

Family Violence and Commonwealth Laws

ISSUES PAPER

Social Security

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

This Issues Paper reflects the law as at 8 March 2011

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Commission Reference: IP 39

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.

All ALRC publications can be made available in a range of accessible formats for people with disabilities. If you require assistance, please contact the ALRC.

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Making a submission

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 27 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, 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—Social Security Law

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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.
- 3. In undertaking the Inquiry, the ALRC was asked to consider legislative arrangements across the Commonwealth that 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.
- 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.

The full Terms of Reference are available on the ALRC's website at www.alrc.gov.au.

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 and they may be marked confidential if preferred. The ALRC will accept anything from handwritten notes to detailed commentary and scholarly analyses on relevant laws and practices. Although not essential, the Commissions prefer electronic communications and submissions may be made simply by contributing comments online at the ALRC's website.

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 27 April 2011.

Outline of Issues Paper

- 9. This Issues Paper, Family Violence—Social Security Law, deals with the treatment of family violence in Commonwealth social security law, including under the:
- Social Security Act 1991 (Cth);
- Social Security (Administration) Act 1999 (Cth); and
- Social Security (International Agreements) Act 1999 (Cth).
- 10. Social security law is administered by the Department of Human Services through Centrelink. The *Guide to Social Security Law* provides guidance to decision makers. It is updated monthly to reflect changes in government policy and legislative interpretation. Although not binding in law, it is a relevant consideration for the decision maker and, as such, is considered in this Issues Paper.²
- 11. Lack of independent financial resources for victims of family violence is a major cause of homelessness.³ Access to independent financial resources, such as those provided under social security law, can provide economic security and independence to facilitate the safety of those experiencing family violence—for example, by enabling victims of family violence to leave a violent relationship, become financially independent or seek alternate accommodation.

Stevens and Secretary, Department of Family and Community Services [2004] AATA 1137.

³ S Tually and others, Women, Domestic and Family Violence and Homelessness: A Synthesis Report (2008).

- 12. Access to income support for victims of family violence is affected by eligibility criteria and by exemptions from participation, activity or administrative requirements. Without exemptions, such requirements may be too onerous for a victim of family violence and, as a result, they may have their income support cut off, possibly compromising their safety and ability to leave a violent situation.
- 13. On the other hand, in certain situations, social security payments may also facilitate economic abuse and duress by family members.
- 14. The ALRC has identified a number of issues relevant to the safety of victims of family violence in Commonwealth social security law and practice. Family violence has the potential to affect eligibility for, and rates of payment of, a range of social security benefits. In particular, family violence may have implications in relation to:
- how relationships are defined—for example, whether a person is considered to be a member of a couple, or independent of family support;
- compliance with various activity, participation and administrative requirements attached to certain social security payments;
- how social security payments are administered; and
- whether social security and income management measures can be improved to provide better protection of the interests of victims who have left, or wish to leave, violent relationships.
- 15. The Terms of Reference provide a limited lens through which the ALRC can propose reforms—that is, to consider improvements to Commonwealth laws to protect the safety of victims of family violence.
- 16. A matter of concern that is consistently raised, in terms of income support for victims of family violence, is the inadequacy of social security payments. While the amounts received by victims of family violence may be relevant to protecting their safety, this aspect of social security—and its budgetary and financial implications—is not a focus of this Inquiry. Reforms to address these issues would be systemic, affecting calculations for different social security payments and, as a result, have an impact on a much broader range of Centrelink customers than just victims of family violence.

Definition of family violence

17. The Social Security Act refers to 'domestic violence' or 'domestic or family violence' in a range of contexts. Neither the Social Security Act nor the Social Security (Administration) Act contains a definition of domestic or family violence. The Guide to Social Security Law refers to a definition that has now been repealed—s 60D(1) of the Family Law Reform Act 1995 (Cth)—in stating that:

Domestic and family violence occurs when someone tries to control their partner or other family members in ways that intimidate or oppress them. Controlling behaviours can include threats, humiliation ('put downs'), emotional abuse, physical assault, sexual abuse, financial exploitation and social isolations, such as not allowing contact with family or friends; AND/OR

Family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.

Domestic violence can include violence to someone who is not a family member, for example co-tenants and people in shared housing situations.⁴

- 18. The *Guide to Social Security Law* provides further, in relation to Crisis Payment, that 'domestic and family violence' includes: child abuse; maltreatment; exploitation; verbal abuse; partner abuse; elder abuse; neglect; sexual assault; emotional abuse; economic abuse; assault; financial coercion; domestic violence; psychological abuse, or social abuse.⁵
- 19. In Family Violence—A National Legal Response, Report 114 (2010) (ALRC Report 114), the ALRC and the NSW Law Reform Commission (NSWLRC) (the Commissions) recommended that state and territory family violence and criminal legislation, and the Family Law Act 1975 (Cth), should adopt the following consistent definition of family violence:

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;
- (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 victims owns the animal; and
- (i) behaviour by the person using the violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above. 6
- 20. While the current definition contained in the *Guide to Social Security Law* is already broad, it may be beneficial to have a definition that is consistent with the definition of family violence in other Commonwealth laws. This would ensure that victims of family violence have some degree of clarity and certainty that the violence that they are experiencing will be recognised and treated similarly across all Commonwealth laws—a common interpretive framework as suggested by ALRC Report 114.

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [1.1.D.235] (Domestic and/or Family Violence (CrP)).

⁵ Ibid, [3.7.4.20] (Qualification for CrP—Extreme Circumstances (Domestic & Family Violence)); [3.7.4.25] (Qualification for CrP—Remaining in the Home After Removal of Family Member Due to Domestic or Family Violence).

Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence—A National Legal Response, ALRC Report 114; NSWLRC Report 128 (2010), Recs 5–1, 6–1, 6–4.

21. The Commissions also noted that provisions which affect the lives and safety of particularly vulnerable groups in society may be more appropriately placed in primary legislation. Placing the definition of family violence in the *Social Security Act* may afford a measure of stability and visibility to the definition.

Question 1 Should the *Social Security Act 1991* (Cth) and/or the *Social Security (Administration) Act 1999* (Cth) be amended to insert a definition of 'family violence' consistent with that recommended by the ALRC/NSWLRC in *Family Violence—A National Legal Response* (ALRC Report 114)?

Identifying, informing and collecting information about family violence

- 22. Family violence may be directly or indirectly relevant to the administration of social security in a number of ways—in particular, in relation to:
- determining whether a person is 'independent' or a 'member of a couple';
- eligibility for exemptions from activity, participation, residence and administrative requirements;
- eligibility for weekly payments;
- eligibility for certain social security payments; and
- waiver of debt.
- 23. These matters are considered separately below. Relevant to all, however, is the need for Centrelink staff to:
- be able to identify a customer who is experiencing family violence;
- inform Centrelink customers about eligibility or exemptions available in circumstances of family violence; and
- collect information about family violence where it is claimed by a victim of family violence.
- 24. Neither the *Guide to Social Security Law* nor the legislation provides much guidance to Centrelink staff on these matters.

Seeking information about family violence

25. Victims of family violence may not be aware of the eligibility criteria for certain social security payments and exemptions. This makes it important that Centrelink staff be able to identify people who are experiencing family violence so that they can inform them about such eligibility or related exemptions available to them.

Ibid, Ch 6.

- 26. Centrelink relies on self-disclosure of family violence. Centrelink staff undertake training to assist them to identify whether a person is experiencing family violence.
- 27. Victims of family violence may be reluctant to identify themselves as such for a number of reasons or may not consider themselves to be a victim due to, for example, traditional notions of 'domestic violence'. Further, victims may fail to disclose family violence as they may not be aware that such information is relevant to eligibility criteria or to exemptions. Other barriers to disclosure may include structural barriers, such as a lack of privacy at Centrelink offices. It may, therefore, be desirable to inform all Centrelink customers about eligibility criteria and exemptions relevant to people experiencing family violence.
- 28. Centrelink does not appear to screen routinely for family violence. Claims for social security payments must generally be made in writing by completing the relevant Centrelink form either online or in hardcopy. In some circumstances, claims may be made by telephone or in person. Application and information forms for various social security payments do not appear to include specific information about family violence, such as how family violence may form the basis for an exemption from participation, activity or Employment Pathway Plan requirements, or from providing original proof of identity or tax file numbers.
- 29. The ALRC is interested in whether Centrelink should screen for family violence, when processing applications or at other stages of the administration of social security payments. For example, it may be desirable to include certain questions about family violence in Centrelink forms (including electronic forms) or for Centrelink staff to ask all Centrelink customers questions about family violence rather than relying on self-disclosure.

Information sharing

- 30. Centrelink may be the first point of contact a person has with the social welfare system. A person eligible for child support, for example, may contact Centrelink before being referred to the Child Support Agency. People may not differentiate between various government agencies and assume that once they have informed one agency about family violence—such as Centrelink—there is no need to inform another. This confusion may increase in the future due to the federal government's initiative to house offices of Centrelink, Medicare and the Child Support Agency under one roof. ¹¹
- 31. Requiring victims of family violence to repeat their story may have a traumatising effect in 're-living' the experience of family violence.

9 Social Security (Administration) Act 1999 (Cth) s 16.

⁸ Ibid, Ch 18.

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [8.1.1.10] (General Claim Requirements).

Department of Human Services, More Portfolio Services in One Place, http://www.dhs.gov.au/ at 7 February 2011.

