

Submission
to the
Australian Law Reform Commission

Family Violence – Commonwealth Laws – Discussion Paper 76

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1. National Children's and Youth Law Centre

- 1.1. The National Children's and Youth Law Centre ("**NCYLC**") is the only Australian national community legal centre for children and young people. NCYLC promotes the rights and interests of Australian children and young people through advocacy, information and education. Since its inception in 1993, NCYLC has made over 180 public submissions on law and policy affecting children and young people and handled over 150,000 inquiries. NCYLC seeks to increase access by children and young people to legal assistance and to improve the legal status of children and young people in Australia.
- 1.2. NCYLC provides information and advice to children and young people through the following services:
 - a) *Lawstuff* (www.lawstuff.org.au) - a website that provides general legal information and referral options on a wide range of issues relevant to children and young people;
 - b) *LawMail* (www.lawstuff.org.au/lawstuff/lawmail) – a confidential legal advice and information service that allows children under the age of 18 years from all over Australia to seek legal advice, referrals and information via email; and
 - c) *What's Up CROC?* (www.ncylc.org.au/croc/home.html) and *Child Rights* (www.childrights.org.au) – websites that provide information about Australia's implementation of the United Nations Convention on the Rights of the Child ("**CROC**" or "**Convention**").

2. Executive summary

- 2.1. NCYLC welcomes the opportunity to comment on the Australian Law Reform Commissions Review of Family Violence and Commonwealth Laws, specifically on Discussion Paper 76 ("**Discussion Paper**").
- 2.2. In providing our comments, we take a child rights based approach. This reflects the understanding that children are the holders of human rights – including not only basic survival and development rights and the special needs associated with protection from

harm, but also rights of participation including the right to be consulted and heard on issues affecting them.¹

- 2.3. Every child has a right to benefit from social security², the right to an adequate standard of living³ and importantly the right to freedom from all forms of violence⁴. There are currently barriers in Australia's social security framework that hinder children and young people from realising these rights, especially those who are experiencing family violence.
- 2.4. NCYLC is concerned that the current social security system does not adequately ensure that young people who are victims of family violence are able to access financial support, allowing them to leave the violent home.
- 2.5. NCYLC strongly submits that the Australian social security laws need to be amended to ensure young people who are experiencing family violence are able to adequately financially support themselves so they do not need to return to the violent environment. This requires the removal of barriers in legislation, policy and in practice, along with improved training of frontline Centrelink staff to ensure that children and young people experiencing family violence are aware of the social security payments available and are able to access them.
- 2.6. **Recommendation:** Legislation, policy and Centrelink procedures are amended to adequately screen for family violence and not rely on young people to self-disclose family violence.
- 2.7. **Recommendation:** That the *Social Security Act* and *Guide to Social Security Law* are amended to include an express reference to family violence, child abuse and neglect in relation to the UTLAH requirements.
- 2.8. **Recommendation:** That sections 1061PL(7)(a)(ii) and 1067A(9)(a)(ii) of the *Social Security Act* are amended to remove the requirement for the decision maker to be satisfied of a "serious risk to the person's physical or mental well-being" in order to

¹ CROC, Articles 6 & 12. This convention has been almost universally ratified. The Australian Law Reform Commission notes: "Given the diversity of its States Parties and breadth of coverage, CROC is clear evidence of customary international norms regarding the rights and responsibilities of children. While CROC is not incorporated in its entirety into the domestic law of Australia, it is a strong statement of Australia's commitment to children's rights and their participation in the legal process." Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report No. 84, *Seen and Heard: Priority for Children in the Legal Process*, Sydney, 1997, at [1.29].

² CROC, Article 26.

³ CROC, Article 27.

⁴ CROC, Article 19.

meet the threshold of circumstances which make it unreasonable for the child or young person to live at home.

- 2.9. **Recommendation:** *The onus is not placed on a young person to obtain details of a parent's income or assets in a social security application.*

3. Child rights-based approach

- 3.1. NCYLC believes that universally accepted human rights standards provide a clear normative framework to assess laws and policies with respect to children and young people.⁵ The UN Convention on the Rights of the Child provides a universally accepted rights-based framework for addressing the treatment of children. The Convention has been adopted and ratified by Australia⁶ and is now the most widely ratified international instrument. Rights contained in the Convention are interdependent and indivisible.⁷
- 3.2. The rights enshrined in the Convention should be used as the foundation and benchmark for considering issues raised by the Issues Paper and improving the current social security system. The relevant rights and provisions in the Convention include
- a) all policies and laws are made with the best interests of the child being the primary consideration in all actions concerning the child (Article 3);
 - b) the right of every child to benefit from social security and for Australia to take the necessary measures to achieve the full realisation of this right (Article 26);
 - c) the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27);
 - d) the right to freedom from all forms of violence (Article 19);
 - e) the right to information and education (Article 17, 28 and 29);
 - f) the right to be heard and to express views in decisions (Article 12); and
 - g) the right not to be discriminated against (Article 2).

