

CFV 145 P Easteal and D Emerson-Elliott
**ALRC INQUIRY INTO FAMILY VIOLENCE: IMPROVING
LEGAL FRAMEWORKS**

**SUBMISSION BY PROFESSOR PATRICIA EASTEAL AM
AND ADJUNCT ASSOCIATE PROFESSOR DEREK EMERSON-ELLIOTT**

**RESPONSE TO THE AUSTRALIAN LAW REFORM COMMISSION DISCUSSION
PAPER**

(Response drafted by Caroline Doyle)

Amendment to Section 4(3)

Discussion paper position

Whilst the ALRC discussion paper acknowledges the current problems in regards to the treatment of victims of domestic violence under *The Social Security Act* (the Act), it does not propose to amend the criteria in s 4 (3) of the Act. The discussion paper instead proposes to amend the *Guide to Social Security Law* (the Guide) and provide additional guidance for victims of domestic violence.

The discussion paper suggests that it would more appropriate to provide additional guidance to decision-makers through further information about the effects of family violence on member of a couple decisions in the Guide. It suggests that this will direct decision-makers to consider how family violence could affect victims' decisions, actions and inactions and will improve the way in which family violence is considered in member of a couple decisions.

It proposes that Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the way in which family violence may affect the interpretation and application of s 4.

Our response

We believe that the discussion paper has missed the key difficulty for victims of domestic violence arising from the current definition of a couple in the Act. That is, that a victim of domestic violence often does not consent to be a member of a couple. Because of the power imbalance between her and her abuser, the resulting dependency that has been imposed on her, and in many cases the resulting mental state in which she finds herself, she is unable to give true consent to be in a couple's relationship. The relationship is in reality more that of a (psychological) hostage and captor relationship. As a result of this disempowerment, victims may not be limited in their ability to make choices and limited capacity to change or even challenge the circumstances that they are in.¹

Based on our research on the effects and dynamics of domestic violence (Easteal) and our interaction with clients who have survived violence in the family (Emerson-Elliott) we believe that the s 4 (3) definition of *The SS Act* must be amended in order to require the

¹ Patricia Easteal and Derek Emerson-Elliott, Domestic Violence and Marriage-like Relationships: Social Security law at the crossroads (2009), Vol 34:3, *Alternative Law Journal*, 174.

decision maker to be satisfied that both members of a couple have a reasonable equality of power in the partnership.² We believe that a statement should be placed after the s 4 (3) definition that states that family violence can be criterion to nullify this definition, or that there must be a (e) definition stating a history of family violence can have an effect on determining if a person is a member of a couple.

Discussion paper position

We note that the discussion paper argues that any amendment to s 4 (3) of the Act may lead to unintended consequences for both the victim of family violence and the social security system itself. It argues that an amendment to s.4 (3) as we propose may affect other areas of law such as child support, intestacy and other Commonwealth and State laws. It suggests that there may be unintended consequences, the new definition would diminish flexibility in decision-making, and it may create inconsistencies with other Commonwealth laws.

Our response

We believe that the discussion paper fails to recognize that the definition in s 4(3) of the Act is limited to the Act. The relevant section reads:

SOCIAL SECURITY ACT 1991 - SECT 4

Family relationships definitions--couples

(1) In this Act, unless the contrary intention appears:

Etc...

We suggest that a change to the definition in s.4 (3) of the Act would have no effect in other Commonwealth, State or Territory law.

Discussion paper position

The discussion paper argues that rather than an amendment to s.4 (3), guidance in relation to the impact of domestic violence should be provided in the Guide. It argues that this would provide desirable flexibility.

Our response

We believe that the need for a decision-maker to be satisfied that there is true consent before ruling that a relationship in which there is domestic violence is a 'couple' relationship is not an issue requiring 'flexibility,' but is an issue of profound importance to the definition of a couple. For that reason we would rank the criterion at least as important as the criteria relating, for example, to the social aspects of the relationship. We believe that only an appropriate amendment to s.4 (3) would guarantee that the issue of consent was appropriately addressed.

Discussion paper position

The discussion paper argues that any amendment of s 4 will create an incentive for false or manipulated claims of family violence in order to access a higher single rate of payment, which could detract from the overall purpose of social security law.

Our response

Our position is that an amendment to s.4 (3) would not be an attractive vehicle for false or manipulative claims. In cases in which lack of consent is argued, strong medical and

² *Ibid*, 177.

psychiatric evidence will be needed to before a decision maker could be satisfied that there is no consent to the relationship. We believe that there would be no additional risk of false or manipulative claims.

Discussion paper position

The discussion paper suggests that the discretion contained in s 24 of the Act is a sufficient mechanism to address the issue in which there is a lack of consent to the relationship.

Our response

As has been illustrated by case law, s.24 requires the circumstances to be unique and that they must have a particular quality of unusualness that permits them to be described as special.³ The discretion can only used as a last resort and when all other means of support have been explored and exhausted⁴ and that it must be unusual, uncommon or exceptional.⁵ Furthermore, people who do suffer from domestic violence are often not made aware of this as an option.⁶

We believe that s.24 is an inappropriate mechanism for decision-making on such a significant and basic issue as whether a relationship is genuinely that of a couple, or is that of captor and hostage. It has been used in domestic violence cases in the past, we submit, only because decision-makers have not been prepared to ‘grasp the nettle’ and see that lack of consent vitiates any presumption that a relationship is a couples relationship.

Amendment to section 1237AAD

Discussion paper position

The discussion paper does not mention the amendment to s1237AAD which we have proposed.⁷

Our response

We believe that s 1237AA must be amended for the reasons given in our paper. In essence, we argued that in cases involving domestic violence, the false statements and/or failures to comply are virtually always attributable to the abusing male—for example, when he insists that his partner not report his (the abusing partner’s) true income.

Case Study – Watson v Secretary, Department of Family and Community Services [2002] AATA 311 (6 May 2002)

Mrs Watson was subjected to horrendous verbal and physical abuse from her partner. She was assaulted repeatedly to ‘keep her in line’, on several occasions ending up in hospital with bruising and broken bones. When she attempted to leave her partner, he told her that ‘If you leave I will kill you and your children.’ The marriage broke up only when Mr Watson was imprisoned for social security fraud. His offence had been to claim social security benefits without declaring that he was employed.

³ *Beadle v Director-General of Social Security* (1985) 60 ALR 224.

⁴ Department of Families, Housing, Community Services and Indigenous Affairs, Guide to Social Security Law, www.fahcsia.gov.au/guides_acts_at_23_September_2011, Discretion to treat a person as not being a member of a couple of a special reason.

⁵ *Ibid.*

⁶ Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

⁷ *Ibid*

Mrs Watson had been receiving social security benefits of her own. These benefits were higher than they should have been because of her husband's undeclared income, and when Mr Watson's fraud became known a substantial overpayment debt was raised against her. Mrs Watson sought waiver under section 1237AAD. It was open to the Secretary to find that Mrs Watson's own statements had not been made 'knowingly' (i.e., without *mens rea*) because they had been made under coercion, but he could not waive the debt because Mr Watson ('another person') certainly had the necessary *mens rea*.