- 32. Victims of family violence may be referred to another government agency such as the Child Support Agency—but assume that they do not need to raise family violence again. As a result, victims of family violence may not be informed about exemptions that may apply for child support purposes.
- It may be desirable for Centrelink to share the fact that the customer has reported experiencing family violence with certain other government agencies. Alternatively, it may be more appropriate for Centrelink and the Child Support Agency to inform all customers about eligibility criteria and exemptions relevant to people experiencing family violence.
- ALRC Report 114 recommended the establishment of a national register which should include certain information about protection orders, family law orders and Family Law Act injunctions. 12 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.¹³

- It may be desirable to extend access to this register to Centrelink social workers. On the other hand, this may be too far-reaching and may raise concerns about the protection of privacy.
- The ALRC is interested in comment about the barriers faced by victims of family violence in disclosing family violence to Centrelink; whether family violence is appropriately identified by Centrelink and whether victims of family violence are notified about eligibility criteria and exemptions by Centrelink staff. The ALRC is also interested in comment on information sharing between Centrelink and the Child Support Agency and/or other agencies such as Job Services Australia.

Question 2 In what circumstances should Centrelink staff be required to inquire about the existence of family violence when dealing with Centrelink customers?

Ouestion 3 Should Centrelink application forms (including electronic forms), correspondence and telephone prompts directly seek information about family violence? For example, should a question about family violence be included on all forms?

Where family violence is disclosed or identified, do **Question 4** Centrelink staff notify victims effectively about eligibility criteria for payments and exemptions, including any corresponding exemptions and requirements for child support?

13 Ibid.

¹² 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.

Question 5 In what circumstances, if any, should information about family violence be shared between Centrelink and other government agencies, such as the Child Support Agency?

Collecting information about family violence

- 37. In order to verify claims about family violence, it is necessary for Centrelink to collect information about family violence when it has been identified.
- 38. Neither the *Guide to Social Security Law* nor legislation provides much guidance to Centrelink staff on these matters. Some guidance is provided in relation to collecting information about family violence in certain contexts, such as determining whether to contact a partner or a parent, the use of documentary evidence or independent and third party referees. ¹⁴
- 39. It is also important that Centrelink customers are aware of how Centrelink collects information about family violence. For example, there may be concerns that victims of family violence may remain members of a couple because they fear that to claim otherwise may lead to retaliation from the person using family violence—especially if they assume that their 'partner' will be contacted.

Question 6 How does Centrelink collect information about family violence when it is identified?

Question 7 Are Centrelink staff and social workers able to access information about persons who have identified themselves as a victim of family violence as to whether they have obtained a protection order or similar? Should Centrelink staff and social workers be able to access the national register recommended in *Family Violence—A National Legal Response*, Report 114 (2010)?

Question 8 In practice, is the possibility of family violence considered by Centrelink staff before deciding to interview a partner or a parent?

Question 9 When contact with a partner or a parent is not appropriate due to the possibility of family violence, on what information should family violence be assessed?

Question 10 Are Centrelink customers aware that Centrelink may decide not to contact partners or parents if the customer is a victim of family violence?

See, eg, Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [2.2.5.10] (Determining a De Facto Relationship); [2.2.5.30] (Determining Separation Under One Roof).

Administration of social security law and family violence

40. There may be concerns about the way in which family violence is taken into consideration by a decision maker. Pre-existing assumptions of different decision makers may lead to different results. For example, the weight placed on the existence of family violence in determining whether people are members of a couple can vary and may lead to different determinations.

Question 11 In practice, do decision makers adequately consider the existence of family violence when making determinations about eligibility criteria or exemptions for certain social security payments?

Relationships and social security law

41. Eligibility for social security payments may depend on a person's personal and financial relationships with others. Family violence may have implications for the way in which these relationships are defined.

'Member of a couple'

- 42. The eligibility for, and rates of, many social security payments differ depending on whether the recipient is a 'member of a couple'. For example:
- some social security payments may be reduced if a person is a member of a couple;
- asset tests often pool the assets of people who are members of a couple. People who claim a social security payment and who are a member of a couple have their entitlements assessed against their partner's income; and
- waiting periods can be affected if a person is deemed to be a member of a couple.
- 43. This rule is based on the premise that couples can live more cheaply than singles because they share expenses and produce economies of scale.
- 44. A decision that a person is a member of a couple may result in the refusal, cancellation or reduction in social security payments. It may also lead to a debt being raised against a person and may be pursued through court proceedings.
- 45. Section 4 of the *Social Security Act* provides that in deciding whether a person is a member of couple—that is, in a de facto relationship—the decision maker is to have regard to 'all the relevant circumstances of the relationship'. In particular, regard must be had to a detailed range of criteria which are similar to the criteria contained in s 4AA of the *Family Law Act* and s 22C of the *Acts Interpretation Act 1901* (Cth) for defining a 'de facto relationship'. ¹⁵ These include:

The reference to 'de facto relationship' replaced a 'marriage-like relationship' in November 2008. The test under s 4 remained the same. See Same-Sex Relationships (Equal Treatment in Commonwealth

- financial aspects of the relationship;
- the nature of the household;
- social aspects of the relationship (including whether the persons hold themselves out as married to each other);
- any sexual relationship between the persons; and
- the nature of the commitment to each other.
- 46. The *Guide to Social Security Law* states that important indicators to consider in relation to the nature of the commitment to each other include evidence of domestic violence, such as 'court documentation, which may indicate the absence of commitment and/or emotional support'. Despite this, it is reportedly not unusual for the decision maker's own experiences and values to weigh into the decision-making process. ¹⁷
- 47. Concerns have been expressed that underlying assumptions in the 'de facto relationship' test may disregard family violence and its potential impact on a victim's decision. There are also concerns that insufficient weight may be placed on the nature of people's commitment to each other, when this—in the view of some—is considered to be the 'essence' of a relationship.¹⁸
- 48. Reform may be needed to ensure that the effects of family violence can disqualify a person being considered to be a member of a couple, for example:
- economic abuse may obviate consent to the 'significant pooling of financial resources';
- patterns of violence and lack of alternative accommodation may mean that a person has no choice but to remain in the same house;
- secrecy associated with family violence may mean that a person continues to hold themselves out as a member of a couple;
- violence in a relationship may negate consent for 'any sexual relationship between the people'; and
- there may be a correlation between the length of the relationship and the degree of violence. 19

Laws—General Law Reform Act) 2008 (Cth).

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [2.2.5.10] (Determining A De Facto Relationship).

¹⁷ Commonwealth Ombudsman, Marriage-Like Relationships: Policy Guidelines for Assessment Under Social Security Law (2007); Re Pelka and Secretary, Department of Family and Community Services [2006] FCA 735.

¹⁸ A Dickey, 'Two Problems Concerning De Facto Relationship Proceedings' (2009) 83 Australian Law Journal 588.

¹⁹ P Easteal and D Emerson-Elliot, 'Domestic Violence and Marriage-Like Relationships' (2009) 34 (3) Alternative Law Journal 173; T Carney, 'Women and Social Security/Transfer Payments Law' in P Easteal (ed), Women and the Law in Australia (2010) 424, 435.

Question 12 Should the criteria in s 4 of *Social Security Act 1991* (Cth) for determining whether a person is a 'member of a couple' be amended clearly to take into account the existence and effect of family violence?

Question 13 Should further guidance be provided in the *Guide to Social Security Law* about the implications of family violence under the criteria in s 4 of the *Social Security Act 1991* (Cth)?

Determining separation under one roof

- 49. A person is considered not to be a member of a couple where he or she is living separately and apart from the other person on a permanent or indefinite basis.²⁰
- 50. Neither the *Social Security Act* nor the *Guide to Social Security Law* provides family violence as an example of where people may be living separately and apart under one roof. Hence, decision makers are not prompted to consider family violence when making a determination about separation under one roof.
- 51. There may be situations where victims of family violence have no choice but to remain under the same roof as a person using family violence. For example, in Aboriginal and Torres Strait Islander communities there are often cultural, kinship and social reasons to remain under the same 'roof' but a person may not consider himself or herself to be a member of a couple. In addition, a lack of transitory and crisis accommodation may mean that a victim of family violence has no choice but to remain under the same roof as the person using family violence.
- 52. The *Guide to Social Security Law* provides that where a claim is made on the basis of living separately and apart yet remaining under the one roof, an assessment must be made by Centrelink. This involves receiving evidence from both parties.²¹
- 53. The *Guide to Social Security Law* states that when deciding to interview a partner for additional information, discretion must be exercised to ensure that contact is appropriate. It provides 'domestic violence' as an example of where it is not appropriate to interview a partner at all.²²
- 54. Independent referees may also be called upon to verify the basis of the claim. The *Guide to Social Security Law* provides that in circumstances where an independent referee is unable to verify a situation, a departmental social worker's report may be required to assist the decision maker—such as in a situation of 'domestic violence' where the separation is not public knowledge.²³

²⁰ Social Security Act 1991 (Cth) s 4(3A).

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [2.2.5.30] (Determining Separation Under One Roof).

²² Ibid, [2.2.5.30] (Determining Separation Under One Roof).

²³ Ibid, [2.2.5.30] (Determining Separation Under One Roof).

Question 14 In practice, is family violence adequately considered in determining separation under one roof? If not, how should family violence be taken into consideration?

Question 15 When contact with a partner is not appropriate due to family violence, how should family violence be assessed?