⁵ J Tobin, "Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs" (2006) 14 *The International Journal of Children's Rights* 275 at 279.

⁶ 17 December 1990.

⁷ G Monahan & L Young, J Tobin (eds), *Children and the Law in Australia* (2008), Chapter 2, 'The Development of Children's Rights', p 39.

- 3.3. Assessing proposed policies and law that affect children from a rights-based perspective is not a novel idea.⁸ Involving human rights considerations in legislative and policy evaluation processes is increasingly common since the former UN Secretary General Kofi Annan's directive in 1997,⁹ which called for governments to uphold human rights regardless of their political, economic, social or cultural systems and notwithstanding their economic and social situation.¹⁰
- 3.4. Recognising and providing effective support for the rights of children and young people in dealing with the issues of family violence and social security will assist the Australian Government in meeting its obligations under the Convention.

4. What children tell us

- 4.1 Through NCYLC's LawMail Service we have observed that children are concerned about the issues surrounding family violence and Centrelink benefits. The following are examples of LawMails received by NCYLC:

"I'm going through a pretty tough time, for now I've been kicked out of my Dad's home for three months now. My Dad keeps saying I can't live with him or my Aunty, and I can't live with my Mum because her husband has physically abused and sexually harassed me and I have an AVO against him. I'm just wondering if I would be entitled to youth allowance and possibly rent assistance." **16 Year Old Female, NSW**

"My Father is abusive and neglectful but because my brother and sister still live with him and have nowhere else to go except foster care again I can't do anything except trying to make a life for myself where I am. However Centrelink will not grant me my claims." **16 Year Old Male, NSW**

"I don't like living at home, I don't feel safe. I tried going to Centrelink to see if I could get financial assistance to move out but they couldn't help me. I didn't fully understand them anyway, even though I went with an adult. I'm back home now but I don't want to stay here." **15 Year Old Female, QLD**

"I truly feel that living with my family is affecting me disastrously and I really don't know how much more I can live through. I don't want to be emancipated – even though my family pulls me to bits I still love them. Is there any way I could move out at 16 and still go to school? Are there any Centrelink benefits I could apply for?" **16 Year Old Female, WA**

⁸ See e.g. J Tobin, above n 5.

⁹ United Nations General Assembly, Report of the Secretary-General, *Reviewing the United Nations: A Programme for Reform*, A/51/950 (14 July 1997); see also United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23 (12 July 1993).

¹⁰ [K Annan, Report of the Secretary-General on the work of the Organisation United Nations August 1999](#)

"I'm moving out with my best friend in about 6 weeks time. I'll have to work almost every spare minute I'm not at school to survive unless I can get Youth Allowance but I'm 15 so I'm not eligible. Is there any way I can get financial support? If I tell a Centrelink worker about my mother's abuse will she be affected in any way because she has 3 other young children that need her and I don't want to take their mother away from them?" **15 Year Old Female, NSW**

5. Question 5-1: Need to screen for Family Violence - Youth Allowance

- 5.1. NCYLC believes that current Centrelink processes may be improved by screening for family violence at the trigger point of an application for Youth Allowance. Young people experiencing family violence need to be made aware of the social security payments for which they are eligible. If they are not aware that they are able to financially support themselves then young people may be forced to stay in the violent home, or become homeless.
- 5.2. NCYLC submits that the screening process used by NSW Health should be used as a template for family violence screening during Youth Allowance applications. NSW Health has routinely screened women for family violence in antenatal, early childhood, alcohol and other drug and mental health services since 2001. The screening is universal in selected services and involves systematic questioning.¹¹ Screening in these services displays a high participation rate, with less than 1% of women declining to answer questions.¹² The program's success has been attributed to staff training, including training by the NSW Education Centre Against Violence, short scripted questions and an implementation protocol.¹³
- 5.3. Centrelink protocols do not require screening for family violence, requiring young people to self-disclose. From NCYLC's experience with young people we know they may not be confident to classify what they are experiencing as "family violence" and therefore they may not self-disclose.
- 5.4. NCYLC is of the opinion that emphasis on self-disclosure fails to recognise the diverse situations that children and young people might find themselves in, and the reasons for some children and young people not disclosing this information. In particular, NCYLC

¹¹ Joanne M. Spangaro, 'Routine screening for domestic violence by NSW Health' *NSW Public Health Bulletin* at <http://www.publish.csiro.au/?act=view_file&file_id=NB07063.pdf>

¹² Ibid.

