



**Australian Government**

**Australian Law Reform Commission**

# Family Violence and Commonwealth Laws— Improving Legal Frameworks

SUMMARY REPORT

This Final Report reflects the law as at 1 November 2011

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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 40 MLC, 19 Martin Place, Sydney, NSW, 2000, Australia.

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# Terms of Reference

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## **Terms of Reference—Impact of Commonwealth Laws on those Experiencing Family Violence**

The 2010 inquiry into family violence by the Australian Law Reform Commission and New South Wales Law Reform Commission (the Commissions) identified issues beyond its scope relating to the impact of Commonwealth laws (other than the *Family Law Act 1975*) on those experiencing family/domestic violence. In addition, the 2009 report of the National Council to Reduce Violence against Women and their Children, *Time for Action*, acknowledges the importance of examining Commonwealth laws that have an impact upon the safety of women and children.

### **Reference**

I refer to the Australian Law Reform Commission for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), the issue of the treatment of family/domestic 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/domestic violence.

I request that the Commission consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family/domestic violence.

### **Scope of the reference**

In undertaking this reference, the ALRC should consider legislative arrangements across the Commonwealth that impact on those experiencing family/domestic violence and sexual assault and whether those arrangements impose barriers to effectively supporting those adversely affected by these types of violence. The ALRC should also 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/domestic violence.

In undertaking this reference, the ALRC should be careful not to duplicate:

- (a) the work undertaken in the Commissions' 2010 family violence inquiry;
- (b) the other actions being progressed as part of the *National Plan to Reduce Violence against Women and their Children* Immediate Government Actions announced by the former Prime Minister on receiving the National Council's report in April 2009; and

- (c) the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of vulnerable witness protections and recently endorsed principles for the protection of communications between victims of sexual assault and their counsellors.

### **Collaboration and consultation**

In undertaking this reference, the ALRC should:

- (a) have regard to the Commissions' 2010 family violence inquiry, the National Council's report and any supporting material in relation to family violence and sexual assault laws;
- (b) work closely with the relevant Australian Government departments to ensure the solutions identified are practically achievable and consistent with other reforms and initiatives being considered in relation to the development of a *National Plan to Reduce Violence against Women and their Children* or the National Framework for Protecting Australia's Children.

### **Timeframe for Reporting**

The Commission will report no later than 30 November 2011.

Dated: 9 July 2010



Robert McClelland

Attorney-General

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Emily Webster, Welfare Rights Lawyer, Central Australian Aboriginal Legal Aid Service.



# Final Report Summary

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## Overview

This Report Summary provides an accessible overview of the policy framework and recommendations in the Final Report in the Inquiry into family violence and Commonwealth laws by the Australian Law Reform Commission (ALRC). The full Report sets out in detail the issues raised by the Terms of Reference, and the research and evidence base upon which the ALRC’s recommendations were formulated.

This Summary begins with a brief account of the background for the Inquiry, including the law reform brief and the development of the reform response and a description of the principles underpinning the recommendations put forward in the Report. This is followed by a consideration of each of the discrete parts and the key recommendations in each area under review, concluding with a succinct summary of the net effect of the recommendations in the Report.

## Improving legal frameworks

### A continuing project

The Report contains 102 recommendations for reform of Commonwealth laws that affect people experiencing family violence. The Report builds upon the work undertaken by the ALRC and the New South Wales Law Reform Commission leading to the report, *Family Violence—A National Legal Response*, ALRC Report 114 (2010).

Both inquiries emanate from the work of the National Council to Reduce Violence Against Women and their Children (the National Council), established in May 2008. The report, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021 (Time for Action)*, was released on 29 April 2009.

Together the ALRC's family violence reports provide a significant contribution to improving legal frameworks to protect the safety of those experiencing family violence. They reflect the goal identified by the Australian Government 'to reduce all violence in our communities', recognising that 'whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the community', and 'comes at an enormous economic cost'.<sup>1</sup>

### **The law reform brief**

While the scope of the problem of family violence is extensive, the brief in this Inquiry was constrained both by the Terms of Reference, set out at the front of this Report; and by the role and function of a law reform commission, as set out in the *Australian Law Reform Commission Act 1996* (Cth).

### ***Legal frameworks***

The ALRC was asked to inquire into and report on the treatment of family violence in Commonwealth laws, specifically: 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. The ALRC was also asked to identify what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.

The ALRC was asked to consider whether legislative arrangements across the Commonwealth impose barriers to providing effective support to those adversely affected by family of violence, and 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.

The overarching objective of this Inquiry was to make recommendations for reform of legal frameworks to protect the safety of those experiencing family violence. In this context, the idea of 'legal frameworks' extends beyond law in the form of legislative instruments and includes education, information sharing and other related matters.

### ***Safety***

The overall touchstone throughout the chapters and recommendations is improving safety. In considering safety throughout the Report, the ALRC refers both to actual safety from harm and to financial security and independence, through things such as social security payments and entitlements, paid employment, and appropriate payments of child support. The importance of financial security and independence for the safety

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<sup>1</sup> Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009).

of victims of family violence was noted by participants in a study conducted by the Australian Domestic and Family Violence Clearinghouse:

Having my own financial independence and complete decision making over what I do and what I spend and how I support my children is at the forefront of any decision I make. That's what financial security is to me.<sup>2</sup>

### ***Limits of law***

A theme articulated during both family violence inquiries, and also in relation to the more general issue of responding to family violence, is the limits of law. As remarked by one stakeholder, 'you can have the perfect law, but ...'. The ALRC also recognises that the Inquiry concerns only a narrow slice of the vast range of issues raised by family violence. A comment made by the Family Law Council, in its advice to the Attorney-General of Australia in January 2009, is equally apt. The Council, noting that it was only focusing on family violence 'when it becomes visible in the Family Law system in Australia', stated that 'his visible pattern is only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is apparently entrenched in Australia'.<sup>3</sup>

### **Development of the reform response**

Commitment to widespread consultation is a hallmark of best practice law reform. In undertaking the Inquiry, a multi-pronged strategy of seeking community comments was implemented. Four Issues Papers were released online, in the discrete areas of the Inquiry. This was followed by an extensive 770-page Discussion Paper, divided into seven separate parts, again reflecting the specific areas of the Inquiry. The Discussion Paper was released online, each part being presented in a separate file for easy accessibility and search capability. This was accompanied by a 49-page Discussion Paper Summary, online and in hardcopy, to facilitate focused consultations in the final stage of the Inquiry process.

One hundred and ten consultations were conducted in two national rounds of stakeholder meetings, forums and roundtables. Internet communication tools—an e-newsletter and an online forum—were used to provide information and obtain comment, building upon the successful integration of such tools into the inquiry process in the 2010 family violence inquiry. By the end of the Inquiry there were 381 subscribers to the e-newsletter. In addition, the ALRC developed consultation strategies for engaging with Indigenous peoples, those from culturally and linguistically diverse backgrounds, people with disability and people who identify themselves as lesbian, gay, bisexual, trans or intersex.

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2 R Braaf and I Barrett Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (2011), prepared for the ADFVC.

3 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 7.