'Special reason'

- 55. The Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (the Secretary) has a discretion, under s 24 of the *Social Security Act*, to rule that, for a 'special reason' in the particular case, a person should, not be treated as a member of a couple. This discretion may be—and in at least one case has been—exercised to determine that an abusive relationship was not marriage-like (now 'de facto').²⁴ However, in other cases, a person has been held to be a member of a couple despite being in an abusive relationship.²⁵
- 56. The *Guide to Social Security Law* states that the 'special reason' must be unusual, uncommon or exceptional and that the discretionary power must be exercised for the purpose for which it was conferred—that is, to make provision for those who are in genuine need. ²⁶ However, the *Guide to Social Security Law* does not provide family violence as an example of where a person might be considered not to be a member of a couple.
- 57. Hence the evaluation of whether there is a 'special reason' that a person should not be treated as a member of a couple may overlook family violence and its potential impact on the victim's decisions. For example, decision makers may not consider that people may hold themselves out to be a member of a couple despite violence due to shame or secrecy.
- 58. There may be arguments that s 24 of the *Social Security Act* should be amended to refer expressly to family violence as a consideration in determining whether to exercise the discretion—especially if s 4 of the *Social Security Act* is not amended.

Question 16 In practice, is family violence adequately taken into consideration in the exercise of the discretion under s 24 of the *Social Security Act* not to treat a person as a member of a couple?

Question 17 Should the 'special reason' discretion in s 24 of the *Social Security Act* be amended expressly to require the existence and effects of family violence to be taken into account? Would this amendment be required if s 4 is amended in this way?

²⁴ Patterson and Department of Families, Community Services and Indigenous Affairs (2006) AATA 689.

²⁵ See, eg, Re Watson and Secretary, Department of Family and Community Services [2002] AATA 311; Re Secretary, Department of Family and Community Services and Perry [2001] AATA 282.

²⁶ Re Secretary, Department of Social Security and Porter (1997) 48 ALD 343.

Ouestion 18 What, if any, further guidance should be provided in the Guide to Social Security Law in relation to exercising the discretion under s 24 to take into account the existence and effect of family violence?

When a person is regarded as 'independent'

Whether a person is 'independent' can affect his or her eligibility for, or rates of payment of, Youth Allowance, Disability Support Pension and Pensioner Education Supplement and whether the person is paid the social security payment directly rather than its being paid to a parent.

Unreasonable to live at home

- One determinant of independence is when it is unreasonable for the person to live at home. The Social Security Act provides that a person is regarded as independent if he or she:
 - cannot live at the home of either or both of his or her parents: (a)
 - because of extreme family breakdown or other similar exceptional circumstances; or
 - because it would be unreasonable to expect the person to do so as (ii) there would be a serious risk to his or her physical or mental wellbeing due to violence, sexual abuse or other similar [exceptional or unreasonable] circumstances. 27
- In addition, for Youth Allowance and Disability Support Pension, a person is also considered independent if the person cannot live at home of their parents:
 - because the parent or parents are unable to provide the person with a (iii) suitable home owing to a lack of stable accommodation.
- 62. The Guide to Social Security Law states that family breakdown must be extreme. The existence of ongoing conflict alone is insufficient grounds to grant independence. Factors that may indicate extreme family breakdown are said to include evidence that the emotional or physical well-being of the person or another family member would be jeopardised if the person were to live at home.²⁹
- Examples of other 'similar exceptional circumstances' are stated to include 'severe neglect', or where extreme and abnormal demands are placed on the young person. 30
- The assessment of whether a person is independent on this ground is generally conducted by a Centrelink social worker.³¹ The Guide to Social Security Law provides

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

²⁸ Ibid s 1067A(9).

²⁹ Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Law<a href="Law<a Family Breakdown & Other Similar Exceptional Circumstances).

³⁰ Ibid, [3.2.5.40] (Assessment of Extreme Family Breakdown & Other Similar Exceptional Circumstances).

³¹ Ibid, [3.2.5.70] (Assessment & Mandatory Procedures for YA and DSP-Unreasonable to Live At Home).

that, in assessing extreme family breakdown and other similar exceptional circumstances, assessment must include personal contact with the claimant, parental contact, third party verification and—for youth protocol cases—contact with state or territory child protection agencies.³²

65. For Youth Allowance and Disability Support Pension, the *Guide to Social Security Law* provides that it is mandatory to contact the parents of a young person, unless the young person refuses permission or if contact with the parent presents a severe risk to the young person or others, or if there has been no parental concern for at least the past two years.³³

Continuous support

- 66. To be considered 'independent', the person must not be in receipt of 'continuous support' from a parent, guardian or income support (other than a social security benefit) from the Commonwealth or a state or territory.³⁴
- 67. In one case reviewed by the Commonwealth Ombudsman, a young person who had left her home due to family violence was not found to be independent, because she was receiving continuous support from her father, who resided interstate. ³⁵ Her Youth Allowance payment was later cancelled because she was unable to provide detail of her father's income or assets. Consequently, she was left without income support for over two months.
- 68. The Ombudsman found it unreasonable for Centrelink to put the onus solely on a young person to obtain income and asset details from a parent the young person is not residing with, or with whom the young person might have had minimal contact. There may be concerns in other situations of family violence where a person is unable, or it is unsafe for a person, to obtain income and asset details from a parent.

Payment

- 69. Payment of Youth Allowance is made to the person unless under 18 years of age and not independent, in which case, the payment is paid to a parent of the young person. The *Guide to Social Security Law* provides that payment may be made to the dependent Youth Allowance customer if authorised by the parent. ³⁶ The Secretary also has a discretion to direct that payment be made to the young person. ³⁷
- 70. In the case considered by the Commonwealth Ombudsman noted above, the Ombudsman considered it unreasonable to expect a young person who had been forced to leave home, because of violence or untenable living arrangements, to be able to

³² Ibid, [3.2.5.40] (Assessment of Extreme Family Breakdown & Other Similar Exceptional Circumstances); [3.2.5.70] (Assessment & Mandatory Procedures for YA and DSP—Unreasonable to Live At Home).

³³ Ibid, [3.2.5.70] (Assessment and Mandatory Procedures for YA and DSP—Unreasonable to Live At Home).

³⁴ Social Security Act 1991 (Cth) ss 1067A(9), 1061PL.

³⁵ Commonwealth Ombudsman, Centrelink: Payment of Independent Rate of Youth Allowance to a Young Person (2008).

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [8.4.1.30] (Payments to a Third Party).

³⁷ Social Security (Administration) Act 1999 (Cth) s 45(2).

obtain parental agreement to get paid directly.³⁸ This may raise concerns of the safety of a young person who, in a situation of family violence, attempts to obtain parental agreement to be paid directly.

Question 19 In what ways might access to Youth Allowance, Disability Support Pension and Pensioner Education Supplement be improved for victims who have left their home because of family violence? For example, does the criterion for a person to be considered 'independent' adequately take into account the existence of family violence? Should family violence be expressly referred to in this context?

Question 20 In practice, is the possibility of family violence considered by Centrelink staff before deciding to contact a parent?

Question 21 When contact with a young person's parent is not appropriate, due to the possibility of family violence, how should claims about family violence be assessed?

Question 22 In what ways, if any, should the *Guide to Social Security Law* be amended in relation to the 'continuous support' criteria to improve the safety of victims of family violence? For example, should specific provisions be made for victims of family violence who need to supply asset and income details from a parent?

Question 23 Should the requirement of parental consent for a person under 18 years of age to be paid directly be waived for victims who have left home because of family violence?

Eligibility requirements

- 71. To receive a social security payment, a low income health care card, or a Commonwealth senior's health card, a person must provide original proof of identity documents, which are considered by Centrelink sufficient to establish identity. In addition, a person must provide the full name, date of birth, tax file number and income and asset details of any non-claimant partner.³⁹
- 72. Victims of family violence are not automatically exempt from providing original proof of identity. The *Guide to Social Security Law* states that all efforts must be made to obtain satisfactory proof of identity and that the onus for establishing proof of identity is on the person. ⁴⁰ The *Guide to Social Security Law* also provides, however,

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³⁸ Commonwealth Ombudsman, Centrelink: Payment of Independent Rate of Youth Allowance to a Young Person (2008).

³⁹ Social Security (Administration) Act 1999 (Cth) ss 8, 75; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [2.2.1.10] (General Procedures for Verifying Identity); [8.1.3.20] (Providing TFN Information).

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

that a departmental form—'Questions for Persons with Insufficient Proof of Identity'—can be used if a person is unable to provide sufficient evidence as to identity. Such persons are listed as including 'persons experiencing domestic violence'. However, continuing efforts must still be made to obtain original proof of identity documents.⁴¹

- 73. Tax file numbers may be requested from a person who resides in Australia and who makes a claim for, or receives, a social security payment. A tax file number may also be requested from the person's partner, if a member of a couple. ⁴² A person cannot be compelled to provide a tax file number, but the person's social security payment may cease to be payable if not provided. ⁴³
- 74. A person may be granted a tax file number exemption—including an indefinite exemption—in relation to providing a tax file number from their partner, where the person can demonstrate risk of violence to himself, herself, their children or dependants, or where other concerns for the health and safety of the person, their children or dependants exist. 44
- 75. This exemption does not cover cases where there is merely a refusal on the part of the partner to provide the information and there are no violence or health concerns, or if a person is claiming or receiving payments in his or her own right. 45
- 76. Victims of family violence may not be aware of the alternative departmental form for providing proof of identity or of the exemption from providing a partner's tax file number in situations of family violence. This may jeopardise their safety by requiring them to attempt to obtain original proof of identity or a tax file number from an abusive family member or to return to a place they have previously fled due to family violence.

Question 24 Do the provisions regarding the requirement for original proof of identity documents and tax file numbers create barriers for victims of family violence? Should further measures be put in place to ensure that victims of family violence who have had to leave their homes because of family violence are not required to return to the home or have contact with an abusive family member?

42 Social Security (Administration) Act 1999 (Cth) s 75; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [8.1.3.20] (Providing TFN Information).

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

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [8.1.3.20] (Providing TFN Information).

Social Security (Administration) Act 1999 (Cth) ss 76, 77; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [8.1.3.20] (Providing TFN Information).

