

## 8. Social Security—Payment Types and Methods, and Overpayment

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### Summary

8.1 This chapter considers mechanisms that are built into social security law and practice to assist victims of family violence, and others, including:

- special or supplementary payments;
- the way in which a person receives their regular social security payment, such as weekly or urgent payments; and
- nominee arrangements.

8.2 The chapter discusses ways in which these payments and payment arrangements may be able to better protect the safety of victims of family violence. Finally, the chapter considers reforms to provisions in social security legislation that recognise debt waiver in ‘special circumstances’, which can act to assist victims of family violence who have been subject to economic abuse or duress.

8.3 In particular, the ALRC considers a number of barriers for victims of family violence in accessing Crisis Payment, weekly and urgent payments and makes proposals to overcome these barriers. The ALRC also considers ways to ensure that family violence can be taken into consideration in decisions to waive the repayment of a social security debt—for example, where the debt was incurred due to economic abuse or duress.

## Special payments and supplementary benefits

8.4 In addition to regular social security payments and entitlements, some payments are available under the *Social Security Act 1999* (Cth) due to the occurrence of a specific circumstance, or are provided as a supplement to a person's regular income support.

### Crisis Payment

8.5 'Crisis Payment' is a one-off payment, equivalent to one week of a person's eligible fortnightly payment, that is payable to a person who is in 'severe financial hardship' at the time of a particular crisis, including family violence. Crisis Payment may be paid in addition to a person's regular payment, to social security recipients, or those who have applied and qualify for social security payments. Claims must be made within seven days of an extreme circumstance.<sup>1</sup>

8.6 A person cannot be paid more than four payments of Crisis Payment due to family violence in any 12 month period.<sup>2</sup> For victims of family violence, one of the following circumstances must apply.

8.7 First, the person must have left his or her home, in circumstances where it is unreasonable to return, and intend to establish a new home. The 'extreme circumstance' is defined as the 'period of time in which the person is abused, flees the home and, in many cases, includes a period of trauma following the person fleeing the home'.<sup>3</sup> The claiming period begins when the person, having left home, decides that they cannot return home as a result of the 'extreme circumstance'.<sup>4</sup>

8.8 Secondly, the person remained in the home after the person using family violence is removed from, or leaves the home. It must be verified that the person using family violence actually lived with the victim in the home immediately before being removed. The claiming period begins when the family member leaves.<sup>5</sup>

8.9 For the purposes of Crisis Payment, 'home' means the person's house or other shelter that is the 'fixed residence' of a person for the foreseeable future. Fixed residence includes a house, apartment, on-site caravan, long-term boarding house or

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1 *Social Security Act 1991* (Cth) ss 1061JH, 1061JHA.

2 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence); [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

3 *Ibid*, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

4 *Social Security Act 1991* (Cth) s 1061JH; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

5 *Social Security Act 1991* (Cth) s 1061JHA; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

moored boat. A ‘home’ does not include a refuge, overnight hostel, squat or other temporary accommodation.<sup>6</sup>

8.10 The family violence must be used by a ‘family member’, defined as a person’s partner, parent, sister, brother, child or any other person whom the Secretary deems should be treated as a family member.<sup>7</sup>

8.11 In addition, Crisis Payment is only available to Australian residents, a Special Category visa holder or the holder of a specified subclass of visa that qualifies the person for Special Benefit (as discussed in Chapter 7).<sup>8</sup>

### **Submissions and consultations**

8.12 In *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011) (the Social Security Issues Paper), the ALRC asked a number of questions about Crisis Payment including: whether Crisis Payment should be available to those otherwise ineligible for a social security payment but due to extreme circumstances of family violence are placed in financial hardship; whether claim periods and eligibility criteria for Crisis Payment adequately reflects the breadth and nature of family violence; and how could access to Crisis Payment be improved for victims of family violence—for instance, should Crisis Payment be ‘wrapped up’ with Special Benefit.<sup>9</sup>

8.13 Stakeholders identified a number of issues faced by victims of family violence in relation to Crisis Payment. Overall, stakeholders agreed that there needed to be more information available about Crisis Payment.<sup>10</sup> Specifically, the Australian Domestic and Family Violence Clearinghouse (ADFVC) recommended the delivery of a comprehensive package of information and a dedicated case worker.<sup>11</sup>

8.14 A number of concerns relating to the qualification criteria for Crisis Payment were also raised, including the:

- requirement to be on, or eligible for, income support;
- nexus with the home and the corresponding definition of ‘extreme circumstance’;

6 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides\_acts/> at 22 July 2011, [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

7 *Social Security Act 1991* (Cth) s 23(14).

8 Ibid ss 29, 30, 30A; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides\_acts/> at 22 July 2011, [3.7.4.10] (Qualification for CrP—General Provisions).

9 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 30, 31, 32, 33.

10 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

- seven day claiming period; and
- amount of payment.

***Requirement to be on, or eligible for, income support***

8.15 In the Social Security Issues Paper, the ALRC asked whether Crisis Payment should be made available to those who are otherwise ineligible for a social security pension or benefit but—due to extreme circumstances of family violence—are placed in financial hardship.<sup>12</sup>

8.16 Most stakeholders supported the idea that financial hardship alone should be the trigger for Crisis Payment, without the additional requirement of being on, or eligible for, income support.<sup>13</sup> Stakeholders submitted that the limitation of Crisis Payment, to those already in receipt of social security payments or entitlements, excludes those who are financially dependent on the person using family violence and have no independent income.<sup>14</sup>

8.17 In these circumstances, access to Crisis Payment may be critical. For example, as noted by the Australian Domestic and Family Violence Clearinghouse (ADFVC), it ‘may mean the difference between being homeless or not, returning to the violent partner or not, seeking assistance or not’.<sup>15</sup>

8.18 In addition, if a person is not currently receiving a social security payment or entitlement, but is otherwise eligible, the requirement to apply for income support, before being able to access Crisis Payment, ‘creates an unduly long, time-consuming and arduous process of registering with Centrelink before they are able to receive a Crisis Payment’.<sup>16</sup>

***Nexus with the ‘home’***

8.19 Crisis Payment for family violence currently turns on either the victim of family violence leaving the home, or the person using family violence being removed from, or leaving, the home. Some stakeholders indicated that this requirement is too restrictive and, as a result, there are people who are affected by family violence, but are not eligible for Crisis Payment.<sup>17</sup> In particular, stakeholders identified the following scenarios that may affect the safety of a victim of family violence.