## **Principles for reform**

The framework for reform in this Inquiry is set out in Chapter 2. In summary, the recommendations in this Report are underpinned by eight principles: seamlessness; fairness; accessibility; effectiveness; self-agency or autonomy; privacy; and system integrity. The first four underpinned the recommendations in *Family Violence—A National Legal Response*; the other three emerged as key principles in the course of this Inquiry:

- (1) *Seamlessness*—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.
- (2) *Accessibility*—to facilitate access to legal and other responses to family violence.
- (3) *Fairness*—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.
- (4) *Effectiveness*—to facilitate effective interventions and support in circumstances of family violence.
- (5) *Self-agency or autonomy*—to ensure that legal responses to family violence respect the individual’s right to make decisions about matters affecting him or her.
- (6) *Privacy*—to ensure that an individual’s sensitive personal information concerning fears for safety is obtained and handled in an appropriate way.
- (7) *System integrity*—to ensure that, where a benefit, or beneficial outcome, is included in relevant laws, any requirement to verify family violence is appropriate to the benefit sought.

## **Summary of recommendations**

### **Part A—Common Threads**

#### *Common interpretative framework*

As a foundational aspect of establishing a common interpretative framework, in Chapter 3 the ALRC recommends including in the Commonwealth laws under review the same core definition of family violence.

The ALRC considers that systemic benefits would flow from the adoption of a common interpretative framework across the specified legislative areas, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers. Importantly, it should also enhance consistency in the treatment of family violence across the legislative frameworks, reinforced by appropriate and regular training.

The common interpretative framework recommended in *Family Violence—A National Legal Response* is based on a core definition of family violence, describing the context in which behaviour takes place, as well as the types of conduct—both physical and

non-physical—that may fall within the definition of family violence. The context, set out in the first part of the definition, is violent, threatening or other behaviour that coerces or controls a family member or causes that family member to be fearful. The second part of the definition provides a non-exhaustive list of the types of behaviour that may constitute family violence.

### ***Disclosure and issues management***

There are a number of tools and methods that may be used to identify family violence-related safety concerns. The ALRC recommends—in Chapter 4—that Department of Human Services (DHS) staff providing customer services should facilitate the disclosure of family violence-related safety concerns by providing information about how family violence may be relevant to a person’s social security, child support and family assistance case, at the point of registration and at subsequent intervention points.

The identification of family violence-related safety concerns should result in an appropriate issues management response, which may include referral to a Centrelink social worker or other expert service providers. To assist with this, and to reduce the need for a customer to re-disclose, the ALRC recommends that DHS should consider developing and implementing a ‘safety concern’ flag to be placed on a customer’s file where family violence-related safety concerns are identified. This flag should be available to relevant agencies subject to informed consent of the customer and with appropriate privacy safeguards.

## **Part B—Social Security**

### ***Underlying concepts***

The Australian social security system is based on four key principles, that:

1. it is based on need—measured by reference to the income and assets of the applicant;
2. it is fair and reasonable to expect unemployed people receiving income support to do their best to find work, undertake activities that will improve their skills and increase their employment prospects and, in some circumstances, contribute something to their community in return for receiving social security payments and entitlements;
3. relationship status determines eligibility and rates of payment—that a person who is a member of a couple receives a lower social security payment than one who is single; and
4. residence is a requirement to preserve social security benefits for those settled in the Australian community.

### ***A need for transparency***

To ensure fairness in the administration of the social security system and to provide a level of self-agency, greater transparency and consistency is required in relation to the information a person can rely on to support a claim of family violence. The ALRC

therefore recommends—in Chapter 5—that a broad range of types of information should be available for this purpose. Finally, the ALRC recommends defined ‘intervention points’ at which Centrelink should promote the disclosure of family violence.

The ALRC recommends that Centrelink procedures should be included in social security legislation or the *Guide to Social Security Law*, rather than Centrelink’s e-reference, which is not publicly available. This will make the procedures more transparent and accessible.

### ***Impact of family violence on relationships***

The ALRC considers that relationships are inherently difficult to define, but recognises that the effect of family violence may not always be considered appropriately in relationship decisions in the social security context. The ALRC therefore makes a number of recommendations—in Chapter 6—to ensure that the impacts of family violence are expressly considered in relationship decisions in social security law through amendments to the *Social Security Act 1991* (Cth) and the *Guide to Social Security Law*.

### ***Proof of identity and residence***

Family violence is relevant to proof of identity and residence requirements attached to certain social security payments. The requirement to provide original proof of identity documents and tax file numbers can create a barrier for persons experiencing family violence to obtain access to social security payments and entitlements. Similarly, residence requirements may mean that certain visa holders or newly arrived residents are unable to access independent financial assistance through the social security system and therefore may not have adequate financial support to enable them to leave a violent relationship. The ALRC considers—in Chapter 7—how these requirements in social security law and practice can be improved to protect the safety of victims of family violence.

### ***Determining capacity to work***

To qualify and remain qualified for social security payments that are available for job seekers, the job seeker must satisfy activity and participation requirements outlined in an Employment Pathway Plan (EPP). The ALRC makes recommendations—in Chapter 8—to improve the administration and content of the tools and processes used to determine a job seeker’s capacity to work, in order to protect the safety of victims of family violence.

The chapter also examines ways in which Job Services Australia (JSA)—the national employment services system—Disability Employment Services (DES) and the Indigenous Employment Program (IEP) systems respond to the needs of job seekers experiencing family violence. The ALRC recommends that the Department of Education, Employment and Workplace Relations (DEEWR), as contractor of JSA, DES and IEP providers, should ensure that providers appropriately and adequately consider the existence of family violence when tailoring service responses.

The ALRC also makes a number of recommendations to ensure that a person's experience of family violence is adequately considered in:

- the negotiation and revision of requirements for activity-tested social security payments; and
- the granting of exemptions from such requirements.

### **Payments**

In Chapter 9 the ALRC considers a number of barriers to accessing Crisis Payment and urgent payments and makes recommendations to overcome them to provide better protection for victims of family violence. The recommendations include removing the requirement for Crisis Payment that either the victim or the person using family violence must have left the 'home'.

The ALRC also recommends amending the *Social Security Act 1991* (Cth) to ensure that family violence can be taken into consideration in decisions to waive the repayment of a social security debt—for example, where the debt was incurred due to economic abuse or duress by a family member.

### **Part C—Income Management**

'Income management' is an arrangement under the *Social Security (Administration) Act 1999* (Cth) by which a proportion of a person's social security and family payments is quarantined to be spent only on particular goods and services, such as food, housing, clothing, education and health care. The aim, as indicated by the Department of Families, Housing, Community Services and Indigenous Affairs, is to ensure that 'income support payments are spent in the best interests of children and families and helps ease immediate financial stress'.<sup>4</sup>

In Chapter 10 the ALRC identifies three broad issues that arise in relation to the ways in which income management affects victims of family violence:

- the appropriateness of compulsory income management to victims of family violence;
- applying voluntary income management to victims of family violence; and
- practical issues that victims of family violence face in accessing necessary funds.

The chapter recommends the introduction of a flexible and voluntary form of income management—an 'opt-in and opt-out' model—to better protect the safety of people experiencing family violence.

Following discussion of compulsory and voluntary income management, the ALRC examines practical issues arising in relation to accessing income managed funds. The

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4 FaHCSIA, *Better Futures, Local Solutions: place-based income management* (2011) <[www.fahcsia.gov.au/sa/families/progserv/welfarereform/pages/place\\_based\\_income\\_mgt.aspx](http://www.fahcsia.gov.au/sa/families/progserv/welfarereform/pages/place_based_income_mgt.aspx)> at 25 November 2011.

