



Australian Government

Australian Law Reform Commission

# Family Violence and Commonwealth Laws

ISSUES PAPER

## Child Support and Family Assistance

You are invited to provide a submission  
or comment on this Issues Paper

ISSUES PAPER 38 (IP 38)  
MARCH 2011

This Issues Paper reflects the law as at 8 March 2011

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Commission Reference: IP 38

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 25, 135 King Street, Sydney, NSW, 2000, Australia.

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# Making a submission

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## Making a Submission to the Inquiry

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is 21 April 2011.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Issues Paper. You may respond to as many or as few questions and proposals as you wish.

### ***Online submission tool***

The ALRC strongly encourages online submissions directly through the ALRC's website <http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-issues-papers>, where an online submission form will allow you to respond to individual questions. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email [web@alrc.gov.au](mailto:web@alrc.gov.au), or phone +61 2 8238 6333.

Alternatively, written submissions may be mailed, faxed or emailed to:

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## **Open inquiry policy**

As submissions provide important evidence to each inquiry, it is common for the Commissions to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are made available on the ALRC's website.

The Commission also accepts submissions made in confidence. Confidential submission will not be made public. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

**In the absence of a clear indication that a submission is intended to be confidential, the Commission will treat the submission as non-confidential.**

# **Family Violence—Child Support and Family Assistance**

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## **The Inquiry**

1. On 9 July 2010, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire and report on the treatment of family violence in Commonwealth laws, including child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence.

2. The ALRC was requested to consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.<sup>1</sup>

3. In undertaking the Inquiry, the ALRC was asked to consider legislative arrangements across the Commonwealth that have an impact on those experiencing family violence and whether those arrangements impose barriers to supporting effectively those adversely affected by this type of violence. The ALRC was also asked to consider whether the extent of sharing of information across the Commonwealth and with state and territory agencies is appropriate to protect the safety of those experiencing family violence.

### **Issues papers**

4. To form one basis for consultation the ALRC is releasing a series of four Issues Papers covering the treatment of family violence in:

- child support and family assistance law;
- immigration law;
- employment and superannuation law; and
- social security law.

5. These Issues Papers are intended to encourage informed community participation in the Inquiry by providing some background information and highlighting the issues so far identified by the ALRC as relevant to the Inquiry. The Issues Papers may be downloaded free of charge from the ALRC's website, [www.alrc.gov.au](http://www.alrc.gov.au).

6. The Issues Papers will be followed by the publication of a Discussion Paper in mid-2011. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC's current thinking in the form of specific proposals for reform. The ALRC will then seek further submissions and will undertake a further round of national consultations in relation to these proposals.

### **Request for submissions**

7. With the release of these Issues Papers, the ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided.

8. There is no specified format for submissions. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred. Submissions will be published on the ALRC website, unless marked confidential. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

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1 The full Terms of Reference are available on the ALRC's website at [www.alrc.gov.au](http://www.alrc.gov.au).

Submissions using the ALRC's online submission form can be made at:  
<http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-issues-papers>

In order to inform the content of the Discussion Paper, submissions addressing the questions in this Issues Paper should reach the ALRC by 21 April 2011.

## **Outline of the Issues Paper**

9. This Issues Paper, *Family Violence, Child Support and Family Assistance Law* (IP 39), deals with the treatment of family violence in Commonwealth child support and family assistance law, namely under the:

- *Child Support (Registration and Collection) Act 1988* (Cth);
- *Child Support (Assessment) Act 1989* (Cth);
- *A New Tax System (Family Assistance) Act 1999* (Cth); and
- *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth).

10. The ALRC has identified a number of issues relevant to the treatment of family violence in Commonwealth child support law. In child protection law and practice, family violence may have implications for the following:

- exemptions to taking reasonable maintenance action;
- collection of child support; and
- protection of personal information.

11. In family assistance law and practice, family violence may have implications for the following:

- payment of the baby bonus;
- exemptions from providing tax file numbers;
- payment of Family Tax Benefit when a child is in informal care; and
- the Special Child Care Benefit.

## **Child support laws**

### **Background**

12. The Child Support Scheme (CSS) was established in 1988 to enforce the right of children to be supported by both their parents.<sup>2</sup> The legislative basis of the CSS is the *Child Support (Registration and Collection) Act* and the *Child Support (Assessment)*

<sup>2</sup> Commonwealth, *Parliamentary Debates*, Senate, 17 February 1988, 165 (P Walsh—Minister for Finance).

*Act.* The Child Support Agency (CSA) administers these Acts. The CSA is part of the Australian Government Department of Human Services.

13. The role of the CSA includes assessing amounts of child support payable, according to a legislative formula.<sup>3</sup> The child support assessment takes into account the income of both parents, the care arrangements, the number of dependent children including those dependent children from other relationships. The CSA also collects and transfers child support payments, where requested by parents or carers.

14. The CSA's policy resource is *The Guide*, referred to in this Issues Paper as the *Child Support Guide*. The *Child Support Guide* is described as a guide to the administration of the CSS,<sup>4</sup> and it is accessible to the public online. CSA staff are expected to follow the *Child Support Guide*.<sup>5</sup> Generally, policies and guides are not binding by law. However, they are a relevant consideration for decision makers, and may be taken into account in reviews of CSA decisions.<sup>6</sup>

### **Matters outside the Inquiry**

15. The scope of this Inquiry is limited by the Terms of Reference. The Terms of Reference provide a limited lens through which the ALRC can propose reforms—that is, to consider improvements to legal frameworks to protect the safety of victims of family violence. This Issues Paper considers reforms to child support legislation, policy and practice, which may improve the safety of victims of family violence.

16. Consequently, the ALRC does not propose to examine a range of issues which—while they may affect victims of family violence—have broader relevance to a range of Child Support Agency customers, and the operation of the Child Support Scheme. Reforms to address these issues would be systemic, and beyond the Terms of Reference. Alternatively, recommending narrower reforms that address the effect of these issues solely on victims of family violence would introduce a two-tiered operation to aspects of the CSS. The ALRC considers a two-tiered system—which would subject victims of family violence to substantially different practices and procedures than other CSA customers—to be inappropriate.

17. Systemic issues which are beyond the Terms of Reference are identified below.

### ***Avoidance of child support obligations***

18. Some payers may avoid their child support obligations by minimising the amount of child support they are required to pay under the child support assessment. Participants in one study identified a range of tactics used by payers to minimise child support assessments, including: listing income under a business name, not declaring entire incomes, and working cash-in-hand.<sup>7</sup>

<sup>3</sup> See Part 5 of the *Child Support (Assessment) Act 1989* (Cth).

<sup>4</sup> Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [Home].

<sup>5</sup> Ibid, [Home].

<sup>6</sup> See *Re Confidential and Social Security Appeals Tribunal* (2010) 118 ALD 620, [6]–[7]:

<sup>7</sup> H Mckenzie and K Cook, ‘The Influence of Child Support and Welfare on Single Parent Families’ (2007) 45 *Just Policy* 13, 15.

19. Payers may also avoid child support by paying child support late or irregularly, paying less child support than the assessment, or not paying at all. This may be an issue particularly where payees collect privately. Where the CSA collects child support, it has a range of coercive powers to effect payment, as discussed below.

20. Avoiding child support obligations may be linked with family violence. It has been identified as ‘part of an ongoing attempt to maintain power and control’,<sup>8</sup> and an extension of other forms of family violence.<sup>9</sup> It may also, in itself, constitute economic abuse.

21. Avoidance of child support by payers is an issue which affects a broad range of payees, including those who may not be victims of family violence. Systemic reforms to the CSS would be needed to address this issue and are beyond the Terms of Reference for this Inquiry.

22. The ALRC will however consider reforms to protect victims of family violence who, due to fear of or duress by the person who has used family violence, opt for private collection of child support—and are, therefore, more vulnerable to non-payment or underpayment of child support.

#### ***Percentage of care***

23. The ‘percentage of care’ is the amount of time a parent or carer provides care for a child. This percentage is used in the child support formula, in order to take into account the costs of the child that are met by a parent or carer by caring for the child.<sup>10</sup>

24. The *Evaluation of the 2006 Family Law Reforms* by the Australian Institute of Family Studies (AIFS) released in December 2009 considered whether child support is relevant to positions adopted by parents in relation to care arrangements. Parents may wish to increase their care percentage to reduce their child support liability or conversely, resist a reduction in their care time to maintain their child support entitlements.<sup>11</sup> This is an area of interaction between child support laws and family law, as parents may be motivated to seek parenting orders or agreements under the *Family Law Act 1975* (Cth) that will affect the assessment of child support under the *Child Support (Assessment) Act*.

25. Manipulation of care arrangements to alter the child support assessment may affect victims of family violence, potentially motivating persons who use violence to seek a larger portion of care of their children to minimise their child support assessment. However, this issue is not limited to cases of family violence. Again, systemic reforms to the CSS would be needed to address this issue. Reforms to child

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

9 Ibid, 26.

10 The percentage of care is dealt with in *Child Support (Assessment) Act 1989* (Cth) pt 5 div 4.

11 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 222. The Summary Report notes, of this type of bargaining, that ‘further work is needed to determine whether the prevalence has actually increased and if so to what extent’. Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), 13.

support legislation to address the issue would be systemic in nature, affecting the child support formula.

26. Finally, the ALRC does not propose to deal with the issue of family violence and parenting orders under the *Family Law Act*. This issue has been previously considered in two 2009 reports and, to a more limited extent, in ALRC Report 114, *Family Violence—A National Legal Response*.<sup>12</sup>

27. The ALRC will, however, consider the rules used by the CSA to determine the percentage of care, particularly when parents dispute the facts in relation to care provided.

### ***Investigatory powers of CSA***

28. The CSA is not required to conduct any inquiries or investigations in making administrative assessments.<sup>13</sup> The *Child Support (Assessment) Act* provides that the CSA may—but is not required to—conduct inquiries and investigations in making determinations about changes to child support assessments ('departure' determinations).<sup>14</sup>

29. The ALRC understands that the CSA does not, in practice, actively investigate cases. Consequently parents and carers may need to investigate the other parties' financial circumstances themselves—for example, to support a change of assessment application. Where parents do not have the ability to do this, they may be financially disadvantaged.<sup>15</sup>

30. This is an issue which may affect victims of family violence, who may be ill-placed to investigate the assets and income of persons who have used violence against them. However, the adequacy of CSA investigatory powers, and the degree to which CSA uses its existing powers, is a broader issue in relation to the CSS. While the ALRC will not be exploring this issue at large, the use of the CSA's investigatory powers may be relevant to reform of other areas explored in this Inquiry.