12 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 31.

13 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

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

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

17 *Ibid*; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

8.20 First, a victim of family violence may not have left the home shared with the person using family violence and cannot afford to do so without financial assistance.<sup>18</sup> Secondly, although a person may have been forced to leave the home as a result of family violence, it may not be a home shared with the person using family violence. For example, there may be victims of family violence who have already moved out of the home to escape the person using family violence but the person using family violence, finds him or her at the new home.<sup>19</sup> As noted in one submission, ‘[p]ost separation violence is a very common and serious form of family violence’.<sup>20</sup>

8.21 Thirdly, there are people who do not have stable accommodation, as a result of family violence. The Commonwealth Ombudsman gave the example of homeless customers or customers who have resided in emergency accommodation who wish to establish stable accommodation in order to escape family violence.<sup>21</sup> Similarly, NAAJA provided an example of a client who was refused payment because

she was living rough in a tent in the river bank in a small town. She couldn’t go back to her tent, or shift camps because the perpetrator would find it very easy to access her. She seemed like an ideal customer for crisis payment but it was refused even on review because her home didn’t fit into the definition.<sup>22</sup>

8.22 Another example given by the Ombudsman is set out in the following case study.

**Case Study—No home to leave**

Ms H contacted Centrelink to advise that she was currently homeless and had recently been physically and sexually assaulted by a family member. She requested a Crisis Payment to assist her in establishing a new home, and complained to the Ombudsman’s office when this request was refused.

Our investigation identified that Centrelink refused Ms H’s request for a Crisis Payment because she had not left her home (she did not have one) as a result of the violence. We advised Ms H that this decision appeared to be consistent with the qualification requirements for Crisis Payment.<sup>23</sup>

8.23 The definition of ‘extreme circumstance’ is also linked either to the person using family violence being removed from, or leaving the home, or the victim leaving the home. The Sole Parents’ Union submitted that the definition of ‘extreme circumstance’ can work to prevent sole parents receiving a needed payment, because ‘[w]hat Centrelink considers the crucial crisis point is not necessarily the same as for the individual concerned’.<sup>24</sup>

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

19 *Ibid.*

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

21 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

22 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

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

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

8.24 There may be additional concerns for people with disability where the person using family violence is also the carer. If the person using family violence is removed from the home, the person with disability may lose the necessary care.

### *Claiming period*

8.25 Most stakeholders submitted that the current claim period of seven days was too short.<sup>25</sup> The Welfare Rights Centre NSW recommended the claim period be extended to 21 days;<sup>26</sup> the ADFVC recommended extending the period to six months.<sup>27</sup>

8.26 In a joint submission, the Good Shepherd Youth and Family Service and others provided the following example to demonstrate the restrictiveness of the seven day claim period for victims of family violence and concerns with the nexus with the home requirement:

A woman spent more than one week in hospital due to domestic violence and upon leaving hospital was taken to [McAuley Community Services for Women] crisis accommodation program. She was 38 weeks pregnant and was suffering from Gestational Diabetes. She was denied a crisis payment for two primary reasons: The incidence of violence had occurred more than 7 days ago (it had occurred 10 days ago when she made the application). The fact she was in unconscious and hospitalised due to the act of family violence was disregarded [and the] act of family violence did not occur in her home, therefore Centrelink, City of Yarra stated ‘If it is outside the home it is an assault and not domestic violence.’<sup>28</sup>

### *Special Benefit*

8.27 In the Social Security Issues Paper, the ALRC also asked whether Crisis Payment should be ‘wrapped up’ with Special Benefit.<sup>29</sup> Most stakeholders did not consider that Crisis Payment should be ‘wrapped up’ with Special Benefit,<sup>30</sup> because the qualification requirements differ markedly;<sup>31</sup> and if it were ‘wrapped up’, Crisis Payment would be unavailable to victims of family violence who already receive a social security payment.<sup>32</sup>

25 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

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

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

29 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 30.

30 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

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

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

**Amount of payment**

8.28 Some stakeholders also mentioned that the amount of Crisis Payment is ‘insufficient to meet the needs of individuals escaping domestic violence’<sup>33</sup> and that the limit of four payments in a 12 month period may be insufficient.<sup>34</sup>

**ALRC’s views**

8.29 There may be persons who have experienced, or are experiencing, family violence but are unable to access Crisis Payment for a range of reasons. These include: that a victim may not have not lived with the person using violence; are in a form of accommodation which is not covered by the definition of ‘home’; or cannot afford to leave home without the assistance that Crisis Payment would provide.

8.30 The ALRC has identified two possibilities for reform. On the one hand, a series of amendments could assist victims of family violence in circumstances such as those identified by stakeholders. For example, if the definition of ‘home’ in the *Guide to Social Security Law* was broadened to include refuges, emergency accommodation and other temporary accommodation, this would address concerns of people fleeing family violence and going into emergency accommodation. However, as discussed above, the claiming period begins when the person, having left home, decides that they cannot return home as a result of the ‘extreme circumstance’.<sup>35</sup> Therefore, if the definition of ‘home’ was expanded to include emergency accommodation, there may be circumstances where a victim of family violence does not qualify for Crisis Payment because of intending to return to the emergency accommodation.

8.31 Amending the *Social Security Act* to remove the requirement of the victim having lived with the person using family violence could also address the concerns regarding ‘post separation violence’. However, these amendments would not address the concerns that a victim of family violence may not be able to access financial assistance to leave the home and the violent relationship in the first place.

8.32 As an alternative, and as social security law is designed to provide for those in ‘need’, it may be preferable to remove the nexus to the home in its entirety and require that a person be ‘subject to’ or ‘experiencing’ family violence. The advantage of such a proposal is that it reflects the nature of the violence rather than focusing on the relationship or where the violence occurs. However, there may be concerns that such a proposal would be too broad.

