification for NSA).

87 Ibid, [3.2.1.45] (Exemptions from RapidConnect Provisions); [3.5.1.220] (Participation Requirements Exemption—Temporary Incapacity (PP)).

88 Ibid.

7.101 Referral to an ESAt or JCA may also occur as a result of the administration of the JSCI. This referral process is considered in detail in Chapter 15.

7.102 Centrelink has primary responsibility for identifying and actioning referrals for an ESAt or JCA.

Outcomes

7.103 ESAt and JCA assessors may make a range of recommendations about access to services and measures which may assist the job seeker. In addition to referrals to JSA and Disability Employment Services (discussed in Chapter 15), other possible interventions that may be recommended include education or training and personal counselling and referral to community services.⁸⁹ An ESAt or JCA will also identify unsuitable activities for a job seeker, such as where work may aggravate a pre-existing illness.⁹⁰

Comprehensive Compliance Assessment

7.104 If a job seeker is having difficulty meeting their activity test or participation requirements, Centrelink will use a Comprehensive Compliance Assessment (CCA) to determine the reasons why. A CCA will be automatically triggered after a job seeker has had three ‘Connection’ or ‘Reconnection Failures’, or three ‘No Show No Pay Failures’ in a six month period. Job services providers or Centrelink may also initiate a CCA at any other time they believe a job seeker’s circumstances warrant it.⁹¹

7.105 During a CCA, a Centrelink specialist officer considers the job seeker’s compliance history and looks at why the job seeker has been failing to meet their requirements. In addition to determining whether a job seeker has been persistently non-compliant, the CCA also acts to identify whether the job seeker:

- has any barriers to participation or employment;
- has been given appropriate activity test or participation requirements; and/or
- would benefit from additional or alternative assistance.⁹²

7.106 Possible outcomes from a CCA include: referral to an ESAt or JCA for further assessment; referral to DES; referral to another JSA service stream (discussed in Chapter 15); a recommendation that the activities or requirements in the job seeker’s EPP be amended; referral to a social worker to assist the job seeker with their personal circumstance; no action where there is reasonable explanation for the past failures and/or recent compliance record is good; or application of a ‘Serious Failure’.

7.107 The findings of a CCA are also used to inform future decisions about the job seeker’s requirements.

89 Ibid, [3.6.2.120] (Identification of Barriers & Interventions (DSP)).

90 Ibid, [1.1.U.55] (Unsuitable work (NSA, YA)).

91 Ibid, [3.1.13.70] (Comprehensive Compliance Assessments).

92 Ibid, [3.1.13.70] (Comprehensive Compliance Assessments).

Employment Pathway Plans

7.108 All activities and participation requirements are contained in an EPP.⁹³ An EPP is an individual agreement negotiated between a customer and their job services provider or Centrelink. Any activity in an EPP must improve the person's skills and experience and therefore their prospects of obtaining suitable paid work, assist the person in seeking suitable work, and if the job seeker is an early school leaver, be educative or training exclusive.⁹⁴

7.109 Employees of job services providers (including JSA and Disability Employment Services (DES)) and Centrelink have delegated powers to require a job seeker to enter into or vary an EPP; approve the terms of an EPP; and suspend or cancel an EPP.⁹⁵

Tailoring an EPP

7.110 The content of an EPP varies for different payments.⁹⁶ An EPP must meet, and be tailored to, the needs of an individual job seeker and not place unreasonable demands on a job seeker, having regard to their personal circumstances.⁹⁷ If a person has a limited capacity to meet an activity test or participation requirement, then a tailored EPP should be prepared taking into account any specific needs of the job seeker, such as family and caring responsibilities and health requirements.⁹⁸

7.111 The *Guide to Social Security Law* provides that in setting the terms of a person's EPP, Centrelink or a JSA provider must take into consideration:

- the person's education, experience, skills, age, physical condition and health (including mental health);
- the state of the labour market,
- the availability of places in appropriate courses of education or training,
- transport options available where the person lives,
- the family and caring responsibilities of the person,
- the financial costs of compliance with the terms of the EPP,
- the person's accommodation situation, and
- any other relevant circumstances that may affect a person's ability to participate and comply.⁹⁹