### **Definitions**

#### ***Definition of family violence***

31. Family violence is not defined in either the *Child Support (Assessment) Act*, or the *Child Support (Registration and Collection) Act*. The *Child Support Guide* contains a broad definition of family violence:

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

13 *Child Support (Assessment) Act 1989* (Cth) ss 29, 66D.

14 Ibid, ss 98H(1)(b), 98Q(1)(b); Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011.

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

Family violence covers a broad range of controlling behaviours. They are commonly of a physical, sexual, and/or psychological nature, and typically involve fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.<sup>16</sup>

32. The *Child Support Guide* also provides definitions for the following non-exhaustive list of behaviours that may be involved in family violence:

- physical abuse;
- sexual abuse;
- emotional abuse;
- verbal abuse;
- social abuse;
- economic abuse; and
- spiritual abuse.<sup>17</sup>

33. As noted in ALRC Report 114, provisions that affect the lives and safety of particularly vulnerable groups of society may be more appropriately placed in primary legislation.<sup>18</sup> Therefore, it may be desirable for the definition of family violence to be provided in the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act*, rather than solely in the *Child Support Guide*. Placing the definition of family violence in child support legislation may give the definition increased stability, visibility and authority.

34. Legislative definitions of family violence were considered in ALRC Report 114. The ALRC and the New South Wales Law Reform Commission (NSWLRC) (the Commissions) recommended that state and territory family violence legislation, state and territory criminal legislation, and the *Family Law Act* should adopt a consistent core definition of family violence. The Commissions recommended the following core definition:

family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;

<sup>16</sup> Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [6.10.1].

<sup>17</sup> Ibid, [6.10.1].

<sup>18</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 6.

- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.<sup>19</sup>

35. It may be desirable to include this definition in child support legislation, as well as other relevant Commonwealth laws that are within the reference—including family assistance legislation, discussed below, and social security legislation. Consistent legislative definitions of family violence may foster a shared understanding across jurisdictions, courts and tribunals, and across agencies such as the CSA and Centrelink. Further, consistent definitions provide victims with clarity and the certainty that family violence will be recognised and treated similarly across Commonwealth laws.

36. The legislative definition could also be replicated in the *Child Support Guide* for enhanced accessibility. While the *Child Support Guide* currently contains a broad definition of family violence, it may be desirable for definitions of family violence to be consistent—not only across legislative frameworks, but also across legislation and policy.

**Question 1** Should the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence—A National Legal Response* (ALRC Report 114)?

#### *Definition of eligible carer*

37. The only reference to violence or abuse in child support legislation is contained in the definition of an ‘eligible carer’. The *Child Support (Assessment) Act* defines an eligible carer as a person who provides at least shared care of a child—that is, at least 35% of care. Non-parent carers who are ‘eligible carers’ and both parents of a child may apply for child support.<sup>20</sup>

38. Where a person who is not a parent or legal guardian cares for a child without the parent or legal guardian’s consent, that person is not an eligible carer, unless it is unreasonable for a parent or legal guardian to care for the child. It is unreasonable for a parent or legal guardian to care for a child if the CSA is satisfied that there is:

19 Ibid, Recs 5–1, 6–1, 6–4.

20 *Child Support (Assessment) Act 1989* (Cth) ss 25, 25A set out the circumstances in which a non-parent carer may apply for child support, and provide that a non-parent carer who has care of a child under child protection law may only apply for child support where he or she is a relative of the child.

- ‘extreme family breakdown’;<sup>21</sup> or
- ‘a serious risk to the child’s physical or mental wellbeing from violence or sexual abuse in the home of the parent or legal guardian concerned’.<sup>22</sup>

39. The ALRC is interested in comment from stakeholders about whether child support is accessible to non-parents who care for children at risk of family violence. The ALRC is also interested in whether, in cases of family violence, the threshold of ‘serious risk’ which applies to non-parent carers who care for children without consent of the parent or legal guardian, is appropriate.

**Question 2** What changes, if any, are needed to improve accessibility to child support payments for non-parent and non-guardian carers of children at risk of family violence?

**Question 3** Does the requirement that the child be at ‘serious risk’ constitute a barrier to child support for non-parent and non-guardian carers, where parents or legal guardians do not consent to them providing care?

### Exemption from requirement to take reasonable maintenance action

#### *Family Tax Benefit Part A*

40. Family Tax Benefit Part A (FTB Part A) is the ‘primary payment designed to help with the cost of raising children’.<sup>23</sup> It is paid to eligible parents and carers for each dependent child or, in some circumstances, each dependent full-time student. The amount of FTB Part A payable to a family is assessed according to the number of children, the age of children, and the family’s income.

41. Family assistance legislation requires a person who receives more than the base rate of FTB Part A for a child to take reasonable action to obtain maintenance, where it is reasonable to do so.<sup>24</sup> This is known as taking ‘reasonable maintenance action’, or the ‘maintenance action test’. To comply with the requirement to take reasonable maintenance action, a person is generally required to apply for child support, where eligible, and to collect payments either privately or via the CSA.<sup>25</sup> If a person does not take reasonable maintenance action, the FTB Part A payments for the child will be reduced to the base rate.<sup>26</sup>

42. The requirement to take reasonable maintenance action may be problematic for victims of family violence, where the other party to the child support case is the person who has used family violence. An application for child support may increase the risk of

21 Ibid s 7B.

22 Ibid s 7B.

23 Family Assistance Office, *Website* <<http://www.familyassist.gov.au>> at 16 February 2011.

24 *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1 cl 10. See also *Child Support (Assessment) Act 1989* (Cth) ss 151, 151A.

25 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <<http://www.fahcsia.gov.au/guides Acts/>> at 1 March 2011, [3.1.5.30].

26 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 cl 10.

violence against the victim. It may also lead to the person who has used violence subjecting the victim to pressure or duress in relation to child support matters, as discussed further below.

### ***Family violence exemptions***

43. Individuals may obtain exemptions from taking reasonable maintenance action on a number of grounds. The two grounds relevant for victims of family violence seeking exemptions are:

- ‘violence or fear of violence’;<sup>27</sup> and
- ‘harmful or disruptive effect’ on the payee or payer (including cases of rape or incest).<sup>28</sup>

44. Centrelink considers all requests for exemptions. The CSA refers persons who may be eligible for exemptions to Centrelink social workers. Indigenous Service Officers (ISOs) may also grant exemptions.<sup>29</sup> In some cases, victims may contact Centrelink prior to contacting the CSA and receive an exemption at this stage—therefore having no contact with the CSA. This is discussed further below.

45. An individual may also obtain an exemption from taking reasonable maintenance action in order to end an existing child support assessment. Once an application for child support is made, and child support is assessed, the CSA cannot accept a person’s election to end the assessment unless an exemption is granted by Centrelink.<sup>30</sup>

46. The *Family Assistance Guide*, which articulates policy in relation to family assistance, provides that Centrelink should generally review cases in which it has granted an exemption at least every 12 months, although the timeframe varies depending on the circumstances and the type of exemption.<sup>31</sup> The review determines ‘whether the parent’s circumstances have changed and, if so, whether the exemption is still appropriate’.<sup>32</sup>

47. The ALRC understands that, in practice, exemptions due to violence or fear of violence are initially granted for a 12-month period. Centrelink social workers review the exemptions at the conclusion of 12 months, and at this stage exemptions may be granted on a permanent basis. The practice of providing permanent exemptions after the 12-month review is not articulated in the *Child Support Guide* or the *Family Assistance Guide*.

27 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [3.1.5.70].

28 Ibid, [3.1.5.70].

29 Ibid, [3.1.5.70]. Multicultural Service Officers—who perform a role alongside social workers and ISOs—are not mentioned in this context.

30 *Child Support (Assessment) Act 1989* (Cth) ss 151, 151A, Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.10.1], [6.10.1].

31 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [3.1.5.90].

32 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [6.10.1].

### **Accessibility**

48. Exemptions may be inaccessible to victims of family violence for a number of reasons. They may be ‘uninformed or not aware’<sup>33</sup> of the availability of family violence exemptions. Victims may also be deterred by the complexity of the exemption procedure and the evidence required.<sup>34</sup> Reviews of exemptions may also deter victims from obtaining an exemption.<sup>35</sup>

49. Financial barriers may also deter victims from seeking exemptions. Where exemptions are granted, victims do not receive child support payments. The lack of child support payments may not be fully compensated by an increase in benefits. A victim of family violence who obtains an exemption may therefore receive less overall income than if he or she received child support payments.<sup>36</sup> If this prospect deters victims from requesting exemptions, their safety may be compromised. Conversely, where they do obtain exemptions, decreased levels of income may compound the financial disadvantage already widely experienced by victims of family violence.<sup>37</sup>

50. The ALRC is interested in comment as to whether victims of family violence face barriers in obtaining exemptions, what form these barriers take, and how they might be overcome. Implementing screening for family violence by the CSA—discussed below—is a reform which may go some way to addressing this issue. Another measure may be to advise all child support customers about family violence exemptions, perhaps in conjunction with family violence screening. The ALRC is also interested in whether reforms are required to address the financial disadvantage of victims of family violence who receive an exemption from the requirement to take reasonable maintenance action.

### **Consequences of family violence exemptions**

51. The operation of the exemption policy as reflected in the *Family Assistance Guide* and the *Child Support Guide* has some problematic consequences.

33 R Patrick, K Cook and H McKenzie, ‘Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear’ (2008) 42 *Social Policy and Administration* 749, 759, R Patrick, K Cook and A Taket, ‘Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners’ (2007) 45 *Just Policy* 21, 25.

34 R Patrick, K Cook and A Taket, ‘Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners’ (2007) 45 *Just Policy* 21, 25.

35 See R Patrick, K Cook and H McKenzie, ‘Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear’ (2008) 42 *Social Policy and Administration* 749, 761, R Patrick, K Cook and A Taket, ‘Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners’ (2007) 45 *Just Policy* 21, 25.