8.33 The ALRC is also concerned that the seven day claim period for Crisis Payment is too short and may operate to restrict access to Crisis Payment for victims of family violence. The ALRC therefore proposes that FaHCSIA should review the claim period and the point at which the claiming period begins, to ensure a flexible response for

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33 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

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

35 *Social Security Act 1991* (Cth) s 1061JH; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

victims of family violence. The ALRC considers that the above proposals should also address concerns regarding the definition of ‘extreme circumstance’.

8.34 Special Benefit provides a social security safety net, by providing income support for people who are in financial hardship due to reasons beyond their control and unable to earn a sufficient livelihood for themselves and their dependants.<sup>36</sup> One criterion for qualification is that a person is unable to receive any other social security pension or benefit.<sup>37</sup> Arguably, this may mean that a person who is experiencing family violence could access Special Benefit and not Crisis Payment.

8.35 However, as discussed in Chapter 7, there may be concerns about residential requirements for Special Benefit. There may also be concerns that Crisis Payment is designed as a one-off payment and so should also be available to those on Special Benefit. The ALRC is therefore interested in comment whether—rather than Crisis Payment being ‘wrapped up’ with Special Benefit—Special Benefit would be sufficient as an alternative for victims of family violence who do not qualify for Crisis Payment.

8.36 In addition, the ALRC proposes that information about Crisis Payment be provided to all customers as considered.<sup>38</sup>

**Proposal 8–1** The *Social Security Act 1991* (Cth) establishes a seven day claim period for Crisis Payment. FaHCSIA should review the seven day claim period for Crisis Payment to ensure a flexible response for victims of family violence.

**Question 8–1** Crisis Payment is available to social security recipients or to those who have applied, and qualify, for social security payments. However, Special Benefit is available to those who are not receiving, or eligible to receive, social security payments. What reforms, if any, are needed to ensure that Special Benefit is accessible to victims of family violence who are otherwise ineligible for Crisis Payment?

**Proposal 8–2** Crisis Payment for family violence currently turns on either the victim of family violence leaving the home or the person using family violence being removed from, or leaving, the home. The *Social Security Act 1991* (Cth) should be amended to provide Crisis Payment to any person who is ‘subject to’ or ‘experiencing’ family violence.

36 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.2.6.10] (Special Benefit (SpB)—Description)).

37 *Ibid.*, [1.2.6.10] (Special Benefit (SpB)—Description)).

38 Proposal 4–8.



### Rent Assistance

8.37 Rent Assistance is not a separate social security payment. It is an increase in—or a supplement to—the rate of a person’s normal income support payment that is available in certain circumstances to a person who pays private rent.

8.38 Rent Assistance is available to social security recipients who:

- are not aged care residents;
- are not ‘ineligible homeowners’; and
- pay, or are liable to pay, rent and the fortnightly rent is more than the ‘rent threshold amount’.<sup>39</sup>

8.39 Rent is defined broadly in the *Social Security Act*. It does not expressly extend to mortgage repayments.<sup>40</sup> In comparison, New Zealand’s *Social Security Act 1964* provides for an ‘Accommodation Supplement’ that is a non-taxable and asset-tested income supplement that provides assistance towards accommodation costs (excluding state housing), but includes rent, board and the costs of owner-occupied homes, including mortgage repayments.

### Submissions and consultations

8.40 In the Social Security Issues Paper, the ALRC asked whether the provisions for Rent Assistance in the *Social Security Act* adequately addressed the situation where a person using family violence defaults on mortgage repayments on the house in which the victim is living, thereby jeopardising the victim’s safety. Specifically, the ALRC asked whether the definition of ‘rent’ should expressly include mortgage repayments where family violence is an issue.<sup>41</sup>

8.41 Most stakeholders supported expanding the definition of ‘rent’ in the *Social Security Act* to include mortgage repayments where family violence is an issue.<sup>42</sup> For example, the ADFVC noted that where a person using family violence defaults on a mortgage repayment may leave victims of family violence in danger of losing their home and unable to secure long term housing.<sup>43</sup>

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39 *Social Security Act 1991* (Cth) ss 1070B–1070J, 1070T.

40 *Ibid* ss 13(2), 13(3).

41 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 34.

42 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; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

8.42 However, the Welfare Rights Centre NSW submitted that rather than this being a social security matter, ‘there may be role for the banking industry to play in this circumstance to relieve against mortgagee hardship’.<sup>44</sup>

### **ALRC’s views**

8.43 The ALRC considers that hardship concerning mortgage repayments should fall under the *National Credit Code* rather than social security law.<sup>45</sup> Under the *National Credit Code*, a person who has:

- either borrowed money to buy a home for personal use (rather than an investment), or used their home as security to raise money for other household, personal or domestic purposes (rather than a business);<sup>46</sup> and
- is unable to pay because of ‘illness, unemployment or other reasonable cause’; and
- can demonstrate if they receive a variation they will be able to repay the loan,

may be eligible for an extension of the term of the loan and reduction in the amount of each payment for that period, a postponement of due dates for payment, or an extension of the term of the contract and a postponement.<sup>47</sup>

8.44 However the ALRC considers that where victims of family violence come within the social security system, they should be aware of the hardship options available in the *National Credit Code*, and therefore that information about the hardship provisions in the *National Credit Code* should be provided to customers as part of Proposal 4–8.

## **Methods of payment**

8.45 Generally, all social security payments are paid on a fortnightly basis in arrears. Payments may also be made in advance, urgently or weekly. Most social security payments are made by direct deposit to the recipient’s bank, building society or credit union account. However, Centrelink may make payment to another person or organisation when a person is under 18 and receiving Youth Allowance. Payment is made to a parent or guardian unless: the young person is independent; or there is a nominee appointed (either a person or an organisation).<sup>48</sup>

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

45 *National Consumer Credit Protection Act 2009* (Cth) sch 1.

46 *Ibid* s 5.

47 *Ibid*.

48 *Social Security (Administration) Act 1999* (Cth) s 45; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.4.1.30] (Payments to a Third Party).