¹³ Joanne M. Spangaro, 'Routine screening for domestic violence by NSW Health' *NSW Public Health Bulletin* at <http://www.publish.csiro.au/?act=view_file&file_id=NB07063.pdf>

notes from its LawMail service that fear for the continued care and safety of siblings living in a violent home is a recurring reason for non-disclosure of family violence.¹⁴

- 5.5. The processes Centrelink uses should be improved to allow young people to detail their circumstances when commencing the application process to allow for screening of family violence. This could include application forms, correspondence and telephone prompts to encourage disclosure of family violence. Centrelink staff should attempt to inform applicants about the benefits of self-disclosure and how these situations might affect their application for financial support.
- 5.6. Centrelink staff should inform applicants of the wide range of activities that come under the heading of family violence. Victims are more likely to disclose family violence when it is defined broadly to include: "sexual assault and tactics of intimidation, humiliation, and isolation that produce feelings of fear in addition to physical violence".¹⁵
- 5.7. NCYLC emphasises that "it is important that Centrelink staff be trained to identify people who are experiencing family violence, so that they can inform them about payments available to them."¹⁶ NCYLC is of the opinion that Centrelink staff should also receive training as to how to communicate with victims of family violence so as to best ensure that victims are dealt with appropriately. This may include training to more effectively refer victims of family violence to Centrelink social workers.
- 5.8. **Recommendation:** *Legislation, policy and Centrelink procedures are amended to adequately screen for family violence and not rely on young people to self-disclose family violence.*

6. Proposal 6-5: Need to make express reference to child abuse, family violence and neglect in the *Guide to Social Security Law*

- 6.1. The *Guide to Social Security Law* provides an outline of the current legislation regarding social security. While the *Guide* is not legally binding, it is significant because it contains considerations relevant for Centrelink when assessing social security applications.

¹⁴ See Chapter 4 of this submission

¹⁵ Taryn Lindhorst et al, 'Screening for Domestic Violence in Public Welfare Offices An Analysis of Case Manager and Client Interactions' *National Institutes of Public Health* at < <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2275299/>>

¹⁶ ALRC, Issues Paper 39, March 2011 at paragraph 25.

- 6.2. NCYLC agrees with the ALRC's recommendation that the *Guide to Social Security Law* be amended to expressly include family violence, child abuse and neglect as additional criteria of when it is UTLAH.
- 6.3. In determining what can constitute family violence NCYLC supports the broad definition for family violence contained in proposal 3-1. This definition should be replicated within the *Guide to Social Security Law*.
- 6.4. Without a clear and detailed outline of what constitutes family violence, there is potential for these factors to be overlooked in the determination of a child's eligibility for Youth Allowance or the Pensioner Education Supplement. Giving express recognition to the factors that can be termed family violence would allow Centrelink staff to comprehensively and accurately assess a child or a young person's living conditions and hence their eligibility for social security.
- 6.5. If the *Guide to Social Security Law* were amended to include family violence as a criterion in the determination of whether it is UTLAH, this would increase consistency for victims of family violence by entrenching a screening process for this circumstance amongst Centrelink staff.
- 6.6. An amendment that gives greater guidance as to the factors that classify as family violence would assist Centrelink staff to eliminate the risk that social security benefits may not be provided to eligible children.
- 6.7. **Recommendation:** *NCYLC agrees with the ALRC's proposal that the Guide to Social Security Law be amended to expressly refer to family violence, child abuse and neglect when considering when it is unreasonable to live at home.*

7. Question 6-3(a): Need to make express reference to child abuse, family violence and neglect in the *Social Security Act*

- 7.1. NCYLC submits that sections 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) of the *Social Security Act* should be amended to expressly to take into account circumstances where there has been, or there is a risk of, family violence, child abuse, neglect.
- 7.2. The *Social Security Act* stipulates the criteria against which a child or a young person is tested to determine their eligibility to access Youth Allowance or the Pensioner Education Supplement. To qualify for either of these benefits, a child or young person must be found to be "independent" against the tests.