ALRC considers that to reflect the underlying principles of accessibility and self-agency articulated in Chapter 2 of the Report, at the very minimum it is necessary to ensure that victims of family violence are able to access and control their income management account—whether through a BasicsCard, voucher or other form of payment or credit. In particular, the limited definition of ‘priority needs’ is contrary to these principles and poses particular difficulties for victims of family violence. The ALRC therefore recommends that the Australian Government should amend the definition of ‘priority needs’ in s 123TH of the *Social Security (Administration) Act 1999* to include travel or other crisis needs for people experiencing family violence. In light of difficulties with the income management account system and BasicsCards, the ALRC also suggests that the Government should review the existence and operation of these in the course of any introduction of an opt-in and opt-out income management model.

## **Part D—Child Support and Family Assistance**

### ***Issues management***

Chapter 13 discusses the major point of intersection between the child support and family assistance legislative schemes: the ‘reasonable maintenance action’ requirement. To receive more than the minimum rate of Family Tax Benefit (FTB) Part A, eligible parents must be in receipt of child support. Family assistance policy recognises that this requirement may affect victims of family violence, and the *Family Assistance Guide* provides for exemptions.

Family violence exemptions are a key protective strategy for victims of family violence in both child support and family assistance contexts. Exemptions enable victims to opt out of obtaining child support payments—where this would place them at risk—without a consequent reduction to their FTB Part A payments. Due to this significant protective role, the ALRC recommends that exemptions should be set out in family assistance legislation.

Another focus of Chapter 13 is the accessibility of exemptions for victims who require them. This chapter recommends that further information about exemptions should be contained in the *Family Assistance Guide*. It is envisaged that the reforms contained in this chapter will operate in conjunction with those in Chapter 4—regarding identifying family violence-related safety concerns (for example, by screening), providing information, and training—to improve accessibility.

### ***Family Assistance***

The current framework for family assistance comprises a range of payments and is primarily governed by two statutes: *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth). Chapter 14 discusses the family assistance framework and the ways that it addresses family violence, focusing on the two primary family assistance payments—Family Tax Benefit (FTB) and Child Care Benefit (CCB).

The safety of family violence victims who are family assistance applicants or recipients should be improved by the reforms in Chapter 4 that are targeted at legal

frameworks—primarily family assistance, social security and child support. Chapter 14 recommends further reforms specifically targeted at family assistance law and policy, particularly in relation to CCB—to improve access to increased CCB in cases of family violence (including child abuse), by lowering the eligibility threshold where children are at risk of abuse.

## **Part E—Employment Law**

### ***A national and phased approach***

Family violence is not simply a private or individual issue, but rather a systemic one arising from wider social, economic and cultural factors. Accordingly, effective measures to address family violence need to operate in both the private and public spheres. This is particularly so in the context of employment, as the line between private and public—or family life and work—is increasingly unclear. As one stakeholder in this Inquiry commented during a consultation, ‘workplaces are becoming our new communities and therefore they must be a place for change’.<sup>5</sup>

Chapter 15 examines the intersections between family violence and Commonwealth employment law and, together with Chapters 16–18, recommends reforms to employment-related legislative, regulatory and administrative frameworks to improve the safety of people experiencing family violence. The ALRC suggests a phased implementation of the reforms outlined in Chapters 15–18 as follows:

- Phase One—coordinated whole-of-government national education and awareness campaign; research and data collection; and implementation of government-focused recommendations.
- Phase Two—continued negotiation of family violence clauses in enterprise agreements and development of associated guidance material.
- Phase Three—consideration of family violence in the course of modern award reviews.
- Phase Four—consideration of family violence in the course of the Post-Implementation Review of the *Fair Work Act 2009* (Cth).
- Phase Five—review of the National Employment Standards (NES) with a view to making family violence-related amendments to the right to request flexible working arrangements and the inclusion of an entitlement to additional paid family violence leave.

### ***The Fair Work Act***

The *Fair Work Act* is the key piece of Commonwealth legislation regulating employment and workplace relations. It establishes a safety net comprising: the NES, modern awards and national minimum wage orders; and a compliance and enforcement regime. It also establishes an institutional framework for the administration of the

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5 CEO Challenge, *Consultation*, Brisbane, 11 October 2011.

system comprising Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO).

Chapter 16 focuses on potential reform of the Act, its institutions, and agreements and instruments made under the Act. The ALRC suggests ways in which these institutions and their processes may function to protect the safety of those experiencing family violence. In addition, Chapter 16 examines:

- family violence clauses in enterprise agreements—the ALRC concludes the Australian Government should support the inclusion of family violence clauses and recommends that the FWO should develop a guide to negotiating such clauses;
- individual flexibility arrangements in enterprise agreements—the ALRC considers the appropriateness of individual flexibility arrangements (IFAs) in circumstances where an employee is experiencing family violence and recommends that the FWO should include information on negotiating an IFA in such circumstances in existing guidance material;
- modern awards—the ALRC considers ways in which modern awards might incorporate family violence-related terms and suggests this should be considered in the course of the modern award reviews to be conducted by FWA in 2012 and 2014; and
- the general protections provisions under the *Fair Work Act*—the ALRC recommends that prior to the Australian Government considering inclusion of a family violence-related ground under the general protections provisions, the Australian Human Rights Commission (AHRC) should examine the possible inclusion of a family violence-related protected attribute under Commonwealth anti-discrimination law.

The NES came into effect from 1 January 2010 and enshrine ten minimum statutory entitlements for all national system employees. Chapter 17 considers possible amendments to the NES. Minimum statutory entitlements, such as those provided for under the NES, are important to ensuring fairness and consistency in access to the entitlements and, ideally, to consistent decision making and employer responses. As a result, as part of Phase Five of the ALRC's suggested strategy for phased implementation of reforms contained in Part E of this Report, the ALRC recommends that the Australian Government should consider amending the NES. In particular, the ALRC recommends that there should be consideration of: whether family violence should be included as a circumstance in which an employee should have a right to request flexible working arrangements; and whether additional paid family violence-related leave should be included as a minimum statutory entitlement under the NES.

### ***Occupational Health and Safety***

Occupational health and safety (OHS) laws are being harmonised across Australia, with a Model Act, Model Regulations and Model Codes of Practice forming the basis of the harmonised OHS regime from 1 January 2012. Chapter 18 examines ways in which the Commonwealth OHS system protects employees experiencing family

violence and, where it does not do so, how that might be addressed. In particular, the chapter examines: legislative duties of care; the nature and role of regulatory guidance; the importance of further consideration of family violence as a possible work health and safety issue, including research and data collection; as well as increased awareness, education and training around family violence and its impact as a possible work health and safety issue. The central premise underlying Chapter 18 is that, where family violence is a possible OHS issue, employees should be given the highest level of protection reasonably practicable, and employers should introduce measures to address family violence and create and sustain safe work environments.

Chapter 18 contains two main approaches to the issue of family violence as a possible work health and safety issue. First, under the Commonwealth OHS system, legislative and regulatory duties appear to be sufficiently broad to capture some circumstances in which family violence may affect an employee in the workplace. In these instances, in terms of employer obligations, the risk posed by family violence is analogous to the risk posed by other forms of workplace violence. As a result, lack of knowledge, rather than legislative inadequacies, represent the greatest challenge in such instances and so improving awareness and understanding of family violence as a possible OHS issue is the focus of reforms.

The ALRC makes a range of recommendations focused on: increasing awareness of family violence and its impact as a possible work health and safety issue; the incorporation of systems and policies into normal business practice to develop the capacity of employers and employees to effectively manage family violence as an OHS risk; and data collection mechanisms to establish an evidence base upon which to plan future policy directions in this area.