### Weekly payments

8.46 Weekly payments of social security can be made to those considered to be ‘most vulnerable’,<sup>49</sup> defined as a person who:

- is homeless, or
- is at risk of homelessness and has issues of vulnerability and significant disadvantage and would benefit from receiving payments on a weekly basis, or
- has considerable difficulty in managing their finances ... on a fortnightly basis and would benefit from receiving payments on a weekly basis.<sup>50</sup>

8.47 Weekly payments are offered in conjunction with other services and referrals, such as family violence counselling. Receiving income support payments on a weekly basis is voluntary. Centrelink works with people to assess their needs.<sup>51</sup>

8.48 In determining whether a person is eligible for weekly payments, the *Guide to Social Security Law* provides that a decision maker should take into account, among other things, ‘recent traumatic relationship breakdown, particularly if domestic or family violence was involved’ and whether the ‘person is experiencing financial exploitation’.<sup>52</sup>

### Submissions and consultations

8.49 In the Social Security Issues Paper, the ALRC asked whether, in practice, Centrelink customers, including victims of family violence, were aware of weekly payments and were provided them when requested.<sup>53</sup>

8.50 Responses from stakeholders indicated that victims of family violence were not always aware of the option to receive their social security payments weekly.<sup>54</sup> The Public Interest Advocacy Centre recommended that ‘all Centrelink customers for whom family violence has been identified, should be routinely informed of the possibility of receiving weekly payments’.<sup>55</sup>

49 *Social Security (Administration) Act 1999* (Cth) s 43; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

50 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People). See also *Social Security (Administration) (Weekly Payments—Classes of Persons) (DEEWR) Specification 2010* (Cth); *Social Security (Administration) (Weekly Payments—Classes of Persons) (FaHCSIA) Specification 2010* (Cth).

51 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

52 *Ibid.*, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

53 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 35.

54 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

8.51 The North Australian Aboriginal Justice Agency (NAAJA) raised an additional concern with the requirement that weekly payments are only available to the ‘most vulnerable’.

We are currently hesitant to advise people to ask for weekly payments in the NT because we are concerned that this will trigger an assessment of the customer as a ‘vulnerable’ person for the purposes of compulsory income management.<sup>56</sup>

### **ALRC’s views**

8.52 In order to increase awareness of the availability of weekly payments, the ALRC considers that information about weekly payments should be included as part of the information provided to all customers in Proposal 4–8.

8.53 As discussed in Chapter 13, a ‘vulnerable welfare payment recipient’ may be subjected to the imposition of income management. An indicator of vulnerability includes financial hardship, financial exploitation, failure to undertake reasonable self-care or homelessness or risk of homelessness.<sup>57</sup>

8.54 The prospect of being subject to income management may mean that people experiencing family violence do not request weekly payments due to fear that they will be placed on compulsory income management. Consequently, such reluctance may jeopardise a victim’s safety as he or she is unable to access the required financial assistance.

8.55 In Chapter 13, the ALRC makes a proposal that persons experiencing family violence should not be caught by the vulnerability indicators for income management, and therefore not placed on compulsory income management. The ALRC therefore considers that the proposals made in Chapter 13 in relation to income management should address the concerns raised by stakeholders in relation to weekly payments.

### **Urgent payments**

8.56 Where a social security recipient is suffering severe financial hardship due to ‘exceptional and unforeseen circumstances’, an urgent payment of the person’s next fortnightly payment may be made.<sup>58</sup> Urgent payments result in a lower subsequent payment on the recipient’s usual payment delivery day.

8.57 An ‘urgent payment’ is to be contrasted with a ‘hardship advance payment’ or an ‘advance payment’. A hardship advance payment is an amount of a recipient’s first instalment of social security payment that is paid when first granted, or the first instalment immediately following resumption of payment, to assist people in severe financial hardship, including those recently released from prison. An advance payment is the early delivery of a recipient’s entitlement.<sup>59</sup>

<sup>56</sup> North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

<sup>57</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [11.4.2.20] (Indicators of Vulnerability).

<sup>58</sup> *Ibid.*, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

<sup>59</sup> *Ibid.*, [8.4.2.10] (Urgent Payments).

8.58 The *Guide to Social Security Law* does not refer to family violence as an ‘exceptional and unforeseen circumstance’. However, a one-off urgent payment may be made to a third party on behalf of a social security recipient in exceptional and unforeseen circumstances, where it is necessary to alleviate immediate hardship to the recipient, such as where the recipient is required to change a place of residence because of family breakdown.<sup>60</sup>

### **Submissions and consultations**

8.59 In the Social Security Issues Paper, the ALRC asked whether family violence should be included in the *Guide to Social Security Law* as an example of an ‘exceptional and unforeseen circumstance’ when considering whether or not to make an urgent payment.<sup>61</sup>

8.60 Stakeholders commented that family violence should be expressly referred to as an ‘exceptional and unforeseen circumstance’.<sup>62</sup> The ADFVC submitted that ‘family violence victims may need additional financial and material support, particularly when they first separate’;<sup>63</sup> and stressed the importance of early access to financial assistance, because ‘women who were able to stabilise their financial situation quickly after separation were doing much better than women who were not’.<sup>64</sup>

8.61 The Commonwealth Ombudsman noted that, although ‘family violence would seem to fall into the broader category of family breakdown ... there would seem to be value in clearly articulating family violence as a relevant consideration for deciding whether to grant an urgent payment’.<sup>65</sup>

8.62 The Welfare Rights Centre Inc Queensland noted difficulties with the requirement that the circumstance be ‘unforeseen’, submitting that ‘[p]eople have been denied urgent payments in cases where they could easily foresee the violence occurring’.<sup>66</sup>

8.63 The Ombudsman raised an additional concern that customers experiencing family violence have been advised that they may access only Crisis Payment or an advance or an urgent payment, rather than a combination of these payments. The Ombudsman noted that such advice was not supported by social security law or policy,

60 *Social Security (Administration) Act 1999* (Cth) ss 43, 44; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.4.2.10] (Urgent Payments).

61 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 37.