- 7.3. A child or young person can qualify for independence where they cannot live at the home of either or both of their parents because of “extreme family breakdown” or “because it would be unreasonable to expect the person to do so as there would be a serious risk to his or her physical or mental well-being due to violence, sexual abuse or other similar unreasonable circumstances”.¹⁷
- 7.4. NCYLC believes that in situations of family violence, child abuse and neglect, sections 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) are inadequate and prevent children and young people from accessing benefits that may be available to them. As they currently stand, these provisions may force children to remain living at home in an environment involving family violence. If children and young people decide to remove themselves from unsafe homes despite failure to meet the UTLAH test, homelessness is a major concern.
- 7.5. NCYLC notes legislative change to expressly refer to family violence, child abuse and neglect can recognise the importance of social issues and promote a cohesive governmental and community response toward these issues. Legislative change, therefore, can result in benefits towards children and young people affected by family violence, child abuse and neglect that goes beyond the practical effect of increasing access to social security benefits.
- 7.6. **Recommendation:** That sections 1061PL(7)(a)(ii) and 1067A(9)(a)(ii) of the *Social Security Act* are amended to include an express reference to family violence, child abuse and neglect in relation to the UTLAH requirements.

8. Question 6-3(b): The “serious risk” test

- 8.1. Children and young people who experience family violence face significant barriers when accessing social security benefits. The present formulation of the independence tests under the *Social Security Act* requires those who have experienced family violence to demonstrate circumstances which make it unreasonable for them to live at home.¹⁸ This is complicated in some cases by the requirement that a decision maker be satisfied of “a serious risk to the person’s physical or mental well-being”.¹⁹

¹⁷ *Social Security Act 1991 (Cth)* ss 1067A(9)(a)(ii), 1061PL(7)(a)(ii). There are other circumstances under the legislation, such as that the child or young person is not receiving continuous support from a parent or guardian. See *Social Security Act 1991 (Cth)*, ss 1067A(9), 1061PL(7).

¹⁸ *Social Security Act 1991 (Cth)* ss 1061PL(7), 1067A(9).

¹⁹ *Social Security Act 1991 (Cth)* ss 1061PL(7)(a)(ii), 1067A(9)(a)(ii).

- 8.2. This formulation requires children and young people to first prove the living circumstances which put them at risk, and then satisfy a decision maker that those living circumstances are sufficiently “serious”.²⁰
- 8.3. NCYLC submits that the mere existence of family violence, child abuse or neglect should be sufficient to cause an individual to be deemed independent. In situations where a child or young person has been exposed to any form of “violence, sexual abuse or other similar exceptional circumstances”,²¹ the risk to physical or mental well-being should be clear and treated with appropriate seriousness.
- 8.4. Young children, especially those in situations of family violence, abuse or neglect, need protection and help in accessing financial support. Relaxing the threshold by reducing the current requirement of “serious risk” to one of “risk” would enlarge the circumstances in which independence may be determined.
- 8.5. **Recommendation:** That sections 1061PL(7)(a)(ii) and 1067A(9)(a)(ii) of the *Social Security Act* be amended to remove the threshold that Centrelink staff be satisfied of a “serious risk to the person’s physical or mental wellbeing”, instead reducing it to simply “risk to the person’s physical or mental wellbeing”.

9. Proposal 6-6: Continuous support

- 9.1. As outlined at paragraph 6.83 of the Discussion Paper, to be considered “independent”, the young 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.
- 9.2. NCYLC agrees with the finding of the Commonwealth Ombudsman (as outlined at paragraph 6.85 of the Discussion Paper) and encourages DEEWR and Centrelink to implement a new procedure so that the onus is not placed on a young person to obtain details of a parent’s income or assets if they are not residing with that parent.
- 9.3. In the consideration of a ‘best-interests’ approach, it may not be in the best interests of a young person to seek this information from parents when the nature of the domestic environment is openly hostile or violent.
- 9.4. **Recommendation:** *The onus is not placed on a young person to obtain details of a parent’s income or assets in a social security application.*

²⁰ Child Rights Taskforce, *Listen to Children*, (May 2011), at 22.

²¹ *Social Security Act 1991 (Cth)* ss 1061PL(7)(a)(ii), 1067A(9)(a)(ii).