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [8.1.3.20] (Providing TFN Information).

Residence requirements

- 77. The general principle is that, to qualify for social security payments, a person must be an Australian resident. For this purpose, the *Social Security Act* defines 'Australian resident' and waiting periods, which are considered necessary to preserve scarce social security resources for those 'settled' within the Australian community. 47
- 78. In addition to the legislative requirement to be an Australian resident at the time of making a claim, some social security payments—generally, the 'pension' type payments that are intended as long-term support—require that a person has been an Australian resident for a certain period of time. This is called a 'qualifying residence requirement' for example as follows:
- Age Pension (10 years);
- Disability Support Pension (10 years);
- Widow Allowance (two years); and
- Parenting Payment (two years). 48
- 79. Some payments—generally, the 'allowance' type payments which are intended as shorter-term income support—do not have prior residence requirements, but have a 'newly arrived resident's waiting period'. A newly arrived resident's waiting period applies to persons who have not been Australian residents but have resided in Australia for a period of, or periods totalling, 104 weeks. Social security payments under the newly arrived resident's waiting period include:
- Carer Payment;
- Youth Allowance;
- Austudy Payment;
- Newstart Allowance:
- Sickness Allowance;
- Special Benefit;
- Partner Allowance:
- Mobility Allowance;
- Pensioner Education Supplement;
- Commonwealth Seniors Health Care Card; and

Social Security Act 1991 (Cth) s 7(2); Social Security (Administration) Act 1999 (Cth) s 29; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.1.1.10] (Residence Requirements).

⁴⁷ B Saul, Waiting for Dignity in Australia: Migrant Rights to Social Security and Disability Support under International Human Rights Law (2010), 2.

⁴⁸ Social Security Act 1991 (Cth) s 43 (Age Pension); s 94(1) (Disability Support Pension); s 500(1) Parenting Payment; s 408BA (Widow Allowance).

- Health Care Card. 49
- 80. Exemptions from qualifying residence requirements and the newly arrived resident's waiting period may apply to refugees, specified visa holders, or those claiming under an international social security agreement.⁵⁰
- 81. For persons who are experiencing hardship, but cannot get any other form of income support, the Special Benefit provides a social security safety net. Although the Special Benefit has a newly arrived resident's waiting period, it does not apply if the person has suffered a substantial change in circumstances beyond his or her control. This includes, for sponsored migrants, where 'domestic violence' is used by a sponsor. Security 2007.
- 82. There is no waiting period for Crisis Payment. However, a person must be:
- an Australian resident;
- a protected special class visa holder; or
- the holder of a specified subclass of visa that qualifies the person for Special Benefit.⁵³
- 83. There may be concerns that newly arrived residents who are experiencing family violence cannot access social security payments due to either two or 10 year waiting periods and, therefore, may have to remain in an abusive relationship because unable to support themselves financially.

Question 25 What reforms, if any, should be considered in relation to the qualifying residence periods or newly arrived residents' waiting period, for victims of family violence? For example:

(a) is the 10 year waiting period for the Age Pension and the Disability Support Pension unreasonable or impractical for victims of family violence; and

⁴⁹ Ibid, ss 201AA, 201AB (Carer Payment); s 549D (Youth Allowance); s 575D (Austudy); ss 623A, 623B (Newstart Allowance); ss 696B, 696C (Sickness Allowance); ss 732, 739A (Special Benefit); ss 771HC, 771HNA (Partner Allowance); ss 1039AA, 1039AB (Mobility Allowance); s 1061PU (Pensioner Education Supplement); s 1061ZH (Seniors Health Card); s 1061ZQ (Health Care Card).

Ibid, ss 7(6), s 43(1)(b) (Age Pension); s 94(1)(e)(11) (Disability Support Pension); s 500(1)(d)(iii) (Parenting Payment); s 575D (Austudy); s 623A (Newstart Allowance); s 771HNA (Partner Allowance); s 1061PU (Pensioner Education Supplement).

⁵¹ Ibid s 739A(7).

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.7.2.20] (Substantial Change in Circumstances for SpB).

⁵³ Social Security (Administration) Act 1999 (Cth) ss 29, 30. Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [3.7.4.10] (Qualification for CrP—General Provisions).

(b) should the *Social Security Act 1991* (Cth) be amended so that there is an exemption from waiting periods for newly arrived residents for victims of family violence?

Activity and participation tests

- 84. To access certain social security payments, activity tests, participation tests or Employment Pathway Plans may be required.⁵⁴ However, victims of family violence may find it difficult to meet these requirements—including various administrative requirements discussed below—due to a partner's active interference or the impact of family violence on the victim, which may be overwhelming. If a person fails to meet the activity test, participation test or Employment Pathway Plan, a 'failure' may apply and payments may be stopped.
- 85. A victim of family violence may be relieved, from the relevant participation or activity test, or the requirement to enter into an Employment Pathway Plan, or may have their Employment Pathway Plan suspended in three circumstances:
- a person is a principal carer of one or more children and is subjected to 'domestic violence' in the 26 weeks prior to making the exemption determination;⁵⁵
- a person is a principal carer of one or more children and there are 'special circumstances' relating to the person's family that make it appropriate to make the determination: ⁵⁶ or
- there are 'special circumstances' beyond the person's control and it would be unreasonable to expect compliance. 57
- 86. What amounts to 'special circumstances' is not defined in the *Social Security Act*. The *Guide to Social Security Law* provides that special circumstances in relation to exemptions from activity and participation tests include when 'a person has been subjected to domestic violence', and:
- 'the domestic violence specifically affects capacity to both look for work and participation in training activities'; ⁵⁸ or

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⁵⁴ Social Security Act 1991 (Cth) ss 500A, 501, 502 (Parenting Payment); ss 540, 541, 544, 544A (Youth Allowance); ss 593, 601, 605 (Newstart Allowance); ss 731A, 731L (Special Benefit).

⁵⁵ Ibid, ss 502C, 501E (Parenting Payment); ss 542, 542F, 544E (Youth Allowance); ss 602B, 607C (Newstart Allowance).

⁵⁶ Ibid, ss 502C, 501E (Parenting Payment); 542, 542F, 544E (Youth Allowance); 602B, 607C (Newstart Allowance); Social Security (Special Circumstances Regarding a Person's Family) (DEWR) Determination 2006 (Cth).

⁵⁷ Social Security Act 1991 (Cth) s 542H (Youth Allowance); s 603A (Newstart Allowance).

Social Security (Special Circumstances Regarding a Person's Family) (DEWR) Determination 2006 (Cth); Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [3.5.1.280] (Participation Requirements Exemption in Special Family Circumstances—Case-by-Case (PP)).

- where it is unforeseen (or unavoidable) and causes major disruption and would be unreasonable to expect the person to comply with the relevant activity or participation test.
- 87. The length of an exemption period ranges from two to 16 weeks, after which, in some circumstances, a person is required to reapply for the exemption. ⁶⁰ Whether an exemption should be made, and the length of any exemption, is assessed by a Centrelink social worker and any decision is based on the social worker's report.

Administrative requirements

- 88. In addition to activity and participation tests, in some cases social security recipients must comply with various administrative requirements. These may include:
- providing certain information;
- attending a particular place;
- completing a questionnaire; or
- undergoing a medical, psychiatric or psychological examination. ⁶¹
- 89. Failure to comply with such administrative requirements can lead to non-payment, unless the person can demonstrate a 'reasonable excuse' for non-compliance. In addition, where a person fails to meet the activity test or the participation requirements and does not have a reasonable excuse (or an exemption), this may constitute a 'failure' and a penalty may apply. Such penalties may apply to Newstart Allowance, Youth Allowance, Parenting Payment, Austudy and Special Benefit. 62 Penalties range from a reduction in the person's payment to non-payment for eight weeks. 63
- 90. The term 'reasonable excuse' is not defined in the *Social Security Act*. The *Guide to Social Security Law* provides that, in determining whether a person has a reasonable excuse, the decision maker must take into account whether the person had access to safe, secure and adequate housing, or was using emergency accommodation or a refuge at the time of the failure and the person was subjected to criminal violence (including 'domestic violence' and sexual assault). A person is taken not to have access

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

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [3.7.5.30] (SpB Activity Test Exemptions (Special Benefit)); [3.2.11.40] (Activity Test for NSA/YA Job Seekers—Exemptions—Special Circumstances (Newstart and Youth Allowance)); [3.5.1.250] (Participation Requirements Exemption—Special Circumstances (PP) (Parenting Payment)).

⁶⁰ Social Security Act 1991 (Cth) s 502C (Parenting Payment); s 542F (Youth Allowance); s 602B (Newstart Allowance); s 731DA (Special Benefit).

⁶¹ Social Security (Administration) Act 1999 (Cth) ss 67, 68, 192.

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.1.13.10] (Types of Failures and Penalties).

to safe, secure and adequate housing where such housing threatens or is likely to threaten the person's safety. ⁶⁴

- 91. In addition to these administrative requirements, a 26 week exclusion from Newstart Allowance, Youth Allowance and Special Benefit applies if a person receiving one of these payments moves to an area of lower employment prospects. An exemption from this exclusion period applies where the reason for moving is due to an extreme circumstance such as domestic or family violence in the original place of residence. 65
- 92. The penalties scheme for breach of activity, participation or administrative requirements may, however, work against some of the most vulnerable—including victims of family violence. Decision makers and Centrelink customers may also lack sufficient awareness of the exemptions available to victims of family violence. As a result, victims of family violence may have their social security payments cut off if they are unable to meet requirements due to the impact of family violence on their day-to-day lives.

Question 26 What measures, if any, might be taken to address any difficulties faced by victims of family violence when they must comply with activity and participation tests, Employment Pathway Plans and/or administrative requirements? For example, are the current exemption periods reasonable for victims of family violence?