Secondly, in instances in which it is more difficult to establish that family violence would engage an employer's duty of care or be covered by existing OHS law, for example where it is more analogous to psychosocial hazards, the ALRC recommends that additional research be undertaken in this area. In particular, the ALRC recommends that Safe Work Australia should identify family violence as a research priority, examine the effect of the harmonised OHS regime on duties and obligations owed in relation to family violence as a possible OHS risk and consider ways to extent and improve data coverage, collection and analysis in this area.

## **Part F—Superannuation**

Superannuation, as a form of long-term saving for retirement, serves an important role and, for many Australians, is one of the most significant forms of wealth.<sup>6</sup> As Australia's population ages, successive governments have introduced measures to maintain and enhance superannuation savings, largely through compulsory superannuation membership and contribution and preferential tax treatment.

In Chapter 19 the ALRC examines ways in which the Australian superannuation system does, or could, respond to protect those people experiencing family violence. In

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6 Australian Government, *'Stronger Super': Government Response to the Super System Review* (2010), 3.

doing so, the ALRC makes a number of recommendations, but also acknowledges the specific role that superannuation plays as a long-term form of savings and recognises the policy tension between the need to preserve superannuation benefits until retirement and the need, in limited circumstances, to allow early access to superannuation funds.

The first part of Chapter 19 deals with circumstances in which a victim of family violence may have been coerced into taking action in respect of their superannuation and considers spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the context of a wider inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth). The ALRC also makes a number of suggestions with respect to compliance action taken in relation to SMSFs and recommends changes to guidance material with respect to establishing, managing and winding up a SMSF.

The second part of the chapter examines circumstances in which a victim of family violence may wish to seek early access to superannuation benefits, for example, for the purposes of leaving a violent relationship. In considering early release on the basis of severe financial hardship, the ALRC recommends amendments to the eligibility requirements for making an application and to guidance material for decision makers in granting early release. The ALRC also considers early release of superannuation on compassionate grounds and makes recommendations in relation to guidance material and training for decision makers.

## **Part G—Migration**

The policy challenge in the area of migration is to ensure accessibility to the family violence provisions for genuine victims of family violence while preserving the integrity of the visa system, given that attaining permanent residency in Australia is highly sought after.

### ***Permanent visa pathways***

Partner visas form part of Australia's family migration stream, allowing non-citizens to enter and remain in Australia on the basis of their spouse or de facto relationship (both opposite and same-sex) with an Australian citizen or permanent resident. All applicants for a partner visa must be sponsored by an Australian citizen or permanent resident. The *Migration Regulations 1994* (Cth) include an exception in the case of family violence, which provides for the grant of permanent residence notwithstanding the breakdown of the spouse or de facto relationship on which their migration status depends. In Chapter 20 the ALRC makes recommendations to improve the accessibility of the family violence exception for victims—in particular, to expand the exception to cover secondary applicants for onshore permanent visas.

A non-citizen who wishes to enter Australia for the purpose of marrying an Australian sponsor can apply for a Prospective Marriage visa (Subclass 300), that allows for entry into Australia for a nine-month period, within which the marriage must take place. After the marriage, an application can be made for permanent residence on the basis of

the married relationship. The ALRC recommends that holders of a Prospective Marriage (Subclass 300) visa who have experienced family violence but who have not married their Australian sponsor should also have access to the family violence exception.

The ALRC also recommends targeted education and training for visa decision makers, competent persons and independent experts, as well as better information dissemination for prospective visa applicants and visa holders in relation to legal rights, and family violence support services, prior to and upon arrival in Australia.

### ***Evidence***

Chapter 21 focuses upon the evidence required to support a claim under the family violence exception, in light of the clear policy tension between the principles of accessibility and system integrity. If evidentiary requirements are too strict and rigid, it may prevent access to the family violence exception for genuine victims. On the other hand, if evidentiary requirements are not sufficiently robust, there is scope for fraudulent claims or other abuse of the family violence exception for migration outcomes. This was an area identified by stakeholders as being in need of substantial reform.

The ALRC recommends a new model for dealing with non-judicially determined claims of family violence. The key recommendation is for the *Migration Regulations* to be amended to provide that any evidence—in addition or as an alternative to statutory declaration from ‘competent persons’—can validly support a non-judicially determined claim of family violence. In addition, the ALRC recommends that the prescriptive requirements governing statutory declaration forms from competent persons in reg 1.26 should be repealed, allowing applicants to bring a wide range of evidence in support of their family violence claim. Where the visa decision maker is not satisfied that an applicant has suffered family violence, referral can be made to an independent expert within the Department of Human Services (Centrelink).

Such a system will increase accessibility and flexibility to victims of family violence while maintaining the need for robust scrutiny of evidence. In particular, integrity measures are reinforced through building on moves towards specialisation within the Department of Immigration and Citizenship (DIAC) and retaining the mechanism for referral to an independent expert.

The area of judicially-determined claims of family violence has proven less problematic in practice. Here, the ALRC recommends the repeal of the requirement contained in reg 1.23 of the *Migration Regulations* that the violence, or part of the violence, must have occurred while the relationship was in existence.

### ***Partners of temporary visa holders***

A number of temporary or provisional visas provide a pathway to permanent residency—that is, to be eligible for a permanent visa, a person must have previously held a temporary or provisional visa. For secondary visa holders of temporary visas, the ALRC recommends—in Chapter 20—that a new temporary visa be created to allow victims of family violence to remain in Australia for a period of time to access

services and make arrangements to return to their country of origin or to apply for another visa.

### ***Refugee law***

Australia is a signatory to the United Nations *Convention Relating to the Status of Refugees* (the Refugees Convention), the key international instrument that regulates the obligations of states to protect refugees fleeing from persecution. Chapter 22 considers the position of asylum seekers who seek protection in Australia as refugees on the basis of having experienced family violence. While family violence claims can fall under the definition of a refugee as contained in the Refugees Convention, this remains a complex area of the law marked by inconsistent decision making.

The ALRC recommends that the Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) in relation to family violence in refugee assessment determinations. Such a direction should refer to guidance material on family violence contained in DIAC's *Gender Guidelines*.<sup>7</sup> The ALRC further recommends that the *Gender Guidelines* should be the subject of ongoing, comprehensive and periodic review.

The ALRC recommends that DIAC amend its instruction, *Ministerial Powers—Minister's Guidelines—s 48A cases and requests for intervention under s 48B*, in the *Procedures Advice Manual 3* to refer to secondary visa applicants who are the victims of family violence.

These recommendations are intended to improve consistency in decision making, and to ensure that procedures allow for, and support victims in, making family violence claims under the Refugees Convention.

### **Net effect of the recommendations**

The net effect of the recommendations will be that:

- consistency in understanding and application of the law in the areas under review will be fostered by consistency of definitions, underpinned by education, training and awareness, including in service delivery areas;
- those experiencing family violence will have greater self-agency by being provided information about access to services and pathways to particular benefits or supports in the areas under review;
- there will be more appropriate identification of, and responses to, the disclosure of family violence in a range of contexts;
- decision makers will be better trained and have access to material that reflects the nature, features and dynamics of family violence leading to a greater consistency and fairness in decision making; and

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<sup>7</sup> Department of Immigration and Citizenship, *Procedures Advice Manual 3, Gender Guidelines: Assessing Gender-Related Claims* (2010).

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- ultimately, the safety—physical, economic and financial—of people experiencing family violence will be improved.

As noted at the outset, the referral of this Inquiry to the ALRC is part of the Australian Government’s goal ‘to reduce all violence in our communities’. To meet the challenges of such a goal requires enormous co-operation, trust, respect, patience, commitment—and leadership. In this Inquiry, the ALRC has undertaken consultations nationwide and received over 160 submissions from a wide range of stakeholders.