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

37 See R Patrick, K Cook and H McKenzie, ‘Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear’ (2008) 42 *Social Policy and Administration* 749. Also, see L Goodman and others, ‘When Crises Collide: How Intimate Partner Violence and Poverty Intersect to Shape Women’s Mental Health and Coping?’ (2009) 10 *Trauma, Violence & Abuse* 306 for a discussion of the intersection of family violence and poverty, as well as mental health.

52. Most notably, persons who have used family violence do not have to pay child support when the victim obtains an exemption. Persons who use family violence are therefore not required to take financial responsibility for their children in these circumstances. The ALRC is interested in reforms that address this consequence of the exemption policy, recognising that the safety of victims must be the priority.

53. An alternative model is provided by some US states, where child support debts accrue while exemptions are in place. Once the exemption expires, the person who has used violence is liable to pay the debt in full.<sup>38</sup> This may prevent persons who use family violence from benefiting financially when victims obtain an exemption. However, the ALRC raises some concerns about this policy. Exemptions protect victims by addressing the risk of violence which may otherwise be triggered by a child support application or liability. Requiring a person who has used violence to pay a child support debt at a later stage—when the exemption is lifted—may still compromise the safety of victims.

54. A further issue is that victims who have obtained an exemption may in some circumstances be required to pay child support to the parent who has used violence. No barrier prevents a person who has used family violence from applying for child support in cases where the victim has obtained a family violence exemption. This may occur following a change to care arrangements—for example, where these arrangement change so that the person who has used violence provides more care. The ALRC is considering whether legislation should provide that where a person has been granted an exemption due to family violence, that person is also exempt from paying child support to the person who has used family violence.

#### *Exemptions not provided for in legislation*

55. Exemptions from the requirement to take reasonable maintenance action are not provided for in legislation. Rather, exemption policy is contained in the *Family Assistance Guide* and, to a lesser extent, the *Child Support Guide*. The ALRC is considering whether exemptions should be provided for in child support legislation, family assistance legislation, or both. Exemptions may be considered a significant matter of policy. Including exemptions in legislation would recognise their significant role in protecting victims by permitting them to opt out from the assessment and collection of child support, without a reduction of their FTB Part A payments.

56. Another advantage of setting out family violence exemptions in legislation is that such provisions would be more authoritative and transparent, and may provide victims of family violence with increased procedural certainty. The ALRC welcomes comment on whether exemption procedures should be contained in legislation, rather than in policy.

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<sup>38</sup> R Patrick, K Cook and H McKenzie, ‘Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear’ (2008) 42 *Social Policy and Administration* 749, 753, 763.

**Question 4** In relation to the legislative requirement that a person take reasonable maintenance action, in order to receive more than the base rate of Family Tax Benefit Part A, what changes, if any, are needed to family assistance and child support legislation and policy to:

- (a) ensure that exemptions are accessible to victims of family violence;
- (b) ensure that exemption periods are of an appropriate duration; and
- (c) address any financial disadvantage of victims of family violence who are exempted?

**Question 5** Should Child Support Agency staff be required to provide information about family violence exemptions when dealing with applications for child support assessment?

**Question 6** What reforms, if any, are needed to ensure that persons who use family violence are not relieved from financial responsibility when victims obtain exemptions from the requirement to take reasonable maintenance action?

**Question 7** Should a person who has been granted an exemption from the requirement to take reasonable maintenance action due to family violence, also be exempt from paying child support to the person who has used family violence?

**Question 8** Exemption policy in relation to the requirement to take reasonable maintenance action is currently provided for in the *Family Assistance Guide* and the *Child Support Guide*. Should legislation provide that a person who receives more than the base rate of Family Tax Benefit Part A may be exempted from the requirement to take reasonable maintenance action on grounds of family violence?

**Question 9** Do any other issues arise for victims of family violence in obtaining exemptions from the requirement to take reasonable maintenance action?

## Seeking information about family violence

### *Child Support Agency*

57. Family violence is relevant to the administration of child support, for example, in relation to collection of payments and protection of personal information. It is important that the CSA is aware of cases in which family violence is an issue, so that these cases may be appropriately dealt with. The ALRC is interested in comment as to whether victims of family violence are effectively identified by the CSA.

58. Victims may be reluctant to disclose information about family violence to agencies such as the CSA. In ALRC Report 114, the Commissions identified a range of reasons for non-disclosure of family violence:

A victim of family violence may hide the abuse due to feelings of shame, low self esteem or a sense that he or she, as the victim, is responsible for the violence. A victim may feel that he or she will not be believed. A victim may hope that the violence will stop, or might believe that violence is a normal part of relationships. Because of the family violence, a victim may feel powerless and unable to trust others, or fear further violence if caught disclosing it.<sup>39</sup>

59. Further, victims may not disclose family violence as they may not be aware that this information is relevant to their child support case.

60. The CSA does not appear to screen routinely for family violence, for example when customers apply for child support. Applications for child support may be made to the CSA by telephone, electronically, on the CSA website, or in writing by lodging an *Application for Child Support Assessment* form.<sup>40</sup> It is unclear whether CSA staff are required to ask persons about family violence when taking telephone applications, or at other stages in the administration of child support cases. The *Application for Child Support Assessment* form and the electronic form do not include questions about family violence or seek related information, for example about protection orders.

61. The ALRC is interested in whether the CSA should screen for family violence when processing applications or at other stages in the administration of child support cases. The ALRC is also considering whether questions about family violence should be included on the *Application for Child Support Assessment* form, and other CSA forms, including electronic forms.

### ***Centrelink***

62. Centrelink may be the first contact point for persons eligible for child support. Centrelink may refer persons eligible for child support to the CSA to apply for a child support assessment. Alternatively, Centrelink may grant the person an exemption from the requirement to apply for child support on family violence or other grounds. In these cases, it will not be necessary for the person to contact the CSA.

63. In order to resolve matters concerning safety of victims promptly and efficiently, eligible persons who wish to obtain family violence exemptions should be granted exemptions as soon as possible, rather than being referred between agencies. It is therefore important that Centrelink staff identify persons experiencing family violence before referring them to the CSA. However, Centrelink does not screen for family violence and relies on victims to self-disclose. Screening for family violence by Centrelink is considered in detail in the ALRC Issues Paper, *Family Violence—Social Security Law*.

64. In ALRC Report 114, the Commissions recommended the establishment of a national register which should include certain information about protection orders,

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39 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [18.4].

40 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.1.1]. Forms are available for download or electronic submission at Child Support Agency, Website <<http://www.csa.gov.au>> at 7 March 2011.

family law orders and *Family Law Act* injunctions.<sup>41</sup> The Commissions recommended that the national register

be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.<sup>42</sup>

65. One option for reform is to provide Centrelink social workers with access to the national register, which would ensure they have access to relevant information about court proceedings and orders. However, extending access to the register to Centrelink social workers may raise privacy concerns.

#### **Information sharing**

66. In some cases, victims may disclose family violence to one government agency, but not another. They may assume that once one agency is informed about family violence, there is no need to inform the other. The Australian Government's initiative to house Centrelink, Medicare and the CSA under one roof may have the unintended consequence of encouraging this perception.<sup>43</sup> Further, requiring victims to repeat their experiences and fears of family violence to multiple agencies may have emotional consequences for victims.

67. Not all victims of family violence elect to obtain an exemption from the requirement to take reasonable maintenance action—indeed, many will choose to apply for child support for the financial reasons discussed above. The ALRC understands that where victims disclose family violence to Centrelink, but decline to obtain an exemption, Centrelink will not inform the CSA of the disclosure. This means that CSA may be unaware that persons referred to it by Centrelink have experienced, or fear, family violence.

68. As noted above, family violence is relevant to the administration of child support. Further, as discussed below and in the ALRC Issues Paper *Family Violence—Social Security*, family violence is relevant to the administration of family assistance and social security. To ensure that these cases are dealt with appropriately by both agencies, it may be desirable for Centrelink and CSA to share information about family violence.

**Question 10** Should application forms for a child support assessment, or other Child Support Agency forms—including electronic forms—seek information about family violence? If so, how?

41 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 30–18.

42 Ibid, Rec 30–18.

43 Department of Human Services, *More Portfolio Services in One Place* <[www.dhs.gov.au](http://www.dhs.gov.au)> at 8 March 2011.

**Question 11** Should Child Support Agency staff be required to inquire about family violence when a person makes a telephone application for a child support assessment? In what other circumstances, if any, should Child Support Agency staff be required to inquire about family violence when dealing with customers?

**Question 12** Should Centrelink staff be required to inquire about family violence when referring a person to the Child Support Agency?

**Question 13** Are Centrelink social workers, Indigenous Service Officers and Child Support Agency staff able to access information about persons who have identified themselves as victims of family violence as to whether they have obtained a protection order or similar? Should Centrelink social workers, Indigenous Service Officers and Child Support Agency staff be able to access the national register recommended in *Family Violence—A National Legal Response*, Report 114 (2010)?

**Question 14** In what circumstances, if any, should information about family violence be shared between the Child Support Agency and other government agencies, such as Centrelink?

## **Assessment of child support**

### ***Determination of percentage of care***

69. The way in which the percentage of care is determined by the CSA may affect victims of family violence.

70. As discussed above, the percentage of care is used in the child support formula. This is the proportion of time a parent or carer provides care for a child. A person must provide at least 35% in order to be eligible for child support payments.<sup>44</sup> Amendments to the *Child Support (Assessment) Act* have changed the rules for determining percentages of care from 1 July 2010.<sup>45</sup>

### ***Alignment of percentage of care***

71. From 1 July 2010, the Family Assistance Office (FAO) and the CSA determine percentages of care in the same way. Determinations of percentages of care under family assistance legislation apply for child support purposes, and determinations under child support legislation apply for family assistance purposes.<sup>46</sup>

44 *Child Support (Assessment) Act 1989* (Cth) ss 5(3), 7B(1).

45 The changes do not apply to cases involving ex-nuptial children in Western Australia. Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [1.4.3].

46 *Child Support (Assessment) Act 1989* (Cth) s 54K; *A New Tax System (Family Assistance) Act 1999* (Cth) s 35T.