Question 27 In practice, are Centrelink customers aware of the exemptions—including 'reasonable excuse'—available in circumstances of family violence? If so, are victims of family violence likely to use the exemptions?

Duress

- 93. Social security recipients can be subject to economic abuse through duress or undue influence. This Inquiry will examine whether social security law and practice might be improved to provide better protection for social security recipients from such abuse.
- 94. Two circumstances in which economic abuse may be manifested—waiver of debt and nominee arrangements—are discussed below. 66 The ALRC is interested in any other circumstances where economic abuse is known to occur in social security contexts.

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

⁶⁵ Social Security Act 1991 (Cth) s 553B (Youth Allowance); s 634 (Newstart Allowance); s 745N (Special Benefit).

⁶⁶ Income management is discussed separately below.

Waiver of debt

- 95. If a person is overpaid a social security pension, allowance or benefit, even when not at fault, the amount overpaid is a debt to Centrelink. However, the Secretary may decide that a debt should be waived if a person can demonstrate that:
- 'special circumstances' exist; and
- he or she or another person did not 'knowingly' make a false statement or 'knowingly' omit to comply with the Social Security Act, its predecessor, or the *Social Security (Administration) Act*. ⁶⁷
- 96. In this context, the *Guide to Social Security Law* states that 'special circumstances' refers to circumstances that are unusual, uncommon or exceptional—special enough circumstances that make it desirable to waive. ⁶⁸ This requires consideration of the person's individual circumstances, but also a consideration of the general administration of the social security system. A special circumstances waiver would be appropriate only if the person's particular circumstances made it unjust for the general rule—that is, to repay the debt—to apply. ⁶⁹
- 97. The *Guide to Social Security Law* states that it is not possible to set out a complete list of the relevant factors to be taken into account in determining whether special circumstances exist. However, factors to consider include the person's physical and emotional state and decision-making capacity and financial circumstances. The *Guide to Social Security Law* does not expressly direct the decision maker to consider family violence in determining whether circumstances are 'special'.
- 98. The *Guide to Social Security Law* states that knowledge must be actual and not merely constructive;⁷¹ and it does not refer to examples of family violence which may impinge on a person's knowledge.
- 99. Case law provides that it is open to infer that a person had actual knowledge of their obligations where there were opportunities for the person to gain that knowledge and where there were no obstacles to acquire the knowledge.⁷² Such obstacles which may be considered as preventing understanding of obligations may include a person's emotional or mental state. For example, as a result of emotional trauma and concern for

Davy and Secretary, Department of Employment and Workplace Relations [2007] AATA 1114; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security LawLawhttp://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

⁶⁷ Social Security Act 1991 (Cth) s 1237AAD.

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances); *Davy and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1114.

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011[6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

⁷¹ Ibid, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances); *Re Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435.

⁷² RCA Corporation v Custom Cleared Sales Pty Ltd (1978) 19 ALR 123.

family safety, the person's ability to comprehend obligations and responsibilities may be reduced. 73

100. The discretion to waive a debt may not be used where a debt is attributable, even in part, to knowingly false statements or failure to comply with the *Social Security Act* by a third party. In cases of family violence, false statements and/or failure to comply with the *Social Security Act* may be attributable to an abusing partner—for example, where the abusing partner insists that his or her partner does not declare true income, employment circumstances, or presence in the family home in order to receive a payment.

Question 28 Should the *Social Security Act 1991* (Cth) be amended expressly to provide for waiver of debt in situations where a person is subject to duress, undue influence or economic abuse? What processes should be in place to determine whether such circumstances exist?

Nominee arrangements

- 101. Part 3A of the *Social Security (Administration) Act* provides for the appointment of nominees for both correspondence and payment of social security. A nominee is required to act in the best interests of the principal.
- 102. There is no regular review of nominee arrangements by Centrelink. Rather, any reviews of nominee arrangements are conducted as soon as any allegation of the misuse of a social security payment is received.
- 103. In addition, the nominee, under Centrelink arrangements, needs not be the person to whom the social security recipient has granted a power of attorney. There are no checks in place to ensure that a person holding the social security recipient's Power of Attorney is informed of any nominee arrangement.
- 104. While nominee arrangements can be useful for protecting the income support of victims of family violence such as those who are homeless or with no fixed address, there is potential for economic abuse by a person holding nominee authority on behalf of Centrelink clients. In particular, the following issues have been identified:
- Centrelink may have inadequate safeguards to ensure nominees are appropriate in the circumstances;
- penalties for nominees who are in breach of their obligations may be inadequate;
- provisions to prevent nominee appointments being made under duress, or misuse of pensioner funds by nominees may be inadequate; and

⁷³ Re Secretary, Department of Family and Community Services and Temesgen [2002] AATA 1290; Re Woodward and Secretary, Department of Family and Community Services [2001] AATA 818; Re Nisha and Secretary, Department of Family and Community Services [2000] AATA 315.

• the fact that it is likely that the social security recipient will be unlikely to notify Centrelink of any abuse, including because the only person aware of the abuse is the nominee authority, may be barrier to any abuse being investigated.⁷⁴

105. The ALRC noted, in *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), that Centrelink nominee arrangements, despite being subject to some criticism, are generally well received and widely utilised. However, the ALRC also recognised that the third party nominee has ongoing powers to make decisions on behalf of a person and that this situation could be subject to abuse. ⁷⁵ This may particularly affect disadvantaged and low income recipients living in remote or rural Australian communities, older people, persons with disability and others.

Question 29 Should social security law or practice be amended in relation to nominee arrangements to minimise the potential for financial abuse by people holding nominee authority? For example, should the *Social Security Act 1991* (Cth) be amended to recognise other legal authorities of a person nominated by the social security recipient, such as under powers of attorney or enduring guardianship?

Payments and payment arrangements

106. Certain payments and payment arrangements are available that may assist victims of family violence under social security law. The ALRC has identified four such areas—Crisis Payment, Rent Assistance, weekly payments and urgent payments. The ALRC is interested in whether there are any other payments or payment arrangements that might assist victims of family violence.

Crisis Payment

107. Crisis Payment is a one-off payment that may be paid to social security recipients who are in severe financial hardship including because of 'domestic or family violence' and they claim within seven days of the extreme circumstance. A person cannot be paid more than four payments of Crisis Payment due to family violence in any 12 month period. 77 One of the following circumstances must apply.

108. First, the person has left home in circumstances where it is unreasonable to return to the home and intend to establish a new home. A Centrelink social worker determines whether the person has, or intends to establish, a new home. The claiming

⁷⁴ S Ellison and others, The Legal Needs of Older People in NSW (2004), prepared for the Law and Justice Foundation of NSW.

⁷⁵ Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report 108 (2008), Ch 70.

⁷⁶ Social Security Act 1991 (Cth) ss1061JH, 1061JHA.

⁷⁷ Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence); [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

period begins when the person, having left their home, decides that they cannot return home as a result of the 'extreme circumstance'. ⁷⁸

- 109. Secondly, the person remained in the home after the removal of a family member due to family violence. It must be verified that the person using family violence actually lived with the victim in the family home immediately before being removed. In some cases, the abusive family member may leave without police involvement and the violent relationship will need to be verified by a third party. The claiming period begins when the family member leaves or is removed from the home.⁷⁹
- 110. Thirdly, the person has used family violence and been removed from their home and legally prevented from returning.
- 111. For the purposes of Crisis Payment, the meaning of 'home' is taken to be the person's house or other shelter that is the fixed residence of a person for the foreseeable future. Fixed residence includes a house, apartment, on-site caravan, long-term boarding house or moored boat. A 'home' does not include a refuge, overnight hostel, squat or other temporary accommodation. ⁸⁰ A 'family member' is a person's partner, parent, sister, brother, child or any other person whom the Secretary deems should be treated as a family member. ⁸¹
- 112. An apprehended violence or restraining order that is issued for a short time (24–72 hours) may be used as an indicator that an extreme circumstance has occurred. 82 While there may no longer be a legal reason preventing the person from returning home, the person may decide to establish a new home that would be considered safer. 83
- 113. Some aspects of the operation of Crisis Payment in the context of family violence may raise concern. For example, there may be concerns about:
- the way in which evidence of family violence is collected, for example by third party verification;
- the definitions of 'family member' and 'home' that may exclude certain persons and situations of family violence;

⁷⁸ Social Security Act 1991 (Cth), s 1061JH; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttps://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

⁷⁹ Social Security Act 1991 (Cth) s 1061JHA; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/ at 4 February 2011, [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

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

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

⁸³ Ibid, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

- requiring claim to be made within seven days after the 'extreme circumstance', and understanding of when the extreme circumstance is said to occur may be too onerous given the effects of family violence for victims of family violence;
- requiring the person using family violence to have lived with the victim immediately before either the victim leaves to home or the person using family violence is removed from the home; and
- the restriction that only four payments can be made in a 12 month period may be insufficient for victims of family violence.
- 114. Moreover, where availability of Special Benefit is widely known, access to Crisis Payment may be less so. It may be preferable, therefore, that Crisis Payment be 'wrapped up' in a pre-existing payment, such as Special Benefit, and that Centrelink moves towards a single payment system. On the other hand, this may risk certain advantages of Crisis Payment being lost. Another suggestion is to increase the visibility of Crisis Payment through brochures and letters to inform Centrelink customers.

Question 30 In what ways, if any, can information about and access to Crisis Payment be improved for victims of family violence? For example, should Crisis Payment be 'wrapped up' with Special Benefit?

Question 31 Should Crisis Payment be available to those who are otherwise ineligible for a social security pension or benefit but due to extreme circumstances of family violence are placed in financial hardship?