The expectations of the work of the ALRC through now two major family violence inquiries—and that of the Australian, state and territory governments in response—are also considerable.



# Recommendations

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## 3. Common Interpretative Framework

**Recommendation 3—1** The Australian Government should amend the following legislation to include a consistent definition of family violence:

- (a) *Social Security Act 1991* (Cth);
- (b) *Social Security (Administration Act) 1999* (Cth);
- (c) *Child Support (Assessment) Act 1989* (Cth);
- (d) *Child Support (Registration and Collection) Act 1988* (Cth);
- (e) *A New Tax System (Family Assistance) Act 1999* (Cth);
- (f) *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth); and
- (g) *Migration Regulations 1994* (Cth).

**Recommendation 3—2** For the purposes of Recommendation 3–1, ‘family violence’ should be defined by reference to:

- (a) a core definition of conduct that is violent, threatening, coercive or controlling, or intended to cause the family member to be fearful; and
- (b) a non-exhaustive list of examples of physical and non-physical conduct.

**Recommendation 3—3** The following guidelines and material should provide for a consistent definition of family violence as proposed in Recommendation 3–2:

- (a) Department of Education, Employment and Workplace Relations and Job Services Australia Guidelines, Advices and Job Aids;
- (b) Fair Work Australia material;
- (c) Fair Work Ombudsman material;
- (d) Safe Work Australia Codes of Practice and other material; and
- (e) other similar material.

**Recommendation 3—4** Where relevant and appropriate, all Australian Prudential Regulation Authority, Department of Human Services, Australian Taxation Office and superannuation fund material, should provide for a consistent definition of family violence as set out in Recommendation 3–2.

#### **4. Disclosure and Issues Management**

**Recommendation 4—1** The *Child Support Guide*, *Family Assistance Guide* and the *Guide to Social Security Law* should indicate that staff providing customer services, including Centrelink social workers, Indigenous Service Officers, and Multicultural Service Officers should identify family violence-related safety concerns through screening, risk identification, or other methods. Identification of such concerns should occur at, or immediately following, the application process, and at defined intervention points (including as set out in Recommendations 12–1 and 12–3).

**Recommendation 4—2** The Department of Human Services should provide information to customers about how family violence may be relevant to their child support, family assistance and social security matters. This should be provided in a variety of formats and should include relevant information about:

- (a) exemptions;
- (b) entitlements;
- (c) privacy and information protection;
- (d) support and services provided by the Child Support Agency, the Family Assistance Office and Centrelink;
- (e) referrals to Centrelink social workers and expert service providers; and
- (f) income management.

**Recommendation 4—3** The *Child Support Guide*, the *Family Assistance Guide*, and the *Guide to Social Security Law* should provide that, when family violence-related safety concerns are identified, the Department of Human Services staff providing customer services must refer the customer to a Centrelink social worker or other expert service providers.

**Recommendation 4—4** The Department of Human Services should consider developing and implementing a ‘safety concern flag’:

- (a) to be placed on a customer’s file when family violence-related safety concerns are identified;
- (b) to be shared between relevant Department of Human Services programs and other relevant departments or agencies, with a customer’s informed consent; and
- (c) with privacy safeguards.

**Recommendation 4—5** The Department of Human Services should ensure that staff providing customer services, including Centrelink social workers, Indigenous Service Officers, and Multicultural Service Officers receive consistent, regular and targeted training about:

- (a) advising customers on the impact of family violence on their case or claim;
- (b) responding to disclosures of family violence-related safety concerns, including by referrals to Centrelink social workers and other expert service providers; and

- (c) the nature, features and dynamics of family violence including the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse background; those from lesbian, gay, bisexual, trans and intersex communities; older persons; and people with disability.

## 5. Social Security—Overview and Overarching Issues

**Recommendation 5—1** The *Guide to Social Security Law* should include:

- (a) the definition of family violence in Recommendation 3–2; and
- (b) information on the nature, features and dynamics of family violence including the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse background; those from the lesbian, gay, bisexual, trans and intersex communities; older persons; and people with disability.

**Recommendation 5—2** Centrelink customer service advisers and social workers should receive consistent, regular and targeted training to ensure that the existence of family violence is appropriately and adequately considered at relevant times.

**Recommendation 5—3** Social Security Appeals Tribunal and Administrative Appeals Tribunal members should receive consistent, regular and targeted training to ensure that the existence of family violence is appropriately and adequately considered at relevant times.

**Recommendation 5—4** The *Guide to Social Security Law* should provide:

- (a) that a range of forms of information may be used to support a claim of family violence;
- (b) guidance as to assessing the weight to be given to different types of information provided to support a claim of family violence, in the context of a particular entitlement or benefit sought; and
- (c) that, where a person claims that he or she is experiencing family violence, it is not appropriate to seek verification of that claim from the person alleged to be using family violence.

## 6. Social Security—Relationships

**Recommendation 6—1** The *Guide to Social Security Law* should suggest the ways in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

**Recommendation 6—2** The *Guide to Social Security Law* should include family violence as a circumstance where a person may be living separately and apart under one roof.

**Recommendation 6—3** The *Guide to Social Security Law* should direct decision makers expressly to consider family violence as a circumstance that may amount to a ‘special reason’ under s 24 of the *Social Security Act 1991* (Cth).

**Recommendation 6—4** The *Social Security Act 1991* (Cth) provides that, a person is independent if the person cannot live at the home of either or both of his or her parents:

- (i) because of extreme family breakdown or other similar exceptional circumstances; or
- (ii) 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.

The Australian Government should amend ss 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) of the *Social Security Act 1991* (Cth):

- expressly to take into account circumstances where there has been, or there is a risk of, family violence, child abuse or neglect; and
- to remove the requirement for the decision maker to be satisfied of ‘a serious risk to the person’s physical or mental well-being’.

**Recommendation 6—5** The *Guide to Social Security Law* should expressly to refer to family violence, child abuse and neglect as a circumstance in which it may be ‘unreasonable to live at home’ under the provisions of ‘extreme family breakdown’—*Social Security Act 1991* (Cth) ss 1067A(9)(a)(i), 1061PL(7)(a)(i); and ‘serious risk to physical or mental well-being’—*Social Security Act 1991* (Cth) ss 1067A(9)(a)(ii), 1061PL(7)(a)(ii).

**Recommendation 6—6** The Department of Education, Employment and Workplace Relations and Centrelink should review their policies, practices and training, including consideration of the information gathering powers under s 192 of the *Social Security Act 1991* (Cth) to ensure that, in cases of family violence, applicants for Youth Allowance, Disability Support Pension and Pensioner Education Supplement, do not have sole responsibility for providing specific information about the:

- (a) financial circumstances of their parent or guardian; and
- (b) level of ‘continuous support’ available to them.

## **7. Social Security—Proof of Identity and Residence Requirements**

**Recommendation 7—1** The *Guide to Social Security Law* should include family violence as a reason for an exemption—including the possibility of an indefinite exemption—from the requirement to provide a partner’s tax file number.

**Recommendation 7—2** Recommendation 20–3 provides that the Australian Government should create a new temporary visa to allow victims of family violence who are secondary holders of a temporary visa to make arrangements to leave Australia or to apply for another visa.