93 Ibid, [3.2.9.20] (Job Search Overview); [3.5.1.160] (When are EPPs Required? (PP)); [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

94 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

95 Ibid, [3.2.8.30] (What is an Employment Pathway Plan?).

96 Ibid, [3.2.8.10] (Activity Testing and Mutual Obligation for NSA/YA Job Seekers Overview); [3.2.9] (Activity Testing for NSA/YA Job Seekers—Suitable Activities); [3.5.1 PP] (Qualification & Payability).

97 Ibid, [3.2.8.30] (What is an Employment Pathway Plan?).

98 Ibid, [1.1.E.103] (Employment Pathway Plan (NSA, YA (job seekers) PP).

99 Ibid, [3.2.8.50] (What Can be Included in an Employment Pathway Plan); [3.5.1.160] (When are EPPs Required? (PP)).

7.112 For job seekers who have been assessed as having a partial capacity to work, the activities recommended by an ESAt or JCA are considered to be the most suitable for inclusion in a person's EPP.¹⁰⁰

7.113 Exemptions are available in certain circumstances—discussed below—however the *Guide to Social Security Law* states that it is preferable to reduce a person's activity or participation requirements rather than to apply an exemption from an activity test, participation requirement or EPP.¹⁰¹

Exemptions

7.114 A victim of family violence may be relieved from an activity test, participation requirement, or the requirement to enter into an EPP, or may have their EPP suspended in three circumstances, where:

- a person is a principal carer of one or more children and is subjected to 'domestic violence' in the 26 weeks prior to making the exemption determination;¹⁰²
- a person is a principal carer of one or more children and there are 'special circumstances' relating to the person's family that make it appropriate to make the determination;¹⁰³ or
- there are 'special circumstances' beyond the person's control and it would be unreasonable to expect compliance.¹⁰⁴

7.115 The *Guide to Social Security Law* provides that special circumstances in relation to exemptions from activity tests and participation requirements include when 'a person has been subjected to domestic violence', and:

- 'the domestic violence specifically affects capacity to both look for work and participation in training activities';¹⁰⁵ or
- where it is unforeseen (or unavoidable) and causes major disruption and would be unreasonable to expect the person to comply with the relevant activity test or participation requirement.¹⁰⁶

100 Ibid, [3.2.8.50] (What Can be Included in an Employment Pathway Plan).

101 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

102 *Social Security Act 1991* (Cth) ss 502C, 501E (Parenting Payment); ss 542, 542F, 544E (Youth Allowance); ss 602B, 607C (Newstart Allowance).

103 *Social Security Act 1991* (Cth) ss 502C, 501E (Parenting Payment); 542, 542F, 544E (Youth Allowance); 602B, 607C (Newstart Allowance); *Social Security (Special Circumstances Regarding a Person's Family) (DEWR) Determination 2006* (Cth).

104 *Social Security Act 1991* (Cth) s 542H (Youth Allowance); s 603A (Newstart Allowance).

105 *Social Security (Special Circumstances Regarding a Person's Family) (DEWR) Determination 2006* (Cth); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.5.1.280] (Participation Requirements Exemption in Special Family Circumstances—Case-by-Case (PP)).

106 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.7.5.30] (SpB Activity Test Exemptions (Special Benefit)); [3.2.11.40] (Activity Test for NSA/YA Job Seekers—Exemptions—Special Circumstances (Newstart and Youth Allowance)); [3.5.1.250] (Participation Requirements Exemption—Special Circumstances (PP) (Parenting Payment)).