*Determining percentage of care*

72. From 1 July 2010, the CSA will usually determine the percentage of care based on the actual care that is occurring.<sup>47</sup> Actual care is generally based on the number of nights a person has cared for a child, or is likely to care for a child, over a 12-month period.<sup>48</sup> If a determination based on nights is not appropriate, the CSA may base a determination on hours of care.<sup>49</sup>

73. The CSA may request information from the parties in order to determine patterns of care. The *Child Support Guide* recognises that actual care may be reflected in care arrangements agreed upon by the parties.<sup>50</sup> Since the July 2010 amendments, care arrangements are defined by the *Child Support (Assessment) Act* as written agreements, parenting plans and court orders—including parenting orders and state and territory protection orders.<sup>51</sup>

*When parties dispute the care that is occurring*

74. Parties may disagree about the actual care that is occurring, and may provide conflicting information about how much care each is providing. The *Child Support Guide* indicates that the CSA encourages parents to resolve such disputes. If the parties cannot resolve the issue, the CSA will request additional information and evidence from the parties.<sup>52</sup>

75. The *Child Support Guide* states that CSA will consider a ‘wide range of evidence’.<sup>53</sup> This may include documentary records, such as diary entries, and records of visits to services, such as health care providers. The CSA may consider its records of customer contact, as well as Centrelink information. The CSA may also consider third party statements, if the third party is willing to be identified as the source of information, and the statement is provided to the other parent.<sup>54</sup> The CSA has a policy not to obtain or consider information from children.<sup>55</sup>

76. The *Family Assistance Guide* is more illustrative than the *Child Support Guide* in relation to types of evidence which may be taken into account in determining percentage of care.<sup>56</sup> As the FAO and the CSA use the same rules to verify the actual care that is occurring,<sup>57</sup> it is likely that the CSA has regard to the same or similar

47 *Child Support (Assessment) Act 1989* (Cth) s 50(3).

48 *Ibid* s 54A (1).

49 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.2.1].

50 *Ibid*, [2.2.1].

51 The *Child Support (Assessment) Act 1989* (Cth) provides that ‘care arrangement’ has the same meaning as in the *A New Tax System (Family Assistance) Act 1999* (Cth). *Child Support (Assessment) Act 1989* (Cth) s 5; *A New Tax System (Family Assistance) Act 1999* (Cth) s 3.

52 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.2.1].

53 *Ibid*, [2.2.1].

54 *Ibid*, [2.2.1].

55 *Ibid*, [6.2.2], [2.2.1].

56 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.30].

57 *Ibid*, [2.1.1.30].

evidence. Examples of evidence which may be taken into account by the FAO are outlined below.

77. Based on this information, the CSA will determine a percentage of care. If the differences in the information cannot be reconciled, CSA will determine the care percentage on the balance of probabilities. If the CSA cannot reach a conclusion on the balance of probabilities, then the CSA will assume that the state of affairs at the time the assessment occurred will continue, and the care percentage will not change.<sup>58</sup> It is unclear how the CSA makes a determination where there has not been a prior assessment.

#### *Interim determinations*

78. *The Child Support (Assessment) Act* provides for interim determinations about percentage of care in specified circumstances. In these cases, the percentage of care is not based on actual care. Interim determinations generally have effect for a period of 14 weeks, and may be extended to up to 26 weeks in special circumstances.<sup>59</sup>

79. The CSA will not use actual care to determine the percentage of care where a care arrangement—as defined in the legislation—is not being complied with, and the person with reduced care is taking ‘reasonable action’ to ensure compliance with the care arrangement. In these circumstances the CSA may make an interim determination, in which the care percentage is based on the care the person should have had under the care arrangement.<sup>60</sup>

80. The CSA may also make an interim determination where a care arrangement is not being complied with, and the person with reduced care is taking ‘reasonable action’ to make a new care arrangement, which provides the person with less care than in the current care arrangement, but more care than the actual care that he or she has. To make an interim determination in these circumstances, the CSA must also be satisfied that the person who is seeking a new care arrangement has ‘special circumstances’.<sup>61</sup>

81. The *Child Support Guide* provides a non-exhaustive list of special circumstances. It includes situations where the parent could not continue to have previous levels of care due to, for example, serious medical problems.<sup>62</sup> In these circumstances, the CSA may base the care percentage on the care the person would have under the new care arrangement.

#### *Determining percentage of care prior to 1 July 2010*

82. Prior to the amendments to the *Child Support (Assessment) Act*, the CSA generally made care percentage determinations in accordance with oral or written

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58 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.2.1].

59 *Child Support (Assessment) Act 1989* (Cth) s 54C.

60 Ibid s 51.

61 Ibid s 52.

62 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.2.8].

agreements, parenting plans or court orders related to care of a child.<sup>63</sup> Where there was no agreement, plan or order in place, the CSA determined the care percentage on the actual care the parties were likely to have over the care period.<sup>64</sup>

*Interim determinations prior to 1 July 2010*

83. Prior to July 2010, parties could apply to the CSA for an interim care percentage determination where care was not in accordance with an agreement, plan or order. In such cases, an interim determination could be based on the actual percentage of care that was occurring.<sup>65</sup> The CSA generally reviews the interim determination within six months, unless there are special circumstances.<sup>66</sup>

84. Section 52 of the *Child Support (Assessment) Act* previously provided that the CSA can make an interim determination where:

- in the circumstances of the case, a percentage of care based on the agreement, plan or order ‘would result in an unjust and inequitable level of financial support to be provided by a parent for the child’;<sup>67</sup> and
- a parent or carer has taken ‘reasonable action’ to seek an agreement or a court order, or to enforce a court order related to the care of the child.<sup>68</sup>

85. The *Child Support Guide* provides further information about where an ‘unjust or inequitable’ level of financial support exists, that is, where there is:

- a ‘significant difference’ between care provided for in the agreement, plan or order, and actual care;<sup>69</sup> and
- an ‘acceptable reason’ for non-compliance with the agreement, plan or order.<sup>70</sup>

86. The *Child Support Guide* specifies a number of acceptable reasons for non-compliance with an agreement, plan or order, including that the CSA is satisfied that domestic violence or abuse could result if the agreement, plan or order was followed. CSA requires evidence from parties to support a claim of violence, including police

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

64 *Child Support (Assessment) Act 1989* (Cth) s 50, amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth); Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.2.5].

65 *Child Support (Assessment) Act 1989* (Cth) ss 52(1), (2), amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth); Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.2.6].

66 *Child Support (Assessment) Act 1989* (Cth) s 52(4), (5), amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth).

67 *Child Support (Assessment) Act 1989* (Cth) s 52(c), amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth).

68 *Child Support (Assessment) Act 1989* (Cth)s 52(d), amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth).

69 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [2.2.6].

70 Ibid, [2.2.6].

reports, letters from medical practitioners, protection orders and applications for protection orders.<sup>71</sup>

87. The *Child Support Guide* also acknowledges that customers may not be in a position to take action to seek an agreement or order, or enforce an order as a result of domestic violence or abuse, until ‘until they are in safe accommodation or have made arrangements to ensure the safety of their child or themselves’.<sup>72</sup>

*Effect of the amendments on victims of family violence*

88. The ALRC is interested in the effect of the July 2010 amendments to the *Child Support (Assessment) Act* in relation to determining the percentage of care, including interim determinations, on victims of family violence.

89. The pre-July 2010 policy, as articulated in the *Child Support Guide*, did take account of the consequences of family violence for victims in the context of interim orders. However, it may be that the amendments effective from 1 July 2010 operate to the further benefit of victims, insofar as care percentages are now generally based on actual care.

90. The AIFS report considered the link between parenting orders and financial issues, including child support. This report predates the July 2010 amendments to the *Child Support (Assessment) Act*, and provides a useful insight into the effect of the pre-amendment rules. The AIFS report noted that ‘family law system professionals expressed concern about child support payments being based on court order arrangements that subsequently change’.<sup>73</sup>

91. The report also noted that parents may be reluctant to seek new court orders to reflect changes in care due to barriers such as the costs of litigation, ‘burn out’, and personal circumstances.<sup>74</sup> In particular, in family violence cases, lawyers considered it an appropriate strategy not to apply to change orders, in order to avoid re-inflaming the family situation. This noted reluctance to engage with the legal system was not limited to the courts, and also applied to Family Dispute Resolution processes. Parents therefore accepted the child support consequences of having assessments based on outdated care orders or agreements.<sup>75</sup>

92. This problem would appear to be addressed by the post-amendment requirement that the CSA base the percentage of care on actual care, in usual circumstances, under the *Child Support (Assessment) Act*. The ALRC is interested in whether, in practice, this is the case. In particular, the ALRC is interested in whether the method of determining the care percentage introduced after 1 July 2010—including in interim determinations—is appropriate in cases of family violence.

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71 Ibid, [2.2.6].

72 Ibid, [2.2.6].

73 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 228.

74 Ibid, 229.

75 Ibid, 229.

93. The ALRC is also interested in whether CSA procedures in relation to determining actual care when parents disagree, as stated in the *Child Support Guide*, is appropriate in cases of family violence.

**Question 15** In what ways, if any, can the legislative basis for Child Support Agency determinations about the percentage of care, be improved for victims of family violence?

**Question 16** In what ways, if any, can the rules, as stated in the *Child Support Guide*, for the Child Support Agency to verify actual care when parents dispute the care that is occurring, be improved for victims of family violence?

#### ***Departure from administrative assessment***

94. A parent or carer may apply to the CSA for a change of assessment, also known as a ‘departure’ from the administrative assessment, due to ‘special circumstances’.<sup>76</sup> The *Child Support (Assessment) Act* specifies a number of grounds for a departure from administrative assessment of child support by the CSA or a court.<sup>77</sup> Family violence is not referred to in the grounds for departure.

95. The CSA or a court may make a departure from the assessment if satisfied that one or more of the grounds specified in the Act exist; it is ‘just and equitable’ for the child, the payer and the payee; and it is ‘otherwise proper’.<sup>78</sup>

96. A person may lodge an objection to the initial CSA decisions with the CSA. If this is disallowed, a person may appeal to the Social Security Appeals Tribunal (SSAT). Prior to 2007, persons could appeal to a court with jurisdiction under the *Family Law Act*. In certain circumstances, a person may apply directly to a court with *Family Law Act* jurisdiction for a departure determination.