If such an amendment is made, the Minister for Families, Housing, Community Services and Indigenous Affairs should make a determination under ss 729(2)(f)(v) and 739A(3)(b) of the *Social Security Act 1991* (Cth) including this visa as a 'specified subclass of visa' that:

- (a) meets the residence requirements for Special Benefit; and
- (b) is exempted from the Newly Arrived Resident's Waiting Period for Special Benefit.

**Recommendation 7—3** Under s 729 of the *Social Security Act 1991* (Cth), Special Benefit is a discretionary benefit available to a person who is not able to obtain any other income support payment. The Australian Government should consider amending the *Social Security Act 1991* (Cth) to enable non-protected Special Category Visa holders to access Special Benefit.

**Recommendation 7—4** The *Social Security Act 1991* (Cth) provides that the Newly Arrived Resident's Waiting Period does not apply to Special Benefit if the person has suffered a 'substantial change in circumstances beyond his or her control'. The *Guide to Social Security Law* should include family violence as a specific example of a 'substantial change in circumstances' for the Newly Arrived Resident's Waiting Period for Special Benefit for both sponsored and non-sponsored newly arrived residents.

## 8. Social Security—Determining Capacity to Work

**Recommendation 8—1** As far as possible, or at the request of the job seeker, all Job Seeker Classification Instrument interviews should be conducted:

- (a) in person;
- (b) in private; and
- (c) in the presence of only the interviewer and the job seeker.

**Recommendation 8—2** Centrelink customer service advisers should receive consistent, regular and targeted training in the administration of the Job Seeker Classification Instrument, including training in relation to:

- (a) the potential impact of family violence on a job seeker's capacity to work and barriers to employment, for the purposes of income support; and
- (b) the availability of support services.

**Recommendation 8—3** The Department of Education, Employment and Workplace Relations should amend the Job Seeker Classification Instrument to include 'family violence' as a new and separate category of information.

**Recommendation 8—4** The Department of Human Services should conduct a review of the Employment Services Assessment with a particular focus on the impact of the assessment on job seekers experiencing family violence.

**Recommendation 8—5** The Department of Human Services should provide Employment Services Assessment and Job Capacity Assessment assessors with consistent, regular and targeted training to ensure that the existence of family violence is appropriately and adequately considered.

**Recommendation 8—6** Job Services Australia, Disability Employment Services and Indigenous Employment Program providers are currently contracted by the Department of Education, Employment and Workplace Relations under Employment Services Deeds and Indigenous Employment Program contracts, respectively. The Department of Education, Employment and Workplace Relations should include a requirement in such Deeds and contracts, that providers should appropriately and adequately consider the existence of family violence when tailoring service responses to individual job seeker needs.

**Recommendation 8—7** The Department of Education, Employment and Workplace Relations should require that all Job Services Australia, Disability Employment Services and Indigenous Employment Program staff receive regular, consistent and targeted training in relation to:

- (a) the nature, features and dynamics of family violence, including its impact on particular job seekers such as Indigenous peoples; those from culturally and linguistically diverse backgrounds; those from lesbian, gay, bisexual, trans and intersex communities; older persons and people with disability.
- (b) the potential impact of family violence on a job seeker’s capacity to work and barriers to employment;
- (c) appropriate referral processes; and
- (d) the availability of support services.

**Recommendation 8—8** The circumstances in which a job seeker can change Job Services Australia or Disability Employment Services providers should be extended to circumstances where a job seeker who is experiencing family violence is registered with the same Job Services Australia or Disability Employment Services provider as the person using family violence.

**Recommendation 8—9** The Department of Education, Employment and Workplace Relations should ensure that Job Services Australia and Disability Employment Services staff identify family violence-related safety concerns through screening, risk identification or other methods at defined intervention points.

**Recommendation 8—10** The Department Education, Employment and Workplace Relations, the Department of Human Services and Centrelink should consider issues, including appropriate privacy safeguards, with respect to the personal information of individual job seekers who have disclosed family violence in the context of their information-sharing arrangements.

**Recommendation 8—11** The *Guide to Social Security Law* should direct Centrelink customer service advisers expressly to consider family violence when tailoring a job seeker’s Employment Pathway Plan.

**Recommendation 8—12** Exemptions from activity tests, participation requirements and Employment Pathway Plans are available for a maximum of 13 or 16 weeks. There are concerns that exemption periods granted to victims of family violence are not long enough. The Department of Education, Employment and Workplace Relations should review exemption periods to ensure a long enough time for victims of family violence.

**Recommendation 8—13** The Department of Education, Employment and Workplace Relations should review the classes of persons who can have an Unemployment Non-Payment Period ended under the *Social Security (Administration) (Ending Unemployment Non-payment Periods—Classes of Persons) (DEEWR) Specification 1990 (No 1)* to ensure it is sufficiently broad to capture victims of family violence.

**Recommendation 8—14** The *Guide to Social Security Law* should expressly refer to family violence as a ‘reasonable excuse’ for the purposes of activity tests, participation requirements, Employment Pathway Plans and other administrative requirements.

## **9. Social Security—Crisis Payment, Methods of Payment and Overpayment**

**Recommendation 9—1** The Australian Government should consider amending the *Social Security Act 1991* (Cth) to enable Crisis Payment to be available to those in financial hardship without the additional need to be on, or eligible for, income support.

**Recommendation 9—2** Crisis Payment for family violence is only available where either the victim of family violence leaves the home or the person using family violence is removed from, or leaves, the home. The Australian Government should amend that *Social Security Act 1991* (Cth) to provide Crisis Payment to any person suffering severe financial hardship who is ‘subject to’ or ‘experiencing’ family violence.

**Recommendation 9—3** The *Social Security Act 1991* (Cth) establishes a seven day claim period for Crisis Payment. There are concerns that the claim period is not long enough for victims of family violence. The Australian Government should review the claim period, and the point at which the claiming period begins, to ensure a long enough claim period for victims of family violence.

**Recommendation 9—4** The *Guide to Social Security Law* provides that an urgent payment of a person’s social security payment may be made in ‘exceptional and unforeseen’ circumstances. In some circumstances, urgent payments may not be made because the family violence was ‘foreseeable’. The *Guide to Social Security Law* should refer expressly to family violence as a circumstance when urgent payments may be sought.

**Recommendation 9—5** The *Guide to Social Security Law* should clarify that urgent and advance payments may be made in circumstances of family violence in addition to Crisis Payment.

**Recommendation 9—6** The *Guide to Social Security Law* should provide that, where a delegate is determining a person’s ‘capability to consent’ to a nominee arrangement, the effect of family violence is also considered in relation to the person’s capability.

**Recommendation 9—7** Section 1237AAD of the *Social Security Act 1991* (Cth) provides that the Secretary of Families, Housing, Community Services and Indigenous Affairs may waive the right to recover all or part of a debt where:

- (a) special circumstances exist; and
- (b) the debtor or another person did not ‘knowingly’ make a false statement or ‘knowingly’ omit to comply with the *Social Security Act*.

The Australian Government should amend s 1237AAD to provide that the Secretary may waive the right to recover all or part of a debt, if satisfied that the debt did not result wholly or partly from the debtor, or another person acting as a nominee for the debtor, knowingly:

- making a false statement or a false representation; or
- failing or omitting to comply with a provision of the *Social Security Act*, the *Social Security (Administration) Act 1999* (Cth) or the *Social Security Act 1947* (Cth).

**Recommendation 9—8** The *Guide to Social Security Law* should refer to examples of family violence through duress and coercion as not constituting knowledge on the part of the debtor.

**Recommendation 9—9** The *Guide to Social Security Law* should refer to family violence as a ‘special circumstance’ for the purposes of s 1237AAD of the *Social Security Act 1991* (Cth).