7.116 The maximum length of an exemption available to victims of family violence who are principal carers is 16 weeks. For victims of family violence who are not principal carers, the maximum exemption that can be granted is 13 weeks. While exemptions are limited to a maximum of 13 or 16 weeks, a person who is on an exemption may reapply for another exemption.¹⁰⁷ Those who are provided an exemption are also exempt from RapidConnect provisions.¹⁰⁸

7.117 In determining whether a person is eligible for an exemption under these grounds, primary regard is to be given to a Centrelink social worker's assessment.¹⁰⁹

7.118 In 2008, a Participation Review Taskforce (the Taskforce) examined the rules for parents and mature-age job seekers with a view to increasing flexibility within the social security system and enabling greater workforce participation. In relation to the exemptions from activity tests, participation requirements and EPPs in circumstances of family violence, the Taskforce recommended that the 16 week exemption for principal carers be replaced with a 12 month exemption to 'recognise the time needed to restore victims of family violence and to support victims to seek services'.¹¹⁰ The Taskforce recommended that this exemption be available in 'cases where the parent is accessing services due to a domestic violence situation' such as counselling or emergency accommodation.¹¹¹ The Taskforce recommended that the existing 13 week 'special circumstances' case-by-case exemption would remain available in other circumstances.¹¹²

Submissions and consultations

7.119 In the Social Security Issues Paper, the ALRC asked what measures, if any, might be taken to address any difficulties faced by victims of family violence in complying with activity tests, participation requirements and EPPs. In particular, the ALRC asked whether the current exemption periods were reasonable for victims of family violence.¹¹³ *Family Violence and Commonwealth Laws—Employment and Superannuation Law* (Employment Law Issues Paper), also asked a number of questions in relation to the administration of the JSCI and the JCA referral process.¹¹⁴

7.120 In response, stakeholders raised concerns about the administration of the JSCI and referrals to JCAs, the flexibility of EPPs in reflecting the needs of victims of family violence, awareness of exemptions and extensions to exemptions, accessibility

107 Ibid, [3.2.11.70] (Activity Test for NSA/YA Job Seekers—Exemptions—Principal Carer Parents with Special Family Circumstances—Case-by-Case Exemptions; [3.5.1.280] (Participation Requirements Exemption in Special Family Circumstances—Case-by-Case (PP)).

108 Ibid, [3.2.1.45] (Exemptions from RapidConnect Provisions).

109 Ibid, [3.5.1.280] (Participation Requirement Exemptions in Special Family Circumstances—Case-by-Case (PP)); [3.2.11.70] (Activity Test for NSA/YA Job Seekers—Exemptions—Principal Carer Parents with Special Family Circumstances—Case-by-Case Exemptions).

110 Participation Review Taskforce, *Participation Review Taskforce Report* (2008), Australian Government.

111 Ibid, 14.

112 Ibid, 14.

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

114 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011).

of exemptions, and the adequacy of the length of exemptions. These concerns are discussed in turn below.

Job Seeker Classification Instrument

7.121 WEAVE submitted that, in administering the JSCI,

staff routinely skip questions bundling several questions into one generic question such as ‘Is there anything else you’d like to tell us about’, ‘are there any other issues that impact on your ability to undertake employment?’ For many women, these questions are not sufficiently specific for them to disclose the existence of domestic violence and they will routinely answer no, having no understanding that such issues could be considered.¹¹⁵

7.122 Many stakeholders emphasised the need for training of Centrelink staff in administering the JSCI.¹¹⁶

7.123 WEAVE commented broadly about the purpose of referral to a JCA, suggesting it should ‘form part of an informed consultation with the victim about their options—they may prefer to seek a Domestic Violence or Special Circumstances exemption, or be assessed for work capacity’.¹¹⁷

Flexibility in tailoring an individual’s Employment Pathway Plan

7.124 The Welfare Rights Centre NSW submitted that often,

employment pathway plans (EPPs) are ‘off the shelf’ plans which are not individually tailored to a particular person’s circumstance ... there is a lack of genuine negotiation when between the employment services provider and the jobseeker on the terms of an EPP.¹¹⁸

Awareness of exemptions and extensions

7.125 Some stakeholders noted a lack of awareness about available exemptions and extensions¹¹⁹ amongst social security recipients, Centrelink¹²⁰ and JSA staff.¹²¹

7.126 In the ADFVC’s study, *Seeking Security*,

Women were worried about their ability to comply with activity and participation requirements, given their childcare responsibilities and a lack of affordable childcare options. Some women were not emotionally ready to return to work. Others had ongoing legal, medical and other time commitments that would make finding work

115 WEAVE, *Submission CFV 14*, 5 April 2011.

116 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

117 WEAVE, *Submission CFV 14*, 5 April 2011.

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

119 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; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011.