Question 32 Do claim periods and eligibility criteria for Crisis Payments adequately reflect the breadth and nature of family violence?

Question 33 What evidence is, or should, be necessary to determine whether family violence amounts to an extreme circumstance for the purpose of Crisis Payment?

Rent Assistance

115. Rent Assistance is available under the *Social Security Act* to social security recipients who:

- are not aged care residents;
- are not 'ineligible homeowners'; or
- pay or are liable to pay rent and the fortnightly rent is more than the 'rent threshold amount'. 84

⁸⁴ Social Security Act 1991 (Cth) ss 1070B–1070J, 1070T.

- 116. Rent is defined broadly in the *Social Security Act*. It does not expressly extend to mortgage repayments. ⁸⁵
- 117. While persons on low income who live in rental accommodation may be able to access Rent Assistance, those who have a mortgage may not and, as such, may be vulnerable to homelessness where the person who has used family violence defaults on rent or mortgage payments.

Question 34 Do the provisions for Rent Assistance in the *Social Security Act 1991* (Cth) adequately address the situation where a person using family violence defaults on mortgage repayments on the house in which the victim is living? Should the definition of 'rent' in s 13(2) of the *Social Security Act 1991* (Cth) expressly include mortgage repayments where family violence is an issue?

Weekly payments

118. Weekly—rather than fortnightly—payments of social security payments can be made to those considered to be 'most vulnerable', 86 defined as a person who:

- is homeless, or
- is at risk of homelessness and has issues of vulnerability and significant disadvantage and would benefit from receiving payments on a weekly basis, or
- has considerable difficulty in managing their finances ... on a fortnightly basis and would benefit from receiving payments on a weekly basis.⁸⁷
- 119. Weekly payments are offered in conjunction with other services and referrals, such as family violence counselling. Receiving income support payments on a weekly basis is voluntary. Centrelink works with people to assess their needs. 88
- 120. In determining whether a person is eligible for weekly payments, the *Guide to Social Security Law* provides that a decision maker should take into account, among other things, 'recent traumatic relationship breakdown, particularly if domestic or family violence was involved' and whether the 'person is experiencing financial exploitation'.⁸⁹ There is no guidance as to how such evidence is to be collected.

⁸⁵ Ibid ss 13(2), 13(3). In comparison, New Zealand's Social Security Act 1964 provides for an 'Accommodation Supplement' which is a non-taxable and asset-tested income supplement that provides assistance towards accommodation costs (excluding state housing), but includes rent, board and the costs of owner-occupied homes, including mortgage repayments.

Social Security (Administration) Act 1999 (Cth) s 43; Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttps://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

⁸⁷ Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Lawhttp://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

⁸⁸ Ibid, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

⁸⁹ Ibid, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

121. Social security recipients who receive weekly payments are ineligible for Crisis Payment and for urgent payments (see below). 90

Question 35 In practice, are Centrelink customers aware of, and do Centrelink customers make use of, the option to have their payments made weekly? In practice, if requested, are victims of family violence provided with weekly payments?

Question 36 Should victims of family violence who are receiving weekly payments be eligible to receive Crisis Payment?

Urgent payments

- 122. Where a social security recipient is suffering severe financial hardship due to exceptional and unforeseen circumstances, an urgent payment may be made. ⁹¹ The *Guide to Social Security Law* does not refer to family violence as an exceptional and unforeseen circumstance.
- 123. The *Guide to Social Security Law* does, however, state that a one-off urgent payment may be made to a third party on behalf of a social security recipient in exceptional and unforeseen circumstances, where it is necessary to alleviate immediate hardship to the recipient, such as where the recipient is required to change their place of residence because of family breakdown. Again, the *Guide to Social Security Law* does not refer expressly to family violence.

Question 37 Should family violence be an example of 'exceptional and unforeseen circumstances' in the *Guide to Social Security Law* when considering whether to make an urgent payment? Are the current payment arrangements—such as weekly payments—available to victims of family violence sufficient?

Income management

- 124. The following part of this Issues Paper discusses the treatment of family violence in the income management of welfare payments under the *Social Security* (*Administration*) *Act*. It briefly explains the nature and history of the income management regime and discusses how income management can work to protect, or work against, the safety of people experiencing family violence.
- 125. The part examines the implications of family violence for how individuals may become subject to, or obtain exemptions from, the application of the income

⁹⁰ Ibid, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

⁹¹ Social Security (Administration) Act 1999 (Cth) ss 43, 44.

⁹² Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [8.4.2.10] (Urgent Payments).

management regime; and the consequences of income management for people experiencing family violence. For example, issues are raised concerning whether:

- family violence should be an indicator of vulnerability for the purposes of administering the 'vulnerable welfare payment recipients' provisions;
- there should be some express provision allowing people experiencing family violence to seek an exemption from income management in specified circumstances;
- changes could be made to the administration of income management accounts, to assist people who are victims of family violence; and
- voluntary, rather than compulsory, forms of income management should be more broadly adopted.

What is income management?

126. 'Income management' is an arrangement under which 50 to 100% of a person's social security and family payments is 'quarantined' to be spent only on 'priority goods and services', such as food, housing, clothing, education and health care.

- 127. The objects of the income management legislation are primarily to:
- promote socially responsible behaviour, particularly in relation to the care and education of children;
- set aside the whole or part of certain welfare payments; and
- meet the priority needs of the welfare recipient, the recipient's partner, the recipient's children and any other dependants of the recipient. ⁹³
- 128. The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) has the primary responsibility for the income management system, which is administered by Centrelink.
- 129. Income management was first introduced in 2007 as part of the Northern Territory Emergency Response (NTER) to allegations of child abuse in specific Indigenous communities. The NTER scheme imposed income management on Indigenous people in receipt of income support or family assistance payments in 73 prescribed communities, including associated outstations and 10 prescribed town camp regions of the Northern Territory.
- 130. The income management legislation was implemented by the Australian Government as a 'special measure' for the purposes of the *International Convention on the Elimination of All Forms of Racial Discrimination*⁹⁴ and the *Racial Discrimination Act 1975* (Cth) (RDA). In 2010, the income management regime was amended ⁹⁶

⁹³ See Social Security (Administration) Act 1999 (Cth) s 123TB.

⁹⁴ International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, [1975] ATS 40, (entered into force on 04 January 1969), arts 1(4), 2(2).

⁹⁵ Racial Discrimination Act 1975 (Cth) s 8.

⁹⁶ Social Security and other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010 (Cth).

following legal challenges to the NTER legislation on the basis of racial discrimination. Questions about whether past or current income management provisions comply with the RDA are beyond the Terms of Reference of this Inquiry.

- 131. The NTER legislation was primarily focused on child protection within the environment of family violence among remote and discrete Indigenous communities. The new income management regime under the *Social Security (Administration) Act* is intended to focus on categories of the most vulnerable Indigenous people. ⁹⁸ While, under the NTER, income management applied to Indigenous people in selected Northern Territory locations, the new regime has been expanded to include other 'declared income management areas', ⁹⁹ including the whole of the Northern Territory. ¹⁰⁰
- 132. The Australian Government's 'Close the Gap' policy under the Northern Territory National Partnership Agreement provides for the continuation of the income management regime at least until review in 2014. ¹⁰¹

Who is subject to income management?

133. In outline, a person may become subject to the income management regime where:

- a child protection officer of a State or Territory requires the person to be subject to the income management regime;
- the Secretary has determined that the person is a vulnerable welfare payment recipient;
- the person meets the criteria relating to disengaged youth;
- the person meets the criteria relating to long-term welfare payment recipients;
- the person, or the person's partner, has a child who does not meet school enrolment requirements;
- the person, or the person's partner, has a child who has unsatisfactory school attendance;

For example, in the High Court case of Wurridjal v Commonwealth (2009) 237 CLR 309 Kirby J observed that the Northern Territory National Emergency Response Act 2007 (Cth) 'expressly removes itself from the protections in the Racial Discrimination Act 1975 (Cth) and hence, from the requirement that Australia, in its domestic law, adhere to the universal standards expressed in the International Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is a party': [213].

⁹⁸ Social Policy Research Centre, Evaluation Framework for New Income Management (2010), prepared for the Department of Families, Community Affairs, Housing and Indigenous Affairs, apps A, B, C.

⁹⁹ Under's 123TFA of the Social Security (Administration) Act 1999 (Cth), the Minister may declare any specified state, territory or area to be a declared income management area.

Social Security (Administration) (Declared Income Management Areas) Determination 2010. Aspects of income management are being trialled in Western Australia, in the Kimberly region and in some districts of metropolitan Perth.

J Macklin (Minister for Housing, Community Services and Indigenous Affairs), 'Release of Income Management Evaluation Framework' (Press Release, 1 February 2011).

- the Queensland Commission 102 requires the person to be subject to the income management regime; or
- the person voluntarily agrees to be subject to the income management regime. ¹⁰³
- 134. In the case of vulnerable welfare payment recipients, disengaged youth and long-term welfare payment recipients, the person must also be residing within a declared income management area.