62 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

64 *Ibid.*

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

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

but seemed ‘to indicate that staff are not considering each customer’s individual circumstances before making a decision about their assistance needs’. Accordingly, the Ombudsman suggested that ‘procedural guidance to staff regarding payments and service for customers affected by family violence be updated to provide discretion to staff to consider all available assistance and to offer any or all payments or services required in the customer’s particular circumstances’.<sup>67</sup>

### ***ALRC’s views***

8.64 Although family violence may be considered as ‘family breakdown’, there is an overarching concern that victims of family violence may be refused urgent payments merely because the family violence is ‘foreseen’. The ALRC considers it would be constructive to amend the *Guide to Social Security Law* expressly to refer to family violence as a separate category of circumstance when an urgent payment may be made so that the reference to ‘unforeseen’ is not a consideration in determining whether to make an urgent payment to a person experiencing family violence.

8.65 The ALRC also proposes that clearer guidance should be provided in the *Guide to Social Security Law* to ensure that urgent or advance payments are not refused on the basis that a person is already receiving Crisis Payment.

8.66 In addition, the ALRC considers that information about urgent payments should be included in Proposal 4–8 to ensure that victims of family violence are aware of the possibility of being able to request an urgent payment.

**Proposal 8–3** The *Guide to Social Security Law* provides that an urgent payment of a person’s social security payment may be made in ‘exceptional and unforeseen’ circumstances. As urgent payments may not be made because the family violence was ‘foreseeable’, the *Guide to Social Security Law* should be amended expressly to refer to family violence as a separate category of circumstance when urgent payments may be sought.

**Proposal 8–4** The *Guide to Social Security Law* should be amended to provide that urgent payments and advance payments may be made in circumstances of family violence in addition to Crisis Payment.

### **Payment pending review**

8.67 Under ss 131 and 145 of the *Social Security (Administration) Act*, the Secretary may continue payment, pending the outcome of an application for review. If a job seeker asks for a review of a decision to apply a ‘Serious Failure’ or an ‘Unemployment Non-Payment Period’ (discussed in Chapter 7) by an Authorised Review Officer or the Social Security Appeals Tribunal, the job seeker should be paid

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

pending the finalisation of the review.<sup>68</sup> Payment pending review is not available for ‘No Show, No Pay’ or ‘Reconnection Failures’.

8.68 The Welfare Rights Centre NSW indicated that there is a reluctance to grant payment pending a review and suggested that there should be a presumption in favour of payment pending review when the customer is at risk of, or experiencing, family violence.<sup>69</sup>

8.69 The ALRC is concerned that such a proposal for a presumption in favour of payment pending review when a customer is at risk of, or experiencing family violence, may create a ‘two-tier’ system and that others would not also benefit from such a presumption. Therefore, the ALRC does not consider a proposal should be made in this regard in this Inquiry.

### **Nominee arrangements**

8.70 Part 3A of the *Social Security (Administration) Act* provides for the appointment of nominees for both correspondence and payment of social security.<sup>70</sup> Nominee arrangements provide flexibility for individuals to decide who can act as their ‘agent’, and also operate as a useful mechanism in situations where an individual has limited, intermittent or declining capacity.<sup>71</sup> For victims of family violence, nominee arrangements can be useful for protecting his or her income support when they are in transitory accommodation or have no fixed address.

8.71 A number of safeguards are provided in the *Social Security (Administration) Act* and the *Guide to Social Security Law* to minimise abuse of a nominee appointment. These include safeguards concerning:

- the process of appointment;
- ensuring the capacity of the principal to consent to a nominee arrangement;
- duties of nominees;
- revocation of nominee arrangements; and
- penalties.

8.72 However, under Centrelink arrangements, the nominee need not be the person to whom the social security recipient has granted a power of attorney and there are no checks to ensure that a person holding the social security recipient’s power of attorney is informed of any Centrelink nominee arrangement.

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68 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.8] (Payment Pending Review).

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

70 *Social Security (Administration) Act 1999* (Cth) ss 123B, 123C.

71 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), [70.96].

***Appointment of nominees***

8.73 An initial safeguard in nominee arrangements is the requirement that a nominee may only be appointed with the written consent of the person to be appointed, after taking into consideration the wishes of the proposed principal.<sup>72</sup> A copy of the appointment is to be provided to the nominee and the principal.<sup>73</sup> There are also safeguards regarding how a nominee appointment is signed—requests for nominee appointments signed with a cross or mark are not to be accepted unless there is supportive evidence as to the principal’s ‘incapacity’ to consent.<sup>74</sup>

***Capability of principal to consent***

8.74 Certain safeguards are in place to ensure that the principal has ‘capability to consent’ to a nominee arrangement. In determining whether a principal is incapable of consenting to the appointment of a nominee, a delegate must have sufficient evidence—such as reliable medical evidence, an order officially appointing a guardian or administrator, or some other authoritative source, such as a social work report.<sup>75</sup>

8.75 Other safeguards include provisions such that where:

- there are questions concerning the principal’s capability to consent, the situation must be investigated;
- the principal is deemed incapable of providing consent, any decision by a delegate to appoint a nominee must be supported by documentary evidence; and
- a principal has a psychiatric disability, a nominee can be appointed where there is a court-appointed arrangement.<sup>76</sup>

***Responsibilities and capability of nominees***

8.76 A nominee is required to act in the best interests of the principal.<sup>77</sup> Further, in the appointment of a nominee, a delegate must be satisfied that the proposed nominee understands the responsibilities and appears capable of carrying them out. The *Guide to Social Security Law* states that particular scrutiny should be given to requests where the nominee runs a boarding or rooming establishment, there are multiple voluntary

72 *Social Security (Administration) Act 1999* (Cth) s 123D(2). Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

73 *Social Security (Administration) Act 1999* (Cth) s 123D(3).