120 M Winter, *Submission CFV 51*, 27 April 2011; M Winter, *Submission CFV 12*, 5 April 2011.

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

difficult. It was also concerning that few women in the financial security study were aware of the exemption from activity and participation tests.¹²²

7.127 WEAVE submitted that customers ‘are not routinely advised of the availability of domestic violence exemptions from jobseeker participation requirements’.¹²³ WEAVE also stated that there is a ‘sceptical attitude amongst Centrelink staff to domestic violence, and a belief that jobseekers routinely try to get out of their obligations any way they can. The lack of information about the existence of a Domestic Violence exemption is the fear that it would provide a ‘perverse incentive’ to jobseekers victims to claim Domestic Violence exemptions to try to avoid their obligations’.¹²⁴

7.128 In addition, the ADFVC noted that generally, JSA members are ‘poorly informed about exemptions, processes and appropriate supports and levels of assistance’.¹²⁵

7.129 Stakeholders therefore recommended training for Centrelink and JSA staff and enhanced information provision to customers about exemptions and extensions.¹²⁶

Length and accessibility of exemptions

7.130 Some stakeholders suggested that the exemption period be extended to reflect more accurately the demands on people who are experiencing or leaving family violence.¹²⁷ Some stakeholders noted anecdotally that exemptions are rarely granted for the full 16 weeks¹²⁸ rather,

The normal period of exemptions, when these are granted, is one or two weeks which is not enough for the victim to recover from trauma and to support her children through their recovery and the change in family circumstances when the parents have separated.¹²⁹

7.131 Similarly, Myjenta Winter submitted that although principal carers can apply for an exemption under ‘special circumstances’, ‘these exemptions are usually only granted for 2 weeks if granted at all, the principal carer is then expected to go back to Centrelink and repeat the whole traumatic story again to another person to try and attain another 2 week exemption’.¹³⁰

122 Ibid.

123 WEAVE, *Submission CFV 14*, 5 April 2011.

124 Ibid.

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

126 ADFVC, *Submission CFV 71*, 11 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 12*, 5 April 2011.

127 ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011 M Winter, *Submission CFV 51*, 27 April 2011.

128 M Winter, *Submission CFV 51*, 27 April 2011.

129 WEAVE, *Submission CFV 14*, 5 April 2011.

130 M Winter, *Submission CFV 12*, 5 April 2011.

7.132 The ADFVC recommended the exemption be extended to at least 6 months¹³¹ while others recommended a 12 month exemption in line with the recommendations of the Participation Review Taskforce.¹³²

7.133 On the other hand, the Welfare Rights Centre Inc Queensland commented that:

It is our understanding that the legislative exemptions for family violence with respect to activity requirements are quite adequate, but that Centrelink customers needed to be made aware of the availability of exemptions.¹³³

7.134 Myjenta Winter submitted that ‘[m]ostly principal carers are denied exemptions for caring for children who have experienced violence’¹³⁴ and that ‘[t]he current exemptions do not acknowledge violence against children. Principal carers of children who have been abused are only eligible for a maximum 13 week special circumstances exemption’.¹³⁵

7.135 WEAVE stated that ‘Centrelink social workers advise women that they cannot renew such exemptions and that they have to refer to JCAs. JCAs in turn advise that they can’t recommend ongoing exemptions without medical evidence’.¹³⁶

ALRC’s views

7.136 A number of concerns were highlighted by stakeholders in relation to activity tests, participation requirements and EPPs. These related to ensuring that the circumstances of a victim of family violence were adequately taken into account in the administration of a JSCI, tailoring an EPP and in considering whether to grant an exemption. Concerns were also raised in relation to the length of exemptions available.