Income management and family violence

- 135. The dynamics of family violence are aimed at the exercise and control of a person or persons in a relationship, where violence includes a range of coercive behaviours. ¹⁰⁴ Indigenous women are 45 times more likely than non-Indigenous women to be the subject of family violence, and more likely to be seriously injured. ¹⁰⁵
- 136. Income management has the potential both to assist and unintentionally harm victims of family violence. Income management may be extremely useful in protecting people who remain in violent relationships. For example, there are well-documented links between alcohol and family violence in some communities ¹⁰⁶ and, when a person is income managed, this may protect victims from increased levels of violence resulting from access 'excluded goods', such as alcohol.
- 137. Income management also ensures that at least 50% of the income is spent on necessities, such as food and housing. If a person's income is managed, it may provide protection from financial abuse—particularly where the income of the person who uses family violence is also income managed.
- 138. On the other hand, lack of control over personal finances can interfere with a person's ability to flee a violent environment in times of crisis, or to take other actions to change the person's circumstances. ¹⁰⁷

Vulnerable welfare payment recipients

139. One issue that arises under the present income management regime concerns the vulnerable welfare payment recipients. Under the *Social Security (Administration) Act*, the Secretary may determine that a person is a vulnerable welfare payment recipient, which may lead to the imposition of income management. An indicator of vulnerability is stated, in the *Guide to Social Security Law*, to be one of the following:

^{&#}x27;Queensland Commission' is defined under Social Security (Administration) Act 1999 (Cth) s 123TC and refers to the Family Responsibilities Commission, established under the Family Responsibilities Commission Act 2008 (Qld), as part of the Cape York Welfare Reform project.

^{103 &#}x27;Simplified outline' set out in Ibid s 123TA.

¹⁰⁴ R Hunter, 'Narratives of Domestic Violence' (2006) 28 Sydney Law Review 733, 740.

¹⁰⁵ Ibid, 747.

J Hunyor, 'Is It Time to Re-think Special Measures under the Racial Discrimination Act? The Case of the Northern Territory Intervention' (2009) 14 (2) Australian Journal of Human Rights 39, 50.

The ALRC recognises that there are many other factors that may constrain people from taking such actions. For example, departure from a person's community may have serious unwanted consequences for an Indigenous person, arising from physical, emotional and kinship dislocation from country and identity through extended family. See, eg, R Hunter, 'Narratives of Domestic Violence' (2006) 28 Sydney Law Review 733, 748.

- financial hardship;
- financial exploitation;
- failure to undertake reasonable self-care; or
- homelessness or risk of homelessness.
- 140. There is no express reference to family violence as an indicator of vulnerability in the *Guide to Social Security Law* or *Social Security (Administration) Act*.
- 141. The *Guide to Social Security Law* does, however, provide that 'financial exploitation' is considered to occur when a person is subject to undue pressure, harassment, violence, abuse, deception or exploitation for resources by another person or people, including other family and community members. ¹⁰⁹ There are other links between the existing indicators and family violence. For example, family violence may lead to homelessness where the victim is forced to leave the home.
- 142. Questions may be raised about whether family violence should nevertheless be included as an express indicator of vulnerability—especially given the widely accepted view that economic abuse should be recognised as a form of family violence. ¹¹⁰ Family violence could be included more explicitly as an indicator of vulnerability and made subject to additional decision-making principles.
- 143. The *Guide to Social Security Law* states, for example, that the decision makers 'should take into account all of the circumstances of the person' when assessing eligibility for weekly payment. Indicators that weekly payments may be beneficial include homelessness, mental health or drug dependency problems and 'recent traumatic relationship breakdown, particularly if domestic violence was involved'. ¹¹¹ Under such guidelines, individuals might initially be offered access to weekly payments, rather than immediately being made subject to income management.
- 144. Many objections may be raised to including family violence as an indicator of vulnerability. The Australian Human Rights Commission, for example, has stated that applying family violence as a trigger for the imposition of income management may have unintended consequences because Indigenous peoples on low incomes who experience family violence require support services, not financial management. 112

As discussed above, the definition of 'family violence' recommended by the ALRC, in ALRC Report 114, included 'economic abuse': Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Recs 5–1, 6–1, 6–4.

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [11.4.2.20] (Indicators of Vulnerability).

¹⁰⁹ Ibid, [11.4.2.20] (Indicators of Vulnerability).

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

Australian Human Rights Commission, Comment to FaHCSIA's Exposure Draft of the Policy Outlines for Income Management (2010), 5. The Australian Human Rights Commission also stated that 'homelessness' or 'the risk of homelessness' should be removed as an indicator of vulnerability: 6.

- 145. Other concerns include that victims of family violence may choose to stay in abusive relationships, rather than leave and claim Crisis Payment, out of fear that disclosing the existence of family violence to Centrelink will result in them losing control of their finances. ¹¹³ Imposing income management on people experiencing family violence, who are capable of looking after themselves and their families, may reduce their ability to take steps to protect their safety.
- 146. On the other hand, there may be advantages in being able to impose income management on a person who is engaging in family violence, in order to protect the victims of that person's violent conduct from further physical or economic abuse.

Question 38 Should family violence be included as an indicator of vulnerability for the purposes of administering the 'vulnerable welfare payment recipients' income management provisions?

Question 39 If so, what definition of family violence should apply? What additional decision-making principles or guidelines may be desirable—in particular, taking into account that a person may be a victim or person using family violence (or both)?

Exemption from income management

- 147. Exemptions from income management can be sought by people under the disengaged youth and long-term welfare payment recipient measures. The availability of these exemptions is subject to meeting a range of conditions under pt 3B, div 2, subdiv BB of the *Social Security (Administration) Act.* ¹¹⁴
- 148. For example, a person on income management with dependent children may qualify for an exemption under s 123UGD of the *Social Security (Administration) Act* if children who are of school age are enrolled at and attend school, or participate in other prescribed activities, and the Secretary is 'satisfied that there were no indications of financial vulnerability in relation to the person during the 12-month period ending immediately before the test time'.
- 149. The *Guide to Social Security Law* states that the principles for determining that there were no indications of financial vulnerability in relation to a person are:
 - a person has been applying appropriate resources to meet priority needs,
 - a person had stable payment patterns and budgeting practices and is meeting priority needs from their income support and family assistance payments,
 - a person had control over their money and was not subject to financial exploitation,

¹¹³ National Welfare Rights Network, Analysis of the Exposure Drafts of Income Management Policy Outlines, 22 June 2010 (2010), 4.

The Minister also has discretion to specify a class of welfare payment recipients who are exempt from income management: *Social Security (Administration) Act 1999* (Cth) s 123UGB.

- a person did not regularly require urgent funds to pay for foreseeable costs, or did not frequently change their income support pay dates and consideration is given to the reason for seeking the urgent payment.
- 150. The *Guide to Social Security Law* sets out some 'core principles' that should be applied in cases where a person seeks an exemption from income management. These principles, in part, state that:
 - It is intended that income management promote personal responsibility and
 positive social behaviour by providing pathways to evidence based
 exemptions for people who have a demonstrated record of responsible
 parenting, or participation in employment or study.
 - Exemptions are available in cases where income management is not necessary because a person has met the broad outcomes that comprise the objectives of income management. That is, the person can demonstrate that they:
 - are not experiencing hardship or deprivation and are applying appropriate resources to meet their families' priority needs,
 - can budget to meet priority needs,
 - are not vulnerable to financial exploitation or abuse, and
 - $-\,$ are demonstrating socially responsible behaviour, particularly in the care and education of dependent children \dots^{116}
- 151. As at March 2009, Centrelink data indicated that 649 clients had applied for and been granted an exemption from income management, which represented 9.8% of managed clients. Three in five exemptions (58%) were due to clients permanently moving away from their community.¹¹⁷
- 152. The general approach to exemptions from income management, as reflected in the core principles, would make it hard for most people experiencing family violence to obtain an exemption.
- 153. Questions may be raised, however, about whether there should be some express provision allowing people experiencing family violence to seek an exemption from income management in specified circumstances. Such circumstances might include where a person has been in contact with family violence counselling or other social services, has demonstrated a desire and capacity to take action to prevent or reduce the violence, and would benefit from an exemption in order to do so.

Question 40 Should the income management regime include provision for people experiencing family violence to be exempted from income management in specified circumstances, where to do so would assist them to take steps to prevent or reduce violence?

Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law*http://www.fahcsia.gov.au/guides_acts/> at 4 February 2011, [11.1.14.30] (Parental Exemptions from Income Management—Financial Vulnerability Test).

¹¹⁶ Ibid, 2 February 2011, [11.1.14.10] (Overview of Exemptions from Income Management).

Australian Institute of Health and Welfare, Report on the Evaluation of Income Management in the Northern Territory (2009) 25. That is, outside the relevant 'declared income management area' under Social Security (Administration) Act 1999 (Cth) s 123TFA.

Accounts and payments

- 154. Under the income management regime, payments to particular welfare recipients are held in separate, notional, accounts known as 'income management accounts'. ¹¹⁸ When a recipient ceases to be income managed, any residual monies are payable to the recipient. ¹¹⁹
- 155. Section 123B of the *Social Security (Administration) Act* provides for the Secretary to appoint a payment nominee on behalf of a welfare recipient, after taking into account the wishes of the recipient. Payments payable to the welfare recipient are paid into the bank account of the payment nominee. ¹²⁰
- 156. A welfare recipient under income management, or a payment nominee, may be issued with a stored value card, vouchers or receive approved expense and other payments. Stored value cards, generally known as BasicsCards, may be used at community stores and other approved outlets. Stored value cards, vouchers or payments may not be used to purchase excluded goods and services, including alcoholic beverages, tobacco products, pornographic material and gambling. 122
- 157. Concerns have been raised, however, about unintended consequences of the income management account system—including for people who are experiencing family violence. Problems have been identified in relation to:
- obtaining access to money for travelling interstate;
- delays in the transfer of needed funds;
- the increased cost of goods and services through the use of the BasicsCard because of the lack of community stores or merchants;
- limits placed on daily expenditure using the BasicsCard are problematic during a crisis of family violence;
- restricted access to account balances because of inadequate facilities and technology; and
- the assessment and reassessment of priority needs, which can be time consuming, invasive and demeaning, because the recipient must seek permission to purchase goods and services not covered by the provision. 123
- 158. Generally, under the income management regime, access to welfare payments is made subject to a detailed set of rules, which determine when Indigenous people are granted access to their money and what payments should be spent on. The system has

120 Ibid s 123F(3).

¹¹⁸ Social Security (Administration) Act 1999 (Cth) s 123WA.