74 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

75 *Ibid.*, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

76 *Ibid.*, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

77 *Social Security (Administration) Act 1999* (Cth) s 123O(1); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.3] (Responsibilities of Nominee).



nominee appointments for the same nominee, or the nominee does not live in the same residence, or in close proximity to, the principal.<sup>78</sup>

#### **Review of nominee arrangements**

8.77 There is no provision for regular review of nominee arrangements by Centrelink. Rather, any reviews of nominee arrangements are conducted as soon as any allegation of the misuse of a social security payment is received.<sup>79</sup> Any allegations of misuse of the nominee arrangements must be referred immediately to a social worker.<sup>80</sup>

#### **Revoking nominee arrangements**

8.78 A nominee arrangement may be revoked in a number of circumstances, including where the nominee:

- informs the Secretary in writing that he or she no longer wishes to be a nominee;<sup>81</sup>
- becomes subject to income management;<sup>82</sup>
- informs the Department of Families, Housing, Community Services and Indigenous Affairs that an event or change of circumstances has occurred, or is likely to occur, which will affect the ability of the nominee to act to the benefit of the principal or failure to comply with certain notices.<sup>83</sup>

#### **Penalties**

8.79 Section 123L of the *Social Security (Administration) Act* requires the nominee to provide a statement regarding the disposal of money under a nominee arrangement. A penalty may apply if the nominee fails to respond to that request.<sup>84</sup> However, no penalty applies in relation to the actual disposal of money under the nominee arrangement. In addition, no penalties attach to breach of duties of the nominee.

#### **Submissions and consultations**

8.80 In the Social Security Issues Paper, the ALRC identified that Centrelink arrangements for nominee appointments, reviews and penalties may allow economic abuse by a family member holding a nominee authority to go unnoticed.<sup>85</sup> The ALRC therefore asked whether social security law or practice concerning nominees should be amended to minimise the potential for financial abuse by people holding nominee authority. The ALRC also asked whether the *Social Security Act* should be amended to

78 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.3] (Responsibilities of Nominee).

79 Ibid, [8.5.3] (Responsibilities of Nominee).

80 Ibid, [8.5.3] (Responsibilities of Nominee).

81 *Social Security (Administration) Act 1999* (Cth) s 123E(1).

82 Ibid s 123E(1A).

83 Ibid ss 123E(2), 123K, 123L.

84 Ibid ss 123E, 123L.

85 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011); S Ellison and others, *The Legal Needs of Older People in NSW* (2004), prepared for the Law and Justice Foundation of NSW.

recognise other legal authorities of a person nominated by the social security recipient, such as under powers of attorney or enduring guardianship.<sup>86</sup>

8.81 While one stakeholder noted that current nominee arrangements are ‘likely to be used in the best interest of the principal in the majority of circumstances’,<sup>87</sup> some stakeholders raised concerns about the appropriateness, and level of knowledge, of nominee arrangements amongst nominees and principals. Stakeholders also raised concerns about:

- safeguards to determine a person’s suitability and capacity to fulfil the requirements of a nominee;<sup>88</sup>
- a lack of recognition of other legal forms of authority,<sup>89</sup> which may create inconsistencies and confusion;<sup>90</sup>
- the lack of review and assessment as to whether the nominee arrangement is in the principal’s best interest or entered into willingly;<sup>91</sup> and
- lack of penalties attached to the duties of a nominee.<sup>92</sup>

8.82 Stakeholders suggested a number of safeguards that might act to protect against economic abuse in nominee arrangements, including:

- additional checks<sup>93</sup>—such as checks for criminal record, bankruptcy, debt and character references—before a nominee is appointed;<sup>94</sup>
- improved interview arrangements, including that:
- interviews for nominee arrangements be undertaken by a Centrelink social worker or other staff with relevant training to identify and screen for issues of duress and capacity;
- the principal be interviewed without the (proposed) nominee present; and
- where it is impractical for the principal to attend an interview, the principal’s wishes are confirmed by an independent authority;<sup>95</sup>

86 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 29.

87 Elder Abuse Prevention Unit Older Person’s Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.

88 Ibid; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

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

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

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

92 Elder Abuse Prevention Unit Older Person’s Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.

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

94 Elder Abuse Prevention Unit Older Person’s Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.

95 Ibid.

- requirements for nominees to keep their financial dealings separate from the principal's entitlement, as well as maintaining receipts and records of expenditure;<sup>96</sup> and
- informing any person holding a power of attorney or enduring guardian of the nominee arrangement.<sup>97</sup>

8.83 The Ombudsman considered that changes such as these would 'foster more consistent decision making and ensure representative arrangements that protect customers rather than potentially exposing them to greater manipulation or abuse'.<sup>98</sup>

8.84 In addition, the Elder Abuse Prevention Unit recommended that penalties should apply to nominees who do not act in the best interest of the principal, such as where the nominee defrauds the principal or Centrelink.<sup>99</sup>

#### ***ALRC's views***

8.85 Inherent in any nominee arrangement there is a potential for economic abuse of the principal by the nominee. The ALRC considers that, in the social security context, this may be minimised through additional safeguards but notes that not all nominees will necessarily be a family member of the principal. Therefore, economic abuse or duress in nominee arrangements will not be 'family violence' in all circumstances. To propose review arrangements for nominee arrangements between family members and not for others would create a two-tier system. Likewise, to suggest stronger penalties for family members who are nominees would create a two-tier system but could deter family members from acting as a person's nominee. In addition, the overlap with powers of attorney and enduring guardianship—while at times may be problematic—is beyond the scope of this Inquiry.

8.86 However, the ALRC does consider that some improvements may be made to current safeguards to ensure that decision makers take into consideration the possibility or presence of family violence upon appointment of a nominee.

**Proposal 8–5** The *Guide to Social Security Law* should be amended to provide that, where a delegate is determining a person's 'capability to consent', the effect of family violence is also considered in relation to the person's capability.

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96 Ibid.

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

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

99 Elder Abuse Prevention Unit Older Person's Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.

## Overpayment

8.87 In delivering social security payments and entitlements, Centrelink is responsible for ensuring customer payments are correct and fraud is minimised.<sup>100</sup> If a person is overpaid a social security pension, allowance or benefit, even when not at fault, the amount overpaid is a debt to Centrelink<sup>101</sup> and can lead to criminal prosecution.<sup>102</sup>

8.88 The social security system allows for flexible arrangements in repayment of debts and, in some circumstances, debt waiver. These concepts are discussed below.