Job Seeker Classification Instrument

7.137 The administration and effectiveness of the JSCI is considered in detail in Chapter 15. However, Centrelink staff may not administer the JSCI appropriately—in particular, to identify victims of family violence. The ALRC therefore considers that it may be appropriate that training be provided to Centrelink staff in administering the JSCI.

Comprehensive Compliance Assessments

7.138 The ALRC did not seek specific information about CCAs in either the Social Security Issues Paper or the Employment Law Issues Paper. The ALRC therefore welcomes comment as to whether family violence is adequately considered by Centrelink specialist officers in conducting a CCA.

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

132 M Winter, *Submission CFV 51*, 27 April 2011.

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

134 M Winter, *Submission CFV 12*, 5 April 2011.

135 M Winter, *Submission CFV 51*, 27 April 2011.

136 WEAVE, *Submission CFV 14*, 5 April 2011.

Job Capacity Assessment and Employment Services Assessment

7.139 The ALRC is also interested in comment on whether, in practice, family violence is considered in referring a job seeker to an ESAt or JCA assessor and whether recommendations made by ESAt or JCA assessors regarding the experiences of victims of family violence are taken into account by Centrelink. Whether family violence should be considered a ‘significant barrier to work’ is considered in Chapter 15.

Flexibility in tailoring an individual’s Employment Pathway Plan

7.140 The ALRC is concerned by stakeholder comment that EPPs are given to victims of family violence ‘off the shelf’ and do not adequately reflect the person’s individual circumstances. This may mean that victims of family violence find it difficult to meet their activity or participation requirements and consequently may be cut off from their social security payment.

7.141 In recognition of the theme of self-agency discussed in Chapter 2, a genuine conversation should take place between the job services provider and the customer to ensure that the content of an EPP connects the person with requisite services, training and work opportunities.

7.142 In particular, the *Guide to Social Security Law* does not expressly direct a Centrelink customer service adviser to consider family violence when tailoring a job seeker’s EPP. The ALRC therefore considers that the *Guide to Social Security Law* should expressly direct Centrelink customer service advisers to consider family violence when tailoring a job seeker’s EPP.

Accessibility of exemptions

7.143 Victims of family violence may not be aware of exemptions—and extensions to exemptions—from activity tests, participation requirements and EPPs. In addition, stakeholders raised concerns about the level of knowledge of Centrelink staff and JSA providers in relation to exemptions and extensions.

7.144 Accordingly, the ALRC proposes that information about exemptions and extensions should be included as part of the information provided to all customers as proposed in Proposal 4–8. This places the choice in the individual’s hands as to whether or not they wish to apply for an exemption or not. While some victims of family violence may need an exemption from activity tests and participation requirements, others may want to continue seeking work to increase their chances of returning to, or joining, the workforce.

7.145 In this context, it is important that the social security system does not presume a ‘one-size-fits-all’ response nor assume that the system knows what is best for an individual’s circumstances.

Length of exemption periods

7.146 Stakeholders raised concerns about the length of exemption periods available for victims of family violence and that the length of exemption did not reflect the nature of

family violence. Some stakeholders recommended extending the exemption in all cases to six to 12 months.

7.147 An automatic exemption of six to 12 months may isolate a victim of family violence from services. Currently, the requirement for a person to apply for a renewal of an exemption means that a customer is re-engaging with the system and has opportunity to be referred to other support mechanisms.

7.148 There are several competing consequences. First, the ‘all-encompassing’ nature of family violence can mean that an appointment to reapply for an exemption may be too overwhelming. Similarly, if a victim of family violence is required to leave home in order to reapply for an exemption, this may subject the person to further risk of violence. On the other hand however, extending exemptions for too long may have unintended consequences effectively isolating the customer from any connection to services.

7.149 There are also different exemption periods that are available to principal carers than to other social security recipients. In order to ensure consistency and not to presume that family violence necessarily has a larger impact on a principal carer than those who are not, it may be necessary that the length of exemption available to all victims of family violence be the same—that is, 16 weeks.