¹¹⁹ Ibid s 123WJ(3).

¹²¹ Ibid pt 3B, div 6, subdiv B.

¹²² Ibid s 123TI.

¹²³ National Welfare Rights Network, Submission to Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010) 26. See Social Security (Administration) Act 1999 (Cth) s 123TH.

been described as 'requiring a micro examination of every aspect of a recipient's financial circumstances that exceeds the rigours of applying for a bank loan'. 124

- 159. Under the income management system, Indigenous welfare recipients who receive quarantined payments have minimal control over their income and are scrutinised on all expenditures or intended purchases. Access to funds in an income management account is based on narrow criteria that do not take into account the 'totality of a person's circumstances'. 125 That is, decision-making principles may not be flexible enough to assist victims of family violence to leave a residence or community or take other urgent steps to avoid violence. Access to resources to cover an immediate departure is likely to be limited. Travel or other crisis needs where a person needs to escape family violence may not be 'priority needs' for the purposes of the income management regime. 126
- 160. It has also been observed that the restrictions of the BasicsCard may affect Indigenous cultural sharing practices—in particular, during 'sorry business', where cash is contributed to the deceased's family. Where family members have experienced family violence, an inability to contribute an amount of cash may exacerbate their vulnerability to the pressures of immediate and extended family, especially where family violence already exists.
- 161. Further, in remote and discrete Indigenous communities, geographical isolation combined with the lack of transport and accommodation may inhibit access to a person's income management account funds and the ability to attend Centrelink to apply for an emergency payment.

Ouestion 41 What changes could be made to law or practice relating to the administration of income management accounts to assist welfare recipients who are victims of family violence? For example, are there alternatives to stored value cards that might provide additional flexibility or portability, such as food stamps or a streamlined access to cash in periods of crisis?

Should travel or other crisis needs, where a person needs to escape family violence, be included in the definition of 'priority needs' for the purposes of the income management regime?

125

¹²⁴ National Welfare Rights Network, Analysis of the Exposure Drafts of Income Management Policy Outlines, 22 June 2010 (2010), 6.

Ibid, 2.

Social Security (Administration) Act 1999 (Cth) s 123TH. Under the income management regime 126 amounts will be debited from a person's income management account for the purposes of meeting priority needs. Other debits require a special request: s 123YA.

¹²⁷ Northern Territory Council of Social Service, Submission to the Senate Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 4.

Compulsory or voluntary income management?

- 162. From one perspective, the established principles of social security and family assistance law provide for the inalienability of social security payments and enshrine a person's legal right to a social security payment. 128
- 163. The compulsory element of income management may be seen to hinder access to these basic rights and there are suggestions that a voluntary approach to income management should be more broadly applied. This issue is discussed below.
- 164. Indigenous people in declared case management areas must comply with a range of requirements in order to avoid being made subject to compulsory income management, or to obtain an exemption. These include requiring a person with children of compulsory school age or younger to demonstrate responsible parenting, by meeting attendance or participation requirements relating to education, health care and other activities. 129
- 165. Indigenous people in remote, discrete, and rural areas face difficulties in complying with such requirements, including because of lack of access to accessible, affordable, available and culturally appropriate services—for example, limited childcare services, limited access to children's activities and infrequent transport during the wet season. 130 Compulsory case management may be too inflexible to take account of the difficulties faced by Indigenous people experiencing family violence.
- 166. Submissions to the Senate Standing Committees on Community Affairs inquiry into the 2010 amending legislation proposed the introduction of a broad voluntary system of income management. This would provide unconditional support for victims of family violence, where financial management is self-determined by the recipient. It was suggested that a voluntary system of income management would encourage disclosure of family violence and better allow clients to be linked with appropriate service providers. These stakeholders stated that an opt-in system might avoid the burden of satisfying exemption criteria and encourage self-management among Indigenous communities. 131
- 167. The income management regime, since the 2010 amendments, provides for a voluntary form of income management—only available to eligible persons who are not subject to compulsory income management. Under the Social Security (Administration)

¹²⁸ National Welfare Rights Network, Submission to Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 8.

¹²⁹ Australian Human Rights Commission, Comment to FaHCSIA's Exposure Draft of the Policy Outlines for Income Management (2010), 8.

¹³⁰ Ibid, 9.

¹³¹ See, eg, submissions to the Senate Standing Committees on Community Affairs: National Welfare Rights Network, Submission to Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 49; Family Relationship Services Australia, Submission to the Senate Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 1-3: Human Rights Law Resource Centre, Submission to the Senate Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 43.

Act, people who are recipients of welfare payments and live in a declared income management area may enter 'voluntary income management agreements'. ¹³²

- 168. These voluntary income management agreements may be suited to Indigenous people who are undecided about becoming income managed but require long-term assistance in managing income—for example, due to the existence of family violence.
- 169. On the other hand, where a person has other problems such as homelessness, mental health or drug dependency problems, compulsory management may be more appropriate. People who are experiencing family violence may also prefer that income management be compulsorily imposed, rather than voluntary, to avoid being pressured by an abusive partner¹³³ to terminate a voluntary income management agreement.
- 170. Voluntary income management was introduced following trials in Indigenous communities in Western Australia. In a submission to the Senate Standing Committees on Community Affairs inquiry, the National Welfare Rights Network suggested that, under voluntary income management, welfare recipients should be able to 'self select the percentage of funds they require to be income managed'. 135

Question 43 Should voluntary income management of people experiencing family violence be adopted more broadly and, if so, how should this done? For example, what amendments to the compulsory income management provisions would be required?

Criticism of income management

- 171. There have been arguments for and against the income management system since its implementation, including in relation to its effect on the incidence of family violence.
- 172. Income management is commonly referred to as a form of 'conditional welfare' because it is devised to change behaviour, targeted at the most disadvantaged members of society. The components of 'conditional welfare' programs include punitive and rehabilitative elements. The provisions of the income management regime operate on both these levels. ¹³⁶

¹³² Social Security (Administration) Act 1999 (Cth) s 123UM. A voluntary income management agreement must be entered into for a minimum of 13 weeks and may be terminated by a request in writing to the Secretary. If an agreement is terminated the client must not enter into another agreement until 21 days after the termination: Social Security (Administration) Act 1999 (Cth) ss 123UN, 123UO.

Nearly half (48.2%) of income managed clients are married or in a defacto relationship: Australian Institute of Health and Welfare, *Report on the Evaluation of Income Management in the Northern Territory* (2009), 20.

National Welfare Rights Network, Submission to Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 22. The Indigenous communities were in the Perth metropolitan area, Cannington and the Kimberley.

¹³⁵ Ibid, 49

See Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), prepared for the Department of Families, Community Affairs, Housing and Indigenous Affairs, [2.1], [2.4].

- 173. Criticisms of the income management regime have included that:
- problems in Indigenous communities may be better addressed through long-term support and increased investment—for example, in improving financial capacity and self-determination; 137
- the prescriptive and punitive approach of the conditional welfare model may discourage disclosure of family violence; ¹³⁸
- the prescriptive and punitive approach under the new system may not meet the needs of people with a disability or mental health problems; 139
- people face problems in exercising rights of review of administrative decisions made under the income management regime; 140
- there is a lack of Indigenous interpreters to inform communities about the income management regime. ¹⁴¹
- 174. It remains unclear whether income management is effective in addressing problems faced by Indigenous welfare recipients. In particular, there is little evidence to indicate that income management has reduced family violence. In any case, a major problem with any evaluation is the lack of a comparison group to measure what would occur in the absence of income management.
- 175. In 2009, FaHCSIA conducted interviews with 76 Indigenous people living in declared income management areas in relation to the state of their family and community wellbeing. Respondents were asked if they had noticed changes with their family since income management was implemented. Most (46%) indicated they were unsure. Slightly more considered that there had been no changes (30%); and some (24%) said there had been changes, which were mainly positive, including that their family was happier, they had increased access to food and experienced less 'humbugging'. 145
- 176. When asked if there had been changes in the community since income management was introduced, 52% thought there had been change (generally of a

139 Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), prepared for the Department of Families, Community Affairs, Housing and Indigenous Affairs, app E.

¹³⁷ National Welfare Rights Network, Submission to Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 31.

¹³⁸ Ibid, 30.

¹⁴⁰ See, eg, Commonwealth Ombudsman, Review Rights for Income Managed People in the Northern Territory (2010), 8.

National Welfare Rights Network, Submission to Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (2010), 10.

¹⁴² Australian Human Rights Commission, Comment to FaHCSIA's Exposure Draft of the Policy Outlines for Income Management (2010), 6.

¹⁴³ Australian Institute of Health and Welfare, Report on the Evaluation of Income Management in the Northern Territory (2009).

¹⁴⁴ Ibid, 15.

¹⁴⁵ Ibid, 53.

positive nature), 21% thought there had not been any change and 27% were unsure. ¹⁴⁶ In relation to family violence specifically, 13% of respondents thought there had been more violence, 37% thought there had been less, with 50% nominating no change. ¹⁴⁷

Question 44 Is there any evidence that income management has improved the safety of people experiencing family violence?

Other issues

177. The ALRC welcomes comment on any other issues relevant to the treatment of family violence in Commonwealth social security law and practice, including income management.

Question 45 Are there any other ways in which Commonwealth social security law and practice could be improved to better protect the safety of people experiencing family violence?

¹⁴⁶ Ibid, 53.

¹⁴⁷ Ibid, 54.