### Recovery of debts

8.89 Centrelink may recover a debt by taking the following actions:

- deduction from a person's social security payment;
- if a person is not receiving a social security payment, a repayment arrangement;
- garnisheeing of a person's wages or bank account; or
- legal proceedings.<sup>103</sup>

8.90 If a person cannot afford debt repayments, the amount of repayment can be negotiated with Centrelink.

8.91 Where Centrelink decides that a payment paid to a third party was made in error, Centrelink may attempt to recover the amount paid from the person who was entitled to the payment, and not from the third party.<sup>104</sup> For example, where a young person's Youth Allowance is paid to a parent and an overpayment occurs, Centrelink will generally seek to recover the overpayment from the young person rather from the parent into whose account the payment was made.

### Submissions and consultations

8.92 The Welfare Rights Centre Inc Queensland suggested an amendment to the *Social Security Act* to allow for fairness in debt repayment for example, in circumstances where a person has a debt but cannot repay due to family violence. In particular, the Centre recommended that a victim of family violence with an outstanding debt could apply for a suspension of the debt repayment.<sup>105</sup>

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100 Australian National Audit Office, *Centrelink Fraud Investigations* (2010), 17.

101 *Social Security Act 1991* (Cth) s 1223.

102 *Criminal Code Act 1995* (Cth) s 135.2(1).

103 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [7.2.1] (Debt Recovery—General Provisions).

104 *Ibid.*

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

**ALRC's views**

8.93 As the ALRC did not raise the issue of repayment of debt in the Social Security Issues Paper, the ALRC is seeking further information about the methods and barriers to debt repayment by victims of family violence and whether this affects his or her safety.

**Question 8–2** When a person cannot afford to repay a social security debt, the amount of repayment may be negotiated with Centrelink. In what way, if any, should flexible arrangements for repayment of a social security debt for victims of family violence be improved? For example, should victims of family violence be able to suspend payment of their debt for a defined period of time?

**Waiver of debt**

8.94 Section 1237AAD of the *Social Security Act* provides that the Secretary may exercise a discretion to waive the right to recover a social security debt where a person can demonstrate that:

- ‘special circumstances’ exist; and
- he or she or another person did not ‘knowingly’ make a false statement or ‘knowingly’ omit to comply with the *Social Security Act*, its predecessor, or the *Social Security (Administration) Act*.<sup>106</sup>

8.95 The purpose of s 1237AAD has been described as

to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of a requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words ... But to anticipate the limits of the categories of possible cases by imposing on the language of the section a fetter upon its application which is not mandated by its words, is to erode its useful purpose.<sup>107</sup>

8.96 The National Welfare Rights Network has previously suggested that s 1237AAD of the *Social Security Act* should be amended to make allowance for ‘situations where women have been pressured by an abusive partner to claim a social security payment as a single person or not to declare the correct amounts of their earnings’.<sup>108</sup>

8.97 A Senate Legal and Constitutional Affairs References Committee Review of Government Compensation Payments, released in 2010, explored the administration and effectiveness of the debt waiver provision and concluded that ‘the recovery of debts ... where debts have been caused by the duress of another person, can clearly

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106 *Social Security Act 1991* (Cth) s 1237AAD.

107 *Fischer v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] FCA 441; *Secretary, Department of Social Security v Hales* (1998) FCR 155.

108 Senate Legal and Constitutional Affairs References Committee, *Review of Government Compensation Payments* (2010), [3.25].

create unfair and unjust outcomes'.<sup>109</sup> The committee therefore recommended that 'the Australian Government review waiver of debt provisions contained in social security legislation and consider amendments to that legislation where current provisions could cause unfair and unjust outcomes for welfare recipients'.<sup>110</sup>

8.98 In the Welfare Rights Centre NSW's submission to the Senate's review, the Centre highlighted concerns around debt waiver provisions where 'a person is in that position due to domestic violence or acting under duress, usually from an ex-partner'.<sup>111</sup> The Centre suggested that an amendment be made to s 1237AAD to 'make allowance for situations where women have been pressured by an abusive partner to claim a social security payment as a single person or not to declare the correct amounts of their earnings'.<sup>112</sup>

### ***Special circumstances***

8.99 The *Guide to Social Security Law* states that 'special circumstances' are circumstances that are unusual, uncommon or exceptional—'special enough circumstances ... that make it desirable to waive'.<sup>113</sup>

8.100 The *Guide to Social Security Law* requires consideration of the person's individual circumstances, but also a consideration of the general administration of the social security system. A special circumstances waiver would be appropriate only if the person's particular circumstances made it unjust for the general rule—that is, to repay the debt—to apply.<sup>114</sup>

8.101 The *Guide to Social Security Law* states that it is not possible to set out a complete list of the relevant factors to be taken into account in determining whether special circumstances exist. However, factors to consider include the person's physical and emotional state and decision-making capacity and financial circumstances.<sup>115</sup> The *Guide to Social Security Law* does not expressly direct the decision maker to consider family violence in determining whether circumstances are 'special'.

### ***Knowledge***

8.102 The discretion to waive a debt may not be used where a debt is attributable, even in part, to knowingly false statements or failure to comply with the *Social Security Act*

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109 Ibid, [3.51].

110 Ibid, Rec 6.

111 Ibid, 44.

112 Ibid, 45.

113 *Davy and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1114; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

114 *Davy and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1114; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

115 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

by a third party. The *Guide to Social Security Law* states that this knowledge must be actual and not merely constructive knowledge.<sup>116</sup> It does not refer to examples of family violence that may impinge on a person's knowledge.

8.103 Case law, however, provides that it is open to infer that a person had actual knowledge of their obligations where there were opportunities for the person to gain that knowledge and where there were no obstacles to acquire the knowledge.<sup>117</sup> Such obstacles that may be considered as preventing understanding of obligations may include a person's emotional or mental state. For example, as a result of emotional trauma and concern for family safety, the person's ability to comprehend obligations and responsibilities may be reduced.<sup>118</sup>

8.104 However, in cases of family violence, false statements or failure to comply with the *Social Security Act* may be attributable to an abusing partner—for example, where the abusing partner insists that his or her partner does not declare true income, employment circumstances, or presence in the family home in order to receive a payment.

8.105 In *Watson v Secretary, Department of Family and Community Services*,<sup>119</sup> Mrs Watson was subjected to verbal and physical abuse from her partner. She was assaulted repeatedly to 'keep her in line' and on several occasions was hospitalised with bruising and broken bones. When she attempted to leave her partner, he told her that 'If you leave I will kill you and your children'. The marriage broke up only when Mr Watson was imprisoned for social security fraud.

8.106 Mrs Watson had been receiving social security benefits of her own. These benefits were higher than they should have been because of her husband's undeclared income, and when Mr Watson's fraud became known, a substantial overpayment debt was raised against her. Mrs Watson sought waiver under s 1237AAD. It was open to the Secretary to find that Mrs Watson's own statements had not been made 'knowingly' because they had been made under coercion, but he could not waive the debt because Mr Watson ('another person') had the requisite knowledge.

8.107 Concerns have been raised in relation to the failure of s 1237AAD to recognise the effect of what is known as the 'battered wives syndrome'.<sup>120</sup> The National Welfare Rights Network has suggested that the reference to 'another person' should be amended to read 'or another person acting as an agent for the debtor':

Such an amendment would cover the situation where the debtor was instrumental in procuring the false statement or representation or the failure or omission to comply

116 Ibid, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances); *Re Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435.

117 *RCA Corporation v Custom Cleared Sales Pty Ltd* (1978) 19 ALR 123.

118 *Re Secretary, Department of Family and Community Services and Temesgen* [2002] AATA 1290; *Re Woodward and Secretary, Department of Family and Community Services* [2001] AATA 818; *Re Nisha and Secretary, Department of Family and Community Services* [2000] AATA 315.

119 *Watson v Secretary, Department of Family and Community Services* [2002] AATA 311.

120 National Welfare Rights Network, *Redressing the Balance of Risk and Responsibility Through Active Debt Prevention Strategies* (2009).

with the relevant legislation, but would not capture a wife or partner who was acting under duress.<sup>121</sup>

### ***Submissions and consultations***

8.108 In the Social Security Issues Paper, the ALRC asked whether the *Social Security Act* should be amended expressly to provide for waiver of debt in situations where a person is subject to duress, undue influence or economic abuse.<sup>122</sup>

8.109 Stakeholders who responded to this question generally supported an amendment to s 1237AAD of the *Social Security Act* to provide for debts to be waived in situations where a person has been subjected to duress or financial abuse in relation to the debt.<sup>123</sup> Professors Patricia Easteal and Derek Emerson-Elliott recommend that s 1237AAD of the *Social Security Act* should be amended either to remove the reference to ‘or another person’.<sup>124</sup>

8.110 For example, the Welfare Rights Centre NSW submitted that, ‘[i]n situations where, in the context of family violence, it would be appropriate to recover a debt from a person other than the recipient, it should be possible to do so’.<sup>125</sup>

### ***ALRC’s views***

8.111 The ALRC is concerned that victims of family violence may be required to repay a debt which was incurred due to duress or coercion by a family member. The ALRC does not consider that removing the words ‘or another person’ would remedy this situation. To do so may mean that circumstances where a nominee has ‘knowingly’ made a false statement or omitted to comply with the *Social Security Act* may mean that the debt will never be recoverable. The ALRC also notes that there may be concerns that if another person, such as a nominee, makes a false statement or omits to comply with the Act, the principal may be liable to repay the debt.

8.112 It may be more appropriate to qualify the term ‘or another person’ with the words ‘acting as an agent for the debtor’. Such an amendment to s 1237AAD should, in the ALRC’s opinion, address circumstances such as those in *Watson*. There may also be value in listing family violence as a ‘special circumstance’ under s 1237AAD in the *Guide to Social Security Law*. The ALRC is reluctant to propose an amendment to s 1237AAD itself as to do so may limit the flexibility intended to be provided by the section. However, care should be taken to ensure that such family violence is verified so as to avoid false claims of family violence in order to avoid repayment of a debt.

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121 Ibid.

122 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 28.

123 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

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

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



**Proposal 8–6** Section 1237AAD of the *Social Security Act 1991* (Cth) provides that the Secretary may waive the right to recover a debt where special circumstances exist and the debtor or another person did not ‘knowingly’ make a false statement or ‘knowingly’ omit to comply with the *Social Security Act*. Section 1237AAD should be amended to provide that the Secretary of FaHCSIA may waive the right to recover all or part of a debt if the Secretary is satisfied that ‘the debt did not result wholly or partly from the debtor or another person acting as an agent for the debtor’.

**Proposal 8–7** The *Guide to Social Security Law* should be amended expressly to refer to family violence as a ‘special circumstance’ for the purposes of s 1237AAD of the *Social Security Act 1991* (Cth).

### Criminal charges

8.113 Obtaining a financial advantage from a Commonwealth entity, such as Centrelink, where the person knows or believes that he or she is not eligible to receive that financial advantage, is a criminal offence under the *Criminal Code 1995* (Cth).<sup>126</sup>

8.114 Referral of cases to the Commonwealth Director of Public Prosecutions (CDPP) is a decision for Centrelink. The ALRC understands that, as part of the referral process, for cases to qualify for investigation and consideration of prosecution action they must undergo assessment and satisfy Centrelink’s *National Case Selection Guidelines*.<sup>127</sup> Investigation outcomes can range from an administrative remedy through to referral to the CDPP for consideration of prosecution.<sup>128</sup>

8.115 The exception is serious fraud cases that have been assessed by Centrelink’s Intelligence staff as a high priority and must be investigated. The ultimate decision whether or not to prosecute is made by the CDPP.

8.116 NAAJA raised concerns that criminal charges may apply where a person intentionally obtained a financial advantage from Centrelink but the reason for obtaining the financial advantage was under circumstances of family violence through duress or economic abuse.<sup>129</sup>

8.117 The ALRC did not raise Centrelink’s referral process to the CDPP in the Social Security Issues Paper. However, the ALRC considers that, as a result of the proposals in Chapter 4 in relation to screening and information sharing, information about family violence should be better captured within Centrelink, which in turn, should inform the referral process to the CDPP.

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126 *Criminal Code Act 1995* (Cth) s 135.2(1).

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

128 *Ibid.*

129 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