## **10. Income Management—Social Security Law**

**Recommendation 10—1** The Australian Government should amend the *Social Security (Administration) Act 1999* (Cth) to ensure that a person or persons experiencing family violence are not subject to Compulsory Income Management. The *Guide to Social Security Law* should reflect this amendment.

**Recommendation 10—2** The Australian Government should amend the *Social Security (Administration) Act 1999* (Cth) to create an ‘opt-in and opt-out’ income management model that is voluntary and flexible to meet the needs of people experiencing family violence. The *Guide to Social Security Law* should reflect this amendment.

**Recommendation 10—3** ‘Priority needs’, for the purposes of s 123TH of the *Social Security (Administration) Act 1999* (Cth) are goods and services that a welfare recipient is not excluded from purchasing. The Australian Government should amend the definition of ‘priority needs’ in s 123TH to include travel or other crisis needs for people experiencing family violence. The *Guide to Social Security Law* should reflect this amendment.

## 11. Child Support Frameworks

**Recommendation 11—1** The *Child Support Guide* should include:

- (a) the definition of family violence in Recommendation 3–2; and
- (b) information about the nature, features and dynamics of family violence including the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse background; those from the lesbian, gay, bisexual, trans and intersex communities; older persons; and people with disability.

## 12. Child Support—Issues Management and Informal Carers

**Recommendation 12—1** The *Child Support Guide* should provide that the Child Support Agency should identify family violence-related safety concerns through screening, ‘risk identification’ or other methods, when a payee:

- (a) requests or elects to end a child support assessment; or
- (b) elects to end Child Support Agency collection of child support and/or arrears.

**Recommendation 12—2** The *Child Support Guide* should provide that the Child Support Agency should refer a payee who has disclosed family violence, including a payee who receives no, or no more than, the base rate of Family Tax Benefit Part A, to a Centrelink social worker or expert service provider when he or she:

- (a) requests or elects to end a child support assessment;
- (b) elects to end Child Support Agency collection of child support; or
- (c) requests that the Child Support Agency terminate, or not commence, enforcement action or departure prohibition orders.

**Recommendation 12—3** The *Child Support Guide* should provide that the Child Support Agency should contact a customer to identify family violence-related safety concerns through screening, ‘risk identification’ or other methods, prior to initiating significant action against the other party, including:

- (a) change of assessments (‘departure determinations’ under the *Child Support (Assessment) Act 1989* (Cth));
- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

**Recommendation 12—4** The *Child Support Guide* should provide that, where a customer has disclosed family violence, the Child Support Agency should consult with the customer regarding his or her safety concerns, prior to initiating significant action against the other party, including:

- (a) change of assessments (‘departure determinations’ under the *Child Support (Assessment) Act 1989* (Cth));
- (b) court actions to recover child support debt; and

(c) departure prohibition orders.

**Recommendation 12—5** The *Child Support Guide* should provide that the Child Support Agency should identify family violence-related safety concerns through screening, ‘risk identification’ or other methods, prior to requiring a payee to collect privately pursuant to s 38B of the *Child Support (Registration and Collection) Act 1988* (Cth).

**Recommendation 12—6** Section 7B(2)–(3) of the *Child Support (Assessment) Act 1989* (Cth) limits child support eligibility to parents and legal guardians, except in certain circumstances. The Australian Government should consider repealing s 7B(2)–(3) of the *Child Support (Assessment) Act 1989* (Cth).

**Recommendation 12—7** The *Child Support (Assessment) Act 1989* (Cth) provides that, where a parent or legal guardian of a child does not consent to a person caring for that child, the person is ineligible for child support, unless the Registrar is satisfied of ‘extreme family breakdown’ (s 7B(3)(a)); or ‘serious risk to the child’s physical or mental wellbeing from violence or sexual abuse’ in the parent or legal guardian’s home (s 7B(3)(b)). The Australian Government should amend s 7B(3)(b) of the *Child Support (Assessment) Act 1989* (Cth) to:

- (a) expressly take into account circumstances where there has been, or there is a risk of, family violence, child abuse and neglect; and
- (b) remove the requirement for the Registrar to be satisfied of ‘a serious risk to the child’s physical or mental wellbeing’.

### **13. Child Support and Family Assistance—Reasonable Maintenance Action Exemptions**

**Recommendation 13—1** Exemption policy in relation to the requirement to take ‘reasonable maintenance action’ is included in the *Family Assistance Guide* and the *Child Support Guide*, and not in legislation. The Australian Government should amend *A New Tax System (Family Assistance) Act 1999* (Cth) to provide that a person who receives more than the base rate of Family Tax Benefit Part A may be exempted from the requirement to take ‘reasonable maintenance action’.

**Recommendation 13—2** The *Family Assistance Guide* should expressly include ‘family violence’ and ‘fear of family violence’ as grounds for an exemption from the ‘reasonable maintenance action’ requirement.

**Recommendation 13—3** The *Family Assistance Guide* provides limited information about reviews of exemptions from the ‘reasonable maintenance action’ requirement, and about the duration of exemptions granted on grounds of violence or fear of violence. The *Family Assistance Guide* should provide additional information regarding the:

- (a) the exemption review process; and
- (b) the duration of exemptions granted on family violence grounds.

## 14. Family Assistance

**Recommendation 14—1** The *Family Assistance Guide* should include:

- (a) the definition of family violence in Recommendation 3–2; and
- (b) information about the nature, features and dynamics of family violence including the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse background; those from the lesbian, gay, bisexual, trans and intersex communities; older persons; and people with disability.

**Recommendation 14—2** The *Family Assistance Guide* should expressly include ‘family violence’ as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

**Recommendation 14—3** A *New Tax System (Family Assistance) Act 1999* (Cth) provides that increases in weekly Child Care Benefit hours and higher rates of Child Care Benefit are payable when a child is at risk of ‘serious abuse or neglect’. The Australian Government should amend *A New Tax System (Family Assistance) Act 1999* (Cth) to omit the word ‘serious’, so that such increases to Child Care Benefit are payable when a child is at risk of abuse or neglect.

**Recommendation 14—4** The *Family Assistance Guide* should provide a definition of ‘abuse’.

## 15. Employment Law—Overarching Issues and a National Approach

**Recommendation 15—1** The Australian Government should initiate a coordinated and whole-of-government national education and awareness campaign about family violence and its impact in the employment context.

**Recommendation 15—2** There is a need to safeguard the personal information of employees who have disclosed family violence in the employment context. The Office of the Australian Information Commissioner and the Fair Work Ombudsman, in consultation with unions and employer organisations, should develop or revise guidance materials with respect to privacy obligations arising in relation to the disclosure of family violence in an employment context.

**Recommendation 15—3** The General Manager of Fair Work Australia, in conducting the review and research required under s 653 of the *Fair Work Act 2009* (Cth), should consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:

- (a) enterprise agreements; and
- (b) individual flexibility arrangements.

**Recommendation 15—4** The Department of Education, Employment and Workplace Relations maintains the Workplace Agreements Database which contains information on federal enterprise agreements that have been lodged with, or approved by, Fair Work Australia. The Department of Education, Employment and Workplace Relations should collect data on the incidence of family violence-related clauses and references in enterprise agreements and include it as part of the Workplace Agreements Database.

**Recommendation 15—5** The Australian Government should support research, monitoring and evaluation of family violence-related developments in the employment law sphere, for example by bodies such as the Australian Domestic and Family Violence Clearinghouse.