7.150 The ALRC considers that DEEWR should review the length of, and accessibility of, exemption periods to ensure that they reflect the nature of family violence experienced by both principal carers and those who are not.

7.151 The ALRC is also interested to hear about current methods used to engage with customers when applying for a further exemption, such as by telephone or email, to ensure that the customer remains connected with services but also remains safe.

Proposal 7–4 Centrelink customer service advisers should receive consistent and regular training in the administration of the Job Seeker Classification Instrument including training in relation to:

- the potential impact of family violence on a job seeker’s capacity to work and barriers to employment, for the purposes of income support; and
- the availability of support services.

Question 7–8 In practice, to what extent can, or do, recommendations made by ESA or JCA assessors in relation to activity tests, participation requirements, Employment Pathway Plans and exemptions account for the needs and experiences of job seekers experiencing family violence?

Question 7–9 In practice, is family violence adequately taken into account by a Centrelink specialist officer in conducting a Comprehensive Compliance Assessment?

Question 7–10 What changes, if any, to the Employment Pathway Plan and exemption processes could ensure that Centrelink captures and assesses the circumstances of job seekers experiencing family violence?

Proposal 7–5 The *Guide to Social Security Law* should expressly direct Centrelink customer service advisers to consider family violence when tailoring a job seeker’s Employment Pathway Plan.

Proposal 7–6 Exemptions from activity tests, participation requirements and Employment Pathway Plans are available for a maximum of 13 or 16 weeks. The ALRC has heard concerns that exemption periods granted to victims of family violence do not always reflect the nature of family violence. DEEWR should review exemption periods to ensure a flexible response for victims of family violence—both principal carers and those who are not principal carers.

Question 7–11 In practice, what degree of flexibility does Centrelink have in its procedures for customers experiencing family violence:

- (a) to engage with Centrelink in negotiating or revising an Employment Pathway Plan; or
- (b) apply for or extending an exemption.

Are these procedures sufficient to ensure the safety of victims of family violence is protected?

Move to area of lower employment prospects

7.152 Unemployment payments are designed as a safety net payment for people who are unemployed and are paid on condition that they do all they can to maximise their chances of finding suitable paid work. Moving to areas of high unemployment can disadvantage job seekers and limit their opportunities for work.¹³⁷ A 26 week exclusion from payment of Newstart Allowance, Youth Allowance and Special Benefit applies if a person receiving one of these payments moves to an area of lower employment prospects.

7.153 An exemption from this exclusion period applies where the reason for moving is due to an ‘extreme circumstance’ such as domestic or family violence in the original place of residence.¹³⁸ ‘Original place of residence’ is not defined in the *Social Security Act* or in the *Guide to Social Security Law*.

137 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.2.1.35] (Move to Area of Lower Employment Prospects for NSA, YA & SpB Recipients).

138 *Social Security Act 1991* (Cth) ss 553B (Youth Allowance); 634 (Newstart Allowance); 745N (Special Benefit).

7.154 In the Social Security Issues Paper, the ALRC asked a general question as to whether Centrelink customers were aware of exemptions available in circumstances of family violence and, if so, whether they were likely to use the exemptions.¹³⁹

7.155 Stakeholders indicated that customers were generally not aware of the types of exemptions available. However, submissions did not directly address the question of exemptions available when a person has moved to an area of lower employment prospects.

7.156 As limited detail was provided in response to the Social Security Issues Paper, the ALRC is interested to hear whether the exemption available to victims of family violence to the exclusion period when a person moves to an area of lower employment prospects is an issue and, if so, what improvements might be necessary.

Question 7–12 A 26 week exclusion period applies to a person who moves to an area of lower employment prospects. An exemption applies where the reason for moving is due to an ‘extreme circumstance’ such as family violence in the ‘original place of residence’. What changes, if any, are necessary to ensure that victims of family violence are aware of, and are making use of, the exemption available from the 26 week exclusion period? For example, is the term ‘original place of residence’ interpreted in a sufficiently broad manner to encapsulate all forms of family violence whether or not they occur within the ‘home’?

Failures

7.157 On 1 July 2009, a new system commenced to ensure compliance by job seekers with activity tests and participation requirements. This system includes the following four levels of ‘failure’ to comply with activity tests and participation requirements:

- No Show, No Pay Failures;
- Connection Failures;
- Reconnection Failures; and
- Serious Failures.¹⁴⁰

A failure cannot be imposed if a person has a ‘reasonable excuse’, discussed below.

7.158 A ‘No Show, No Pay Failure’ results in the loss of one day’s payment for each day that a person does not show up for one of the compulsory activities in his or her EPP, does not attend a job interview, or deliberately acts in a way in a job interview that could result in a job offer not being made.

139 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 27.

140 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.1.13.10] (Types of Failures & Penalties).

7.159 A ‘Connection Failure’ may be made if a person fails to attend an appointment with Centrelink or a JSA provider, sign an EPP, look for a job, or hand in a Job Seeker Diary. A Connection Failure does not result in a loss of payment. Rather Centrelink will contact the person to arrange a new appointment or to sign an EPP. If a person still does not satisfy these requirements—known as a ‘Reconnection Requirement’—a person may have a reconnection failure resulting in the loss of one day’s payment for every day until the requirement is met.

7.160 A ‘Serious Failure’ applies where a person has had at least three no show no pay, connection or reconnection failures or a combination of these types of failures, in the last six months and Centrelink believes that the person is deliberately and persistently not complying with requirements or a person refuses to accept a suitable job offer. The penalty for a serious failure is an eight week non-payment period.

7.161 A Serious Failure is not imposed unless a CCA decides that the job seeker has been persistently non-compliant. Where a Serious Failure is imposed, the new structure still pursues its emphasis on re-engagement by establishing a Compliance Activity option which allows the job seeker to undertake an activity similar to work experience for eight weeks in lieu of the loss of payments.

7.162 Centrelink is responsible for determining whether to impose a failure or penalty for non-compliance with activity test requirements. However, job service providers generally initiate the process by reporting to Centrelink instances of potential non-compliance by lodging a ‘Participation Report’—an online form detailing the circumstances of the job seeker’s potential non-compliance.

Unemployment Non-Payment Period

7.163 In addition, an Unemployment Non-Payment Period—a preclusion period of an eight-week loss of payment—applies to any job seeker who voluntarily leaves a job without reasonable excuse, or loses a job through misconduct.¹⁴¹ An Unemployment Non-Payment Period may be ended if a person is in a class of persons specified by a legislative instrument and serving the non-payment period would cause the person to be in severe financial hardship.¹⁴²

7.164 Currently, those who do not have access to safe, secure and adequate housing or who are using emergency accommodation or a refuge are considered to be within the ‘class of persons’.¹⁴³ Access to safe, secure and adequate housing also means having a right to remain, or a reasonable expectation to remain, in their accommodation.¹⁴⁴

141 Ibid, [3.1.13.80] (Unemployment Non-Payment Periods).

142 Ibid, [3.1.13.80] (Unemployment Non-Payment Periods).

143 *Social Security (Administration) (Ending Unemployment Non-Payment Periods--Classes of Persons) (DEEWR) Specification (No 1) 2009* ((Cth)); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.1.13.80] (Unemployment Non-Payment Periods).

144 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.1.13.80] (Unemployment Non-Payment Periods).

However, a person experiencing family violence is not referred to expressly as a person who might fall in a relevant class of persons for unemployment non-payment periods.

Reasonable excuse

7.165 In addition to activity tests and participation requirements, in some cases, social security recipients must comply with various administrative requirements. These may include:

- providing certain information;
- attending a particular place;
- completing a questionnaire; or
- undergoing a medical, psychiatric or psychological examination.¹⁴⁵

7.166 Failure to comply with such administrative requirements can lead to non-payment, unless the person can demonstrate a ‘reasonable excuse’. In addition, where a person fails to meet activity or participation test requirements and does not have a ‘reasonable excuse’ or an exemption, this may constitute a ‘failure’, discussed above, and a penalty may apply. Such penalties may apply to Newstart Allowance, Youth Allowance, Parenting Payment, Austudy and Special Benefit.¹⁴⁶ As discussed above, penalties range from a reduction in the person’s payment, to non-payment for eight weeks.¹⁴⁷

7.167 The term ‘reasonable excuse’ is not defined in the *Social Security Act*. The *Guide to Social Security Law* provides that, in determining whether a person has a reasonable excuse, the decision maker must take into account whether the person had access to safe, secure and adequate housing, or was using emergency accommodation or a refuge at the time of the failure and the person was subjected to criminal violence (including ‘domestic violence’ and sexual assault). A person is taken not to have access to safe, secure and adequate housing where such housing threatens or is likely to threaten the person’s safety.¹⁴⁸

Submissions and consultations

7.168 In the Social Security Issues Paper the ALRC asked whether, in practice, Centrelink customers were aware of exemptions—including the ‘reasonable excuse’

145 *Social Security (Administration) Act 1999* (Cth) ss 67, 68, 192.

146 *Social Security Act 1991* (Cth) s 500J (Parenting Payment; ss 550, 550B (Youth Allowance; ss 572A, 576A (Austudy); ss 615, 631 (Newstart Allowance); s 745H (Special Benefit).

147 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 22 July 2011, [3.1.13.10] (Types of Failures and Penalties).

148 *Ibid*, [3.1.13.90] (Reasonable Excuse). *Social Security (Reasonable Excuse—Participation Payment Obligations) (DEEWR) Determination 2009 (No.1) 2009* (Cth); Explanatory Statement, *Social Security (Reasonable Excuse: Participation Payment Obligations) (DEEWR) Determination 2009 No.1 2009* (Cth).

exemption—available in circumstances of family violence and whether customers were likely to use the exemption.¹⁴⁹

7.169 Stakeholders who responded to this question indicated that Centrelink customers were given very little information about provisions to help them in circumstances of family violence.¹⁵⁰

7.170 The Commonwealth Ombudsman submitted that:

Our office is aware that family violence may be a ‘reasonable excuse’ for a failure to comply with a requirement, but it is not clear whether customers are aware of this or whether compliance staff specifically question customers about the existence of family violence ... when deciding whether to apply a failure. It may be appropriate for either the social security law or policy to provide specific guidance to staff about whether family violence may be a relevant consideration in determining whether a customer has a ‘reasonable excuse’.¹⁵¹

ALRC’s views

7.171 In the context of ‘reasonable excuse’, the *Guide to Social Security Law* currently refers to ‘domestic violence’ as a criminal offence. The ALRC is concerned that not all family violence amounts to a criminal offence and therefore, not all family violence may lead a decision maker to conclude that a person has a reasonable excuse which, in turn, may mean that a victim of family violence has their payments suspended and cannot access independent financial assistance. Accordingly, the ALRC considers that the *Guide to Social Security Law* should expressly refer to family violence as a ‘reasonable excuse’ to ensure that the range of violent conduct is included. This proposal is complemented by Proposal 3–1 which proposes a broad definition of family violence for the purposes of social security law.

7.172 In addition, the ALRC is concerned about the lack of knowledge about the ‘reasonable excuse’ provisions among victims of family violence which may prevent a victim of family violence accessing the exemption and having their payment cut off. The ALRC therefore proposes that information about the reasonable excuse exemption be included in Proposal 4–8.

7.173 The ALRC is also seeking further information as to whether the current criteria on which Centrelink can end a person’s Unemployment Non-Payment Period presents a barrier to the safety of victims of family violence.

149 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 27.

150 ADFVC, *Submission CFV 71*, 11 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; M Winter, *Submission CFV 51*, 27 April 2011.

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

Proposal 7-7 The *Guide to Social Security Law* should expressly refer to family violence as a ‘reasonable excuse’ for the purposes of activity tests, participation requirements, Employment Pathway Plans and other administrative requirements.

Question 7-13 Centrelink can end a person’s ‘Unemployment Non-Payment Period’ in defined circumstances. In practice, are these sufficiently accessible to victims of family violence?