#### ***CSA initiated change of assessment***

97. The CSA may also initiate a change of assessment due to ‘special circumstances’.<sup>79</sup> There is only one ground on which the CSA may make a determination in these circumstances, namely where the assessment results in

an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of the income, earning capacity, property and financial resources of either parent.<sup>80</sup>

98. The CSA must be satisfied that it is ‘just and equitable’ and ‘otherwise proper’ to make the determination.<sup>81</sup>

76 *Child Support (Assessment) Act 1989* (Cth) s 98B.

77 Ibid s 117(2).

78 Ibid ss 98C(1), 117(1).

79 Ibid s 98K.

80 Ibid s 98L.

81 Ibid s 98L(1).

99. The CSA is required to notify the parties in writing that it is considering making the determination, and must serve on the parties a summary of the information that it used to form the view that a determination should be made to change the assessment.<sup>82</sup> It must also inform the parties that they may reply to the summary, and serve a copy of such a reply on the other party.<sup>83</sup> The parties may jointly elect that the CSA discontinue proceedings, but only where the payee does not receive an income-tested benefit, pension, or allowance.<sup>84</sup>

100. There is no requirement in the legislation or the *Child Support Guide* for the CSA to consult with either party prior to the written notification of both parties. This process may be commenced without the CSA consulting the payee, a practice that may compromise safety if the payee is a victim of family violence. It may re-ignite conflicts between parties or provoke violence, and the victim may be subject to threats or coercion in relation to the proceedings.

101. The ALRC is interested in stakeholder comment as to whether there should be a requirement in the legislation or the *Child Support Guide* for the CSA to ask payees if they have concerns about family violence before initiating change of assessment determinations.

102. The ALRC is also interested in comment regarding whether there are other circumstances in which the CSA should be required to ask customers about family violence before initiating procedures under child support legislation or policy.

**Question 17** Is family violence adequately taken into account in the grounds for a departure determination?

**Question 18** What reforms, if any, are needed to ensure that victims of family violence obtain a departure determination where appropriate?

**Question 19** Should the Child Support Agency be required to ask payees if they have concerns about family violence before it initiates departure determinations?

**Question 20** Should the Child Support Agency be required to ask customers about family violence prior to initiating other proceedings or actions? If so, which proceedings or actions should this requirement apply to?

## **Collection and enforcement of child support**

### ***Collection of child support payments***

103. Payees may elect to collect child support payments privately from the payer, or for the CSA to collect and transfer payments. Child support legislation provides that the CSA must initially register a child support assessment for collection by the CSA,

82 Ibid s 98M.

83 Ibid ss 98M, 98N.

84 Ibid s 98P.

unless the payee elects that the CSA not collect child support.<sup>85</sup> The *Application for Child Support Assessment* form presents applicants with the option to collect privately.

104. Private collection may suit families in which there are low levels of conflict. However, for victims of family violence, collection by the CSA may be more advantageous. The methods of collection used by CSA can minimise payers' opportunities for non-compliance with child support obligations. The CSA uses a range of methods to collect payments, including deductions from:

- salary and wages;<sup>86</sup>
- tax refunds;<sup>87</sup>
- social security pensions or benefits;<sup>88</sup>
- family tax benefits;<sup>89</sup>
- payments under the *Veterans' Entitlements Act 1986* (Cth);<sup>90</sup> and
- parental leave payments.<sup>91</sup>

105. Importantly for the safety of victims, where the CSA collects child support, victims will not need to have direct contact about child support payments with persons who have used family violence. Participants in one study considered that they were able to 'reduce contact and increase safety' once the CSA collected child support.<sup>92</sup>

#### *Changing method of collection*

106. Where the CSA is collecting child support, a payee (or payer and payee together) may elect to end collection by the CSA. Once the election is made, child support is payable directly to the payee. The CSA must accept the payee's election to end collection by the CSA.<sup>93</sup>

107. A payee who has previously elected to collect privately may apply for collection by the CSA. The CSA must accept the payee's application.<sup>94</sup> In these circumstances, the payee may also apply for the CSA to collect unpaid amounts of child support, called arrears. The CSA must grant the payee's application to collect arrears that accumulated in the three month period before the CSA started enforcing child support payments.<sup>95</sup>

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85      *Child Support (Registration and Collection) Act 1988* (Cth) s 24A. If the applicant is the payer, the CSA will not register the assessment for collection by the CSA.

86      Ibid s 43.

87      Ibid s 72.

88      Ibid s 72AA.

89      Ibid s 72AB.

90      Ibid s 72AC.

91      Ibid s 72AD.

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

93      *Child Support (Registration and Collection) Act 1988* (Cth) ss 38, 38A; Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [5.6.1].

94      *Child Support (Registration and Collection) Act 1988* (Cth) s 25.

95      Ibid s 28A.

108. Where the CSA is satisfied that there are ‘exceptional circumstances’, it may grant a payee’s application to collect arrears accumulated over a period of up to nine months.<sup>96</sup> The *Child Support Guide* provides that exceptional circumstances include where a payer has ‘threatened or pressured the payee not to apply for registration for CSA collection’.<sup>97</sup> The payee must provide evidence to show exceptional circumstances.<sup>98</sup>

#### *Private collection and family violence*

109. Victims may elect to collect privately, or to end collection by the CSA, as a result of fear of, or coercion by, a person who has used violence. The ALRC understands that, due to fear and coercion, victims may also collect less child support than they are entitled to—or no child support at all.

110. Victims may not disclose to the CSA that they are not receiving child support in full or at all. It has been reported that victims may misinform the CSA about payments received in response to threats, due to fear of the consequences, or to avoid contact with persons who have used violence.<sup>99</sup> Statistics of such cases may be ‘hidden’, as the CSA may consider such cases to be successful private collection cases,<sup>100</sup> in the absence of any information to the contrary.

111. There may be further disincentives for a victim to advise that they are receiving less than the full amount of child support. Unless a payee has been granted an exemption, he or she must collect the full amount of child support to fulfil the ‘reasonable maintenance action’ requirement. If he or she does not collect the full amount, he or she may be required to change from private collection to collection by the CSA.<sup>101</sup> If the payee does not comply, his or her FTB Part A is reduced to the base rate. The ALRC is interested in comment as to whether victims of family violence are affected by the requirement to take reasonable maintenance action in such circumstances.

#### *Private collection required by the CSA*

112. The *Child Support (Registration and Collection) Act* provides that the CSA may require parents to collect privately where the payer has a ‘satisfactory payment record’ which is ‘likely to continue’.<sup>102</sup> The CSA must also be satisfied that a decision to end collection by the CSA is ‘appropriate in relation to the liability’.<sup>103</sup> The *Child Support Guide* provides that it is not appropriate to require private collection where there has been a ‘history of family violence’,<sup>104</sup> and where a person has ‘previously been

<sup>96</sup> Ibid s 28A.

<sup>97</sup> Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [5.1.4].

<sup>98</sup> Ibid, [5.1.4].

<sup>99</sup> I Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (2007) 31, 33.

<sup>100</sup> Ibid, 33.

<sup>101</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [3.1.6.70].

<sup>102</sup> *Child Support (Registration and Collection) Act 1988* (Cth) s 38B(1).

<sup>103</sup> Ibid s 38B(1).

<sup>104</sup> Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [5.6.2].

exempted from having to take reasonable maintenance action'.<sup>105</sup> It is unclear how victims of family violence are identified where they have not previously obtained an exemption.

#### **Court enforcement of arrears and Departure Prohibition Orders**

113. The CSA may take action to enforce child support arrears in a number of courts, including state and territory magistrates courts, the Family Court or the Federal Magistrates Court.<sup>106</sup> Parents may also take court action to enforce child support.<sup>107</sup>

114. The CSA can make a Departure Prohibition Order preventing a person with child support debt from leaving Australia.<sup>108</sup> Such orders may be issued when a person owes child support, has not made arrangements for it to be paid, and has 'persistently and without reasonable grounds'<sup>109</sup> failed to make payments. A person may apply for a 'Departure Authorisation Certificate', which authorises a person to leave the country.<sup>110</sup>

115. Victims of family violence may come under pressure from persons who have used family violence to elect that the CSA end enforcement of arrears, or revoke Departure Prohibition Orders. The *Child Support (Registration and Collection) Act* provides that payees may elect for the CSA not to collect unpaid amounts of child support when he or she elects to end collection by the CSA.<sup>111</sup> The mechanism by which victims may elect that the CSA revoke a Departure Prohibition Order is unclear.

**Question 21** What reforms, if any, are needed to protect victims of family violence who, due to fear of persons who have used violence:

- (a) elect to collect child support privately, or elect to end collection by the Child Support Agency; and
- (b) privately collect less than the assessed amount of child support, or no child support?

**Question 22** In practice, how does the requirement to take reasonable maintenance action affect victims of family violence who collect less than the full amount of child support? What reforms, if any, are needed to ensure that victims of family violence in these circumstances are not financially disadvantaged by receiving less Family Tax Benefit Part A?

**Question 23** What reforms, if any, are needed to ensure that victims of family violence are not required by Child Support Agency to privately collect child support?

105 Ibid, [5.6.2].

106 *Child Support (Registration and Collection) Act 1988* (Cth) ss113(1), 104.

107 Ibid ss 113(1)(b)(ii), 113A.

108 Ibid s 72D .

109 Ibid s 72D(c).

110 Ibid s 72K.

111 Ibid ss 38A.

- Question 24** What reforms, if any, are needed to protect victims of family violence who, due to fear of persons who have used violence, elect to:
- end Child Support Agency collection of child support debt?
  - request that Child Support Agency revoke a Departure Prohibition Order?

## Child Support Agreements

116. The *Child Support (Assessment) Act* provides that parties can make an agreement regarding child support, and apply to the CSA to accept the agreement.<sup>112</sup> Parenting plans, as well as maintenance and financial agreements under the *Family Law Act*, may be child support agreements, where they comply with the requirements of the *Child Support (Assessment) Act*.<sup>113</sup>

117. The provisions that may be included in a child support agreements are specified in the *Child Support (Assessment) Act*, and include varying the rate at which a parent is liable to pay child support, and providing for non-periodic payment of child support.<sup>114</sup> Non-periodic payments include lump sums, or non-cash payments such as school fees or rental payments.

118. Victims of family violence may be pressured into entering into child support agreements that are disadvantageous to them. However, child support agreements contain certain safeguards that may protect parties from exploitation. There are two types of child support agreement: binding child support agreements, and limited child support agreements. These agreements contain different safeguards.

119. A binding child support agreement must contain a statement from each party that he or she was provided with independent legal advice about the agreement's effect on his or her rights, and its advantages and disadvantages.<sup>115</sup> The agreement must also contain an annexure with a certificate signed by legal practitioner stating that the advice was provided.<sup>116</sup>

120. In a limited child support agreement, a child support assessment must be in force at the time that parties make an application to the CSA to accept the agreement.<sup>117</sup> The annual rate of child support under the agreement must be at least equal to the annual rate of child support under the assessment.<sup>118</sup>

121. The ALRC is interested in whether these safeguards in binding and limited child support agreements are sufficient to protect victims of family violence from accepting

112 Child support agreements must be in writing, and signed by the parties. *Child Support (Assessment) Act 1989* (Cth) ss 80C(2)(a), (b), ss 80E(1)(a), (b).

113 Ibid s 84(5).

114 Ibid s 84(1).

115 Ibid s 80C(2).

116 Ibid s 80C(2).

117 Ibid s 92(3).

118 Ibid s 80E(2).

disadvantageous agreements due to coercion by, or fear of, the person who has used family violence.

**Question 25** In cases where victims of family violence are subject to pressure to enter into child support agreements, are the provisions in the *Child Support (Assessment) Act 1989* (Cth) providing that:

- (a) independent legal advice must be provided; or
- (b) annual child support assessments may not be decreased

sufficient to protect victims from entering into disadvantageous agreements, and if not, what reforms are needed?

## Disclosure of personal information

122. Child support legislation requires that the CSA disclose information about one party to the other party at certain stages of a child support case. Disclosure of personal information in accordance with these requirements may have an effect on victims of family violence.

123. The CSA is required to disclose personal information about a parent or carer to the other party when making a child support assessment. The CSA is required to give both parties written notice of the assessment, and must specify matters such as income, the number and age ranges of any dependent children, and the number and age ranges of any other children for whom a party pays or receives child support.<sup>119</sup>

124. Other circumstances where personal information is disclosed include during a change of assessment procedure,<sup>120</sup> where a party objects to a CSA decision,<sup>121</sup> and where a party applies for a review at the SSAT.<sup>122</sup>

125. It is clear from the *Child Support Guide* that—in at least some of these circumstances—the purpose of such disclosure is to facilitate principles of procedural fairness. The parent is provided with the information that is taken into account by the CSA in making a decision, and has the right to challenge the outcome if she or he thinks it unfair or incorrect.<sup>123</sup>

126. However, providing one party's personal information to the other party may have a detrimental effect on victims of family violence. Victims have reported resentment at ongoing disclosure of personal financial information.<sup>124</sup> This may also affect the safety of victims, particularly when unaware that information provided to the CSA will be provided to person who has used violence.

119 Ibid ss 76(1), (2).

120 Ibid s 98G.

121 *Child Support (Registration and Collection) Act 1988* (Cth) s 85.

122 Ibid, ss 95(3), 96(1).

123 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [4.1.6], [6.3.3].

124 I Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (2007), 32.

127. The requirement for financial disclosure potentially may deter victims of family violence from lodging applications for child support, objections, or applications to change child support assessments. The ALRC is interested in reforms which may address this issue, while ensuring that principles of procedural fairness are adhered to.

**Question 26** What reforms, if any, are necessary to protect the safety of victims of family violence, where the Child Support Agency discloses information about one party to another in accordance with child support legislation? Are changes to the legislation required, and if so, what changes?

### Reporting family violence

128. Where a threat is made against a person to the CSA, child support legislation allows the CSA to disclose this where it is a ‘credible threat to the life, health or welfare of a person’.<sup>125</sup> To disclose the threat, the CSA must also

- believe ‘on reasonable grounds that the communication is necessary to prevent or reduce the threat’;<sup>126</sup> or
- have reason to suspect the threat is evidence that an offence may be, or has been, committed, and communicates the information for the purpose of ‘preventing, investigating or prosecuting’ the offence.<sup>127</sup>

129. The *Child Support Guide* provides that where a threat is made to the CSA against a person, the matter should be referred to a senior officer who should consider whether to report the threat to police. The CSA will generally advise the threatened person, and ask him or her whether he or she wants the CSA to report the threat.<sup>128</sup>

130. It is not, however, a legislative or policy requirement for the CSA to consult the threatened person before reporting the threat to the police,<sup>129</sup> and the CSA will report a threat without consultation when it considers that there is an ‘immediate or urgent need to prevent an offence’.<sup>130</sup> In addition, the CSA may report a threat to the police against the wishes of the threatened person if the threat is serious.<sup>131</sup>

131. The ALRC is interested in finding how well this system works in practice to protect victims of family violence.

125 *Child Support (Registration and Collection) Act 1988* (Cth) s 16(3)(e); *Child Support (Assessment) Act 1989* (Cth) s 150(3)(e).

126 *Child Support (Registration and Collection) Act 1988* (Cth) s 16(3)(e)(i); *Child Support (Assessment) Act 1989* (Cth) s 150(3)(e)(i).

127 *Child Support (Registration and Collection) Act 1988* (Cth) s 16(3)(e)(ii); *Child Support (Assessment) Act 1989* (Cth) s 150(3)(e)(ii).

128 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [6.10.1].

129 *Child Support (Registration and Collection) Act 1988* (Cth) s 16(3)(e); *Child Support (Assessment) Act 1989* (Cth) s 150(3)(e); Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [6.10.1].

130 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* (2008) <<http://www.csa.gov.au/guidev2>> at 17 February 2011, [6.10.1].

131 Ibid, [6.10.1].

**Question 27** Are victims of family violence adequately protected by the Child Support Agency's procedures to deal with threats made to the Child Support Agency against them by family members? What reforms, if any, are needed to protect victims where family members make threats against them to the Child Support Agency?

### Protection of personal information

132. The *Child Support Guide* provides that where the CSA identifies a person as being at risk of family violence, and considers that increased security is warranted, the case will be referred to an authorised Restricted Access Customer System (RACS) coordinator.<sup>132</sup> A RACS classification means that the person's information is placed under higher security and there are a limited number of CSA officers who may access the information.<sup>133</sup>

133. In considering whether to classify a person's information as RACS, the CSA may consider the person's requests, as well as 'any special protection' provided by other government agencies for the person's information.<sup>134</sup>

**Question 28** Is the personal information of persons at risk of family violence adequately protected by Child Support Agency practices, such as the Restricted Access Customer System? In what ways, if any, can the protection of personal information be improved?

### Other issues

134. There may be other relevant issues in the child support context which the ALRC has not identified in this Issues Paper. The ALRC is interested in comment on any other areas of child support law and practice that have an impact on the safety of victims of family violence.

**Question 29** Are there any other concerns about the interaction of child support law and practice and the protection of safety of victims of family violence? What reforms, if any, are necessary to improve the safety of victims of family violence?

132 Ibid, [6.10.1].

133 Ibid, [6.3.7].

134 Ibid, [6.3.7].

## **Family assistance**

### **Background**

135. The Commonwealth has provided family allowances since 1941.<sup>135</sup> The current framework for family assistance comprises a range of payments and is primarily governed by two statutes: *A New Tax System (Family Assistance) Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999*. These Acts are referred to in this Issues Paper as the *Family Assistance Act* and the *Family Assistance (Administration) Act* respectively.

136. In replacing the previous family assistance scheme, this legislative framework aimed to ‘simplify the structure and delivery of assistance for families’<sup>136</sup> by establishing one body to administer a consolidated set of payments, all of which would have ‘similar eligibility rules’.<sup>137</sup> These payments play a significant role in supporting low-income families.<sup>138</sup>

137. Centrelink administers ‘family assistance payments’ on behalf of the FAO.<sup>139</sup> Such payments comprise a range of types, including: family tax benefit (FTB),<sup>140</sup> baby bonus,<sup>141</sup> maternity immunisation allowance,<sup>142</sup> child care benefit,<sup>143</sup> child care rebate,<sup>144</sup> and FTB advance.<sup>145</sup> As of 1 January 2011, paid parental leave is available. In addition to these payments, the FAO offers other types of support, such as rent assistance.<sup>146</sup>

138. The *Family Assistance Guide* is available online at the website of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).<sup>147</sup> As noted above, guides, as articulations of policy, are not binding in law, but nonetheless are a relevant consideration for the decision maker.

### **Definition of family violence**

139. Neither the *Family Assistance Act* nor the *Family Assistance (Administration) Act* provides a definition of ‘family violence’. The *Family Assistance Guide* also leaves the term undefined.<sup>148</sup>

135 P Whiteford and G Angenent, *The Australian System of Social Protection: An Overview* (2001), 12.

136 Commonwealth, *Parliamentary Debates*, Senate, 24 May 1999, 5170 (I Campbell).

137 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1999, 6417 (W Truss—Minister of Agriculture, Fisheries and Forestry).

138 See Australian Institute of Health and Welfare, *Australia’s Welfare 2005* (2005), 75.

139 Child Support Agency, *Website* <<http://www.csa.gov.au>> at 7 March 2011.

140 *A New Tax System (Family Assistance) Act 1999* (Cth) pt 3 div 1.

141 Ibid pt 3 div 2.

142 Ibid pt 3 div 3.

143 Ibid pt 3 div 4.

144 Ibid pt 3 div 5.

145 Ibid s 3, ‘family assistance’.

146 Family Assistance Office, *What Payments We Offer* <<http://www.familyassist.gov.au/payments>> at 16 February 2011.

147 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011.

148 The *Guide to Social Security Law*, which is also hosted on the FAHCSIA website, does contain a definition of family violence. Department of Families, Housing, Community Services and Indigenous

140. As noted in the context of the discussion on child support, it may be desirable for definitions of family violence to be included in primary legislation. In ALRC Report 114 the Commissions recommended a consistent definition of family violence in state and territory family violence and criminal legislation, and the *Family Law Act*. As discussed above, including this definition in relevant Commonwealth laws, such as family assistance legislation, may increase clarity and certainty for victims of family violence, by ensuring that the violence they have experienced will be recognised and treated similarly across all Commonwealth laws.

**Question 30** Should family assistance legislation be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence—A National Legal Response* (ALRC Report 114)?

## Family Tax Benefit

141. FTB is an income-tested payment for eligible parents and carers. FTB includes 2 parts: FTB Part A and FTB Part B. FTB Part A is discussed above in relation to child support. FTB Part B is a benefit for eligible single parent families and families with one primary income earner. The rate of FTB Part B depends on the age of the youngest child and, in families with two working parents, the income of the parent who is the secondary income earner.<sup>149</sup>

142. FTB is paid for dependent children under the age of 16 and, in certain circumstances, for dependent children over the age of 16.<sup>150</sup> Parents and carers must provide at least 35% of a child's care to receive FTB.<sup>151</sup> When more than one person provides care for a child, and they are not members of the same couple, FTB payments can be shared.<sup>152</sup>

143. The ALRC has identified several ways which FTB-related legislation and policy may affect victims of family violence, namely:

- the methods by which the FAO determines the 'percentage of care' in cases where FTB is shared;

Affairs, *Guide to Social Security Law* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 04 February 2011, [1.1.D.235].

149 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 pt 4; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [1.1.2].

150 FTB Part A may be paid for dependent children up to the age of 24 years old, and FTB Part B may be paid for dependent children up to the age of 18 years old. Generally, they must be in full time study. *A New Tax System (Family Assistance) Act 1999* (Cth) ss 17B, 22, sch 1 cl 29(3). Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.10].

151 *A New Tax System (Family Assistance) Act 1999* (Cth) s 22(7).

152 Ibid s 59, sch 1 cl 11.

- policies regarding the payment of FTB in cases of informal care, when a child may be at risk of harm; and
- exemptions from tax file number requirements in cases of family violence.

***Percentage of care***

144. Persons who provide shared care for a child—defined as more than 35% of care<sup>153</sup>—may receive FTB payments. The percentage of care affects how FTB is apportioned between persons who share care of a child. It is worth noting that the percentage of care is not the same as the percentage of FTB payable to the parent or carer. As noted above, since 1 July 2010, the FAO and the CSA determine care percentages in the same way,<sup>154</sup> and each agency will apply a percentage of care determined by the other agency.

145. The *Family Assistance Guide* provides that the FAO may consider various sources in order to determine the care percentage, where parties disagree as to the arrangements that are in place. It provides that each party should be asked to provide evidence to support their claim, and lists a wide range of examples of evidence which may be taken into account.<sup>155</sup> In addition to parenting plans, written agreements, and court orders, the FAO will consider evidence such as:

- confirmation of play group, kindergarten or school enrolment,
- proof of attendance or membership of local organisations or activities,
- receipts for expenses incurred while the child was in care,
- confirmation of care arrangements from close family friends or relatives,
- confirmation from professional members of the community who have regular contact with the family, such as teachers, police, ministers of religion, accountants, lawyers or doctors,
- social worker reports, especially in cases where there may be a fear of violence if the other parent is contacted,
- proof of travel arrangements at contact times (e.g. rail or airline tickets), and
- records from the FAO or other government agencies which may confirm present or previous patterns of care ...<sup>156</sup>

146. The FAO, like the CSA, will not seek verification about care from a child.<sup>157</sup>

147. The ALRC is interested in comment as to whether stakeholders consider the method of determining the care percentage for family assistance purposes—including

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153 Ibid s 59(1)(b).

154 The rules to determine the percentage of care in the *Family Assistance Act* reflect those in the *Child Support (Assessment) Act*. Ibid Part 3, div 1, subdiv D; and *Child Support (Assessment) Act 1989 (Cth)* pt 5 div 4 subdiv B.

155 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.30].

156 Ibid, [2.1.1.30].

157 Ibid, [2.1.1.30].

in interim determinations and cases where parents dispute the care that is occurring—appropriate in cases of family violence.

**Question 31** In what ways, if any, can the legislative basis for Family Assistance Office determinations about the percentage of care, be improved for victims of family violence?

**Question 32** In what ways, if any, can the rules, as stated in the *Family Assistance Guide*, for the Family Assistance Office to verify actual care when parents dispute the care that is occurring, be improved for victims of family violence?

### *Children in formal and informal care*

#### *Original carer no longer has care of a child*

148. FTB is paid to the person providing actual care for the child, where possible.<sup>158</sup> Family assistance legislation and the *Family Assistance Guide* set out the effect on FTB payments when there is a change in care, and a child is no longer cared for by their original carer.<sup>159</sup> The original carer is likely to be the child's parent or parents.

149. Where a person no longer has care of a child, he or she is required to notify the FAO.<sup>160</sup> In some cases, the original carer may continue to receive FTB where the child is not in his or her care. Generally, however, the original carer should not receive FTB for more than a four-week period in these circumstances. After four weeks, the person providing informal care should receive the FTB payments.<sup>161</sup> However, if the original carer has legal responsibility for the child, did not consent to the change in care, and takes reasonable steps to seek the return of the child, he or she may receive FTB for up to 14 weeks.<sup>162</sup>

#### *Formal and informal care*

150. The *Family Assistance Guide* distinguishes between formal and informal care. Formal care occurs where there is a change in legal responsibility for the child, usually under state and territory care and protection legislation. People who provide formal care are generally foster carers. By contrast, informal care is ‘a private agreement between the parent and another party, where there is no change to any form of legal

158 Ibid, [2.1.1.85].

159 *A New Tax System (Family Assistance) Act 1999* (Cth) s 22; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.60], [2.1.1.85].

160 *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 25, Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.60].

161 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.85].

162 *A New Tax System (Family Assistance) Act 1999* (Cth) s23; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.85].

responsibility'.<sup>163</sup> Grandparents, relatives and family friends are identified as persons who usually provide informal care.<sup>164</sup>

151. Those with formal care of a child, like foster carers, can obtain FTB. In cases of informal care, FTB payments are contingent on the 'nature and duration of the absence from the parent's care'.<sup>165</sup>

#### *Informal care not in child's best interests*

152. The *Family Assistance Guide* provides principles for dealing with cases when informal care arrangements may not be in the best interests of a child.<sup>166</sup> It states that a case should be referred to a social worker where:

- the child is not a family member of the person claiming FTB or a social security payment that is dependent on the provision of care for a child, and
- the person has not supplied documentation to support that the child is legally in his or her care, or
- the person has previously lost care of children.<sup>167</sup>

153. Examples are provided of care arrangements that may not be in the child's best interests—such as those in which the child's well-being or daily needs are disregarded, the child is exposed to drugs or alcohol, or there is a 'lack of guidance and oversight'.<sup>168</sup> Family violence is not specifically mentioned.

154. The *Family Assistance Guide* prescribes a broad role for Centrelink social workers in these cases. It includes obtaining information about the reason for the change in care and how long the arrangement is likely to last, contacting the original carer, and making a recommendation to the FAO about FTB and other payments. Social workers may also seek approval to disclose information to a state welfare authority.<sup>169</sup> The ALRC understands that Centrelink social workers may also provide support services to carers and children in these circumstances. Where the child is Indigenous or a refugee child, social workers are required to consult with ISOs and Multicultural Service Officers (MSOs).<sup>170</sup>

155. The *Family Assistance Guide* provides that where FTB to the original carer is cancelled due to a change to informal care, it should be cancelled only after the social

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163 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.85].

164 Ibid, [2.1.1.85].

165 Ibid, [2.1.1.85].

166 Ibid, [2.1.1.100].

167 Ibid, [2.1.1.100].

168 Ibid, [2.1.1.100].

169 Ibid, [2.1.1.100]. *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 168 allows for the disclosure of information about a person in certain circumstances, including where the Secretary certifies it 'necessary in the public interest' in that case or class of cases; or where the person to whom the information relates authorises the information being communicated to another person.

170 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.1.1.100].

worker has made a recommendation. The social worker's recommendations must be given 'due weight'.<sup>171</sup>

156. The ALRC is interested in whether, in practice, such cases are referred to social workers. The ALRC is also interested in the effect of cancelling FTB payments to original carers, and the effect of FTB payments to new carers, where children are at risk of, or have experienced, family violence.

**Question 33** What reforms, if any, are needed to ensure that the Family Assistance Office identifies, and refers to social workers, cases in which children living in informal care may be at risk of harm because of family violence?

**Question 34** What reforms, if any, are needed to improve the safety of children considered at risk of family violence, when the Family Assistance Office, due to a change in care, cancels a former carer's Family Tax Benefit, or starts paying Family Tax Benefit to a new carer?

#### ***Exemption from Tax File Number requirements***

157. An individual applying for FTB must provide both a tax file number (TFN)<sup>172</sup> and a TFN for his or her partner during the relevant payment period.<sup>173</sup> If a person either does not know his or her TFN or is currently applying for one, then the person may authorise the Commissioner of Taxation to share his or her TFN with the FAO and file a statement to that effect.<sup>174</sup>

158. There are limited circumstances in which an individual may qualify for an exemption from providing a partner's TFN, including where a partner is violent, imprisoned for life, or seriously ill or disabled.<sup>175</sup> In particular, an indefinite exemption may be granted when the applicant has a 'well based reason' to believe that requesting the partner's TFN may cause the partner to 'become violent to the applicant or a child' or cause 'other concerns for the safety or the health of the applicant or a child'.<sup>176</sup>

159. The *Family Assistance Guide* provides that these cases are determined on request. Requests are referred to a social worker or an ISO for advice and assistance.<sup>177</sup> The ALRC is interested in whether victims of family violence are aware of, and are obtaining, exemptions from the TFN requirement, where appropriate.

171 Ibid, [2.1.1.100].

172 *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 7.

173 Ibid s 3(1) (definition of 'TFN claim person').

174 Ibid ss 8(4)–(5).

175 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [4.1.1.20].

176 Ibid, [4.1.1.20].

177 Ibid, [4.1.1.20].

**Question 35** What, if any, improvements are needed to ensure that applicants for family assistance are aware of, and using, the exemption from providing their partners' tax file numbers in cases of family violence? Should *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) expressly refer to family violence as an example of an indefinite exemption?

### Baby bonus

160. The baby bonus is a flat rate payment—currently \$5,294—to assist with the costs of a newborn or adopted child.<sup>178</sup> It is generally paid in 13 fortnightly instalments<sup>179</sup> to a parent of a child or a person who cares for or adopts the child.<sup>180</sup>

161. The *Family Assistance Guide* discusses the payment of the baby bonus by instalments and referrals to a social worker or a specialist officer—that is, ISOs and MSOs. The *Family Assistance Guide* states that young people, especially those 17 years or younger, are ‘generally inexperienced in handling large sums of money and/or may be subject to pressure to use the payment unwisely’.<sup>181</sup> These applicants must be referred to a social worker, ISO or MSO to discuss available services such as financial planning and support groups.<sup>182</sup>

162. Some applicants who are older than 17 are also referred to social workers or specialist workers. This includes applicants who have experienced family violence, have had a child subject to child protection, are considered ‘vulnerable to exploitation’, or may be ‘subject to pressure to use the payment unwisely’.<sup>183</sup> The social worker, ISO or MSO will assess the needs of, and the support required by the applicant, and will provide information and referrals regarding appropriate services to the applicant.<sup>184</sup>

163. As discussed above, family assistance legislation and the *Family Assistance Guide* do not contain a definition of family violence. A legislative definition of family violence that is consistent across family assistance, social security and child support legislation, may assist social workers and specialist officers in determining whether a person has been the victim of family violence. In particular, the definition’s treatment of economic abuse may assist in determining when an individual may be subject to pressure or exploitation in relation to baby bonus payments.

164. The ALRC is interested in whether, in practice, victims of family violence are referred to social workers, ISOs and MSOs, when claiming the baby bonus, particularly in light of the lack of screening for family violence by Centrelink, as discussed above.

178 Ibid, [1.2.2], [3.3].

179 *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 47(1).

180 *A New Tax System (Family Assistance) Act 1999* (Cth) s 36. A person is not eligible for the baby bonus where he or she, or his or her partner, receives parental leave.

181 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 March 2011, [2.4.3].

182 Ibid, [2.4.3].

183 Ibid, [2.4.3].

184 Ibid, [2.4.3].

165. The ALRC is also interested in whether these officers have sufficient access to information about family violence protection orders and child protection orders related to the baby bonus applicant. As noted above, providing social workers with access to a national register may assist them in obtaining relevant documentation to assist victims of family violence, but may also lead to privacy concerns.<sup>185</sup>

**Question 36** What, if any, reforms are needed to ensure that baby bonus applicants who are victims of family violence are referred to social workers, Indigenous Service Officers and Multicultural Service Officers?

**Question 37** What, if any, reforms are needed to ensure that social workers, Indigenous Service Officers and Multicultural Service Officers are able to access information about whether a baby bonus applicant has a protection order or a child subject to child protection?

## Child Care Benefit

166. Child Care Benefit (CCB) is an income-tested payment that assists eligible parents and carers with the cost of child care. CCB is available to parents or carers responsible for child care costs where their children attend ‘approved child care services’<sup>186</sup>—services approved for the purposes of family assistance law.<sup>187</sup> The FAO website states that approved child care services meet

certain standards and requirements. This includes having a licence to operate, qualified and trained staff, being open certain hours, and meeting health, safety and other quality standards.<sup>188</sup>

167. The following services may provide approved care:

- long day care services;
- family day care services;
- in-home care services;
- occasional care services; and
- outside school hours care services.<sup>189</sup>

168. CCB is also available where child care is provided by a person who has been approved as a registered carer by the FAO.<sup>190</sup> As discussed below, increased payments of CCB are available where children are at risk of ‘serious abuse’—but only where care is provided by approved child care services. The focus of this section is on

<sup>185</sup> See Question 13.

<sup>186</sup> This term is used in both the *A New Tax System (Family Assistance) Act 1999* (Cth) and the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth).

<sup>187</sup> *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 195(1). The *A New Tax System (Family Assistance) Act 1999* (Cth) addresses eligibility for CCB at pt 3 div 4.

<sup>188</sup> Family Assistance Office, Website <<http://www.familyassist.gov.au>> at 16 February 2011.

<sup>189</sup> *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 194.

<sup>190</sup> See *Ibid* ss 209, 210.

whether increased payments of CCB effectively protect children who experience abuse. Therefore, CCB provided by registered carers will not be given further consideration.

169. CCB may be paid to the approved child care service and passed on to the person as a fee reduction; or the person may pay child care fees and claim CCB as a lump sum at the end of the financial year.<sup>191</sup> CCB only covers a limited number of hours of child care a week. A default limit of 24 hours per week applies to all eligible persons, and a limit of 50 hours per week applies where persons meet a ‘work/training/study test’,<sup>192</sup> or other conditions provided for in the legislation.<sup>193</sup>

#### ***Child at risk of serious abuse***

170. Where an approved child care service considers a child is at risk of ‘serious abuse or neglect’, the FAO may grant more than 50 hours per week of approved child care,<sup>194</sup> or, where a 24 hour limit would have applied, raise the limit to 50 hours.<sup>195</sup> Additionally, the FAO may pay CCB at a higher rate.<sup>196</sup> The higher rate of CCB is described in the *Family Assistance Guide* and elsewhere—although not in the family assistance legislation—as the Special Child Care Benefit (SCCB). SCCB may be approved for up to the total amount of weekly child care fees.<sup>197</sup>

171. Increased weekly hour limits for CCB due to risk are sometimes also called SCCB, as on the *Claim for Special Child Care Benefit and/or increased weekly limit of hours* form.<sup>198</sup> However, the *Family Assistance Guide* provides that CCB for more than 50 hours of approved care due to risk is not the same as SCCB.<sup>199</sup>

172. If an approved service believes a child is at risk of serious abuse or neglect, it may approve SCCB or increased weekly hour limits for a maximum of 13 weeks.<sup>200</sup> Further periods of SCCB or increased weekly hour limits can be approved by the FAO.<sup>201</sup> The additional weekly hours can be paid at the SCCB rate.<sup>202</sup>

191 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 41(2), 43, 44; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) ss 219B, 219BA; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <<http://www.fahcsia.gov.au/guides Acts/>> at 1 March 2011, [1.2.4].

192 *A New Tax System (Family Assistance) Act 1999* (Cth) s 54(2), (3).

193 *Ibid* s 54.

194 *Ibid* s 55.

195 *Ibid* s 54.

196 *Ibid* s 76(1). SCCB may also be available to families experiencing hardship. SCCB will only be considered in this Issues Paper in relation to children at risk of abuse.

197 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <<http://www.fahcsia.gov.au/guides Acts/>> at 1 March 2011, [2.6.7].

198 This form is available at Centrelink, *Website* <<http://www.centrelink.gov.au>> at 7 March 2011.

199 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <<http://www.fahcsia.gov.au/guides Acts/>> at 1 March 2011, [2.6.3.20].

200 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 54, 55; s 77.

201 *Ibid* ss 54, 55; s 81.

202 Department of Education, Employment and Workplace Relations, *Child Care Service Handbook, 2010–2011* (2010), 194, 196.

173. SCCB and increased weekly hour limits are available only in the form of reduced child care fees.<sup>203</sup> Lump sums at the end of the financial year are not available for these benefits.

#### **Protective function**

174. SCCB and increased weekly hours of child care have a protective function. The Department of Education, Employment and Workplace Relations and the Office of Early Childhood Education and Childcare state that the SCCB—including additional hours of CCB—is designed to support attendance at child care, where costs are a barrier,<sup>204</sup> so that:

- the amount of time the child spends in the risk environment is reduced
- the amount of time the child spends in a stable and developmentally beneficial environment is maintained or increased
- the child remains ‘visible’ in the community and opportunities to link the family with other appropriate services are increased
- the parent/carer has an opportunity for respite or to seek assistance from other agencies such as health and family support services.<sup>205</sup>

175. The ALRC is interested in whether an increase in the rate or weekly hour limits of CCB are accessible to child care services and families, where children are at risk of family violence. The ALRC is also interested in comment about whether the legislative requirement that a child be at ‘risk of serious abuse’ hampers accessibility to increased payments of CCB.

#### **‘Abuse’ undefined**

176. Family assistance legislation does not define ‘abuse’, and ‘serious abuse’. The *Child Care Handbook* directs child care services to a ‘commonly accepted definition of abuse and neglect’ in the National Child Protection Clearinghouse’s 2004 resource sheet, ‘What is Child Abuse?’.<sup>206</sup> Defining these terms in the *Family Assistance Guide* or family assistance legislation may assist parents and carers, child care services, and the FAO in considering eligibility and determining claims for SCCB and increases in weekly hours of CCB.

**Question 38** Are increases in weekly Child Care Benefit hours and higher rates of Child Care Benefit sufficiently accessible in cases of family violence? What reforms, if any, are needed to improve accessibility?

203 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 54(10), 55(6), 73.

204 Department of Education, Employment and Workplace Relations, *Child Care Service Handbook, 2010–2011* (2010), 194, 196; Department of Education, Employment and Workplace Relations, *Special Child Care Benefit for Children at Risk: Fact Sheet for Approved Child Care Services*.

205 Department of Education, Employment and Workplace Relations, *Special Child Care Benefit for Children at Risk: Fact Sheet for Approved Child Care Services*.

206 Department of Education, Employment and Workplace Relations, *Child Care Service Handbook, 2010–2011* (2010), 197.

**Question 39** Does the legislative requirement that the child be at ‘risk of serious abuse’ serve as an unreasonable barrier to eligibility for higher rates of Child Care Benefit and increased weekly hours of Child Care Benefit?

**Question 40** Should *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) be amended to insert definitions of ‘abuse’ or ‘serious abuse’? Should the *Family Assistance Guide* provide definitions of ‘abuse’ or ‘serious abuse’?

### Other issues

177. There may be other issues in the family assistance context which the ALRC has not identified in this Issues Paper but that are relevant to the safety of victims of family violence. The ALRC is interested in comment on any other areas of family assistance and practice that affect the safety of victims of family violence.

**Question 41** Are there any other concerns about the interaction of family assistance law and practice and the protection of safety of victims of family violence? What reforms, if any, are needed to improve the safety of victims of family violence?