#### **16. *Fair Work Act 2009* (Cth)**

**Recommendation 16—1** The Australian Government should consider family violence-related amendments to the *Fair Work Act 2009* (Cth) in the course of the 2012 Post-Implementation Review of the Act.

**Recommendation 16—2** Fair Work Australia should review its processes, and members and other relevant personnel should be provided with consistent, regular and targeted training to ensure that the existence of family violence is appropriately and adequately considered at relevant times.

**Recommendation 16—3** The Fair Work Ombudsman, in consultation with unions and employer organisations, should include information in Best Practice Guides with respect to negotiating individual flexibility arrangements in circumstances where an employee is experiencing family violence.

**Recommendation 16—4** The Australian Government should support the inclusion of family violence clauses in enterprise agreements. At a minimum, agreements should:

- (a) include a statement outlining when and what type of verification of family violence may be required;
- (b) ensure the confidentiality of personal information supplied;
- (c) establish lines of communication for employees;
- (d) set out relevant roles and responsibilities of employers and employees;
- (e) provide for flexible working arrangements; and
- (f) provide access to paid leave.

**Recommendation 16—5** The Fair Work Ombudsman should develop a guide to negotiating family violence clauses in enterprise agreements, in conjunction with the Australian Domestic and Family Violence Clearinghouse, unions and employer organisations.

**Recommendation 16—6** In the course of the 2012 review of modern awards by Fair Work Australia, the ways in which family violence terms may be incorporated into awards, consistent with the modern award objectives should be considered.

**Recommendation 16—7** In the course of the first four-yearly review of modern awards by Fair Work Australia, beginning in 2014, the inclusion of a model family violence term should be considered.

**Recommendation 16—8** The Australian Human Rights Commission, in the context of the consolidation of Commonwealth anti-discrimination laws, should examine the possible basis upon which status as an actual or perceived victim of family violence could be included as a protected attribute under Commonwealth anti-discrimination law.

## 17. The National Employment Standards

**Recommendation 17—1** As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending s 65 of the *Fair Work Act 2009* (Cth) to provide that an employee:

- (a) who is experiencing family violence, or
- (b) who is providing care or support to another person who is experiencing family violence,

may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

**Recommendation 17—2** As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending the National Employment Standards with a view to including provision for additional paid family violence leave.

## 18. Occupational Health and Safety Law

**Recommendation 18—1** Safe Work Australia should, in developing or reviewing its Research and Data Strategy or other relevant strategies:

- (a) identify family violence and work health and safety as a research priority;
- (b) examine the effect of the harmonised legislative and regulatory OHS scheme on duties and obligations owed in relation to family violence as a possible work health and safety issue; and
- (c) consider ways to extend and improve data coverage, collection and analysis in relation to family violence and its impact as a work health and safety issue.

**Recommendation 18—2** As part of the national education and awareness campaign in Recommendation 15–1, Safe Work Australia should work with the Australian Domestic and Family Violence Clearinghouse, unions, employer organisations, State and Territory OHS regulators and other relevant bodies to:

- (a) raise awareness about family violence and its impact as a possible work health and safety issue; and
- (b) develop and provide education and training in relation to family violence as a possible work health and safety issue.

**Recommendation 18—3** Safe Work Australia should consider including information on family violence as a possible work health and safety issue in relevant Model Codes of Practice, for example:

- (a) ‘How to Manage Work Health and Safety Risks’;
- (b) ‘Managing the Work Environment and Facilities’;
- (c) ‘How to Consult on Work Health and Safety’;
- (d) ‘Preventing and Responding to Workplace Bullying’; and
- (e) any other code that Safe Work Australia may develop in relation to other relevant topics, such as workplace violence and psychosocial hazards.

## **19. Superannuation Law**

**Recommendation 19—1** In *Family Violence—A National Legal Response*, ALRC Report 114 (2010) the Australian Law Reform Commission and NSW Law Reform Commission recommended that the Australian Government should initiate an inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth). Any such inquiry should include consideration of the treatment of superannuation in proceedings involving family violence.

**Recommendation 19—2** The Australian Taxation Office publishes a range of guidance material which is designed to assist SMSF trustees. The Australian Taxation Office should review and amend such guidance material to ensure that trustees experiencing family violence are provided with specific information about: their obligations; setting up and managing a SMSF; and winding up a SMSF in such circumstances.

**Recommendation 19—3** The Australian Government should consider amending regulation 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) to require that an applicant, as part of satisfying the ground of ‘severe financial hardship’, has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks.

**Recommendation 19—4** The Australian Prudential Regulation Authority, in conjunction with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies, should develop guidance for trustees in relation to early release of superannuation on the basis of ‘severe financial hardship’ under the *Superannuation Act 1976* (Cth) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth). Guidance could include information in relation to:

- (a) what may constitute a ‘reasonable and immediate family living expense’ in circumstances involving family violence; and
- (b) the effect family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses.

**Recommendation 19—5** In any guidelines for early release of superannuation benefits on compassionate grounds, the Department of Human Services should incorporate information about family violence. This should include that family violence may affect the test of whether an applicant lacks the financial capacity to meet the relevant expenses without a release of benefits.

**Recommendation 19—6** Department of Human Services staff involved in assessing applications for early release of superannuation on compassionate grounds under the *Superannuation Act 1976* (Cth) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be provided with consistent, regular and targeted training in relation to family violence, including:

- (a) the potential impact of family violence on applicants’ circumstances; and
- (b) responding appropriately to applicants who disclose, or who are experiencing, family violence.

## **20. Migration Law—The Family Violence Exception**

**Recommendation 20—1** The Australian Government should amend the *Migration Regulations 1994* (Cth) to allow Prospective Marriage (Subclass 300) visa holders to have access to the family violence exception.

**Recommendation 20—2** The Australian Government should amend the *Migration Regulations 1994* (Cth) to provide secondary applicants for onshore permanent visas with access to the family violence exception.

**Recommendation 20—3** The Australian Government should create a new temporary visa to allow victims of family violence who are secondary holders of a temporary visa to:

- (a) make arrangements to leave Australia; or
- (b) apply for another visa.

**Recommendation 20—4** The Australian Government should consider reviewing the Migration Review Tribunal’s application fee arrangements contained in reg 4.14 of the *Migration Regulations 1994* (Cth), including its impact on the ability of victims of family violence to access merits review.

**Recommendation 20—5** The Australian Government should collaborate with relevant migration service providers, community legal centres, and industry bodies to ensure targeted education and training on family violence issues for visa decision makers, competent persons, migration agents and independent experts.

**Recommendation 20—6** The Australian Government should collaborate with migration service providers, community legal centres, and industry bodies to ensure that information about legal rights and the family violence exception are provided to visa applicants prior to and on arrival in Australia. Such information should be provided in a culturally appropriate and sensitive manner.

## **21. The Family Violence Exception—Evidentiary Requirements**

**Recommendation 21—1** The Australian Government should repeal relevant provisions contained in reg 1.23 of the *Migration Regulations 1994* (Cth) requiring that, the violence, or part of the violence must have occurred while the married or de facto relationship existed between the alleged perpetrator and the alleged victim.

**Recommendation 21—2** Until Recommendation 21—1 is implemented, the Department of Immigration and Citizenship should amend its *Procedures Advice Manual 3 Guidelines* to provide that:

- (a) relationship break downs may occur over a period of time;
- (b) the requirement in reg 1.23 of the *Migration Regulations 1994* (Cth) should not be applied to refuse a family violence claim unless there has been a clear break in the relationship and the family violence occurs well after that event; and
- (c) in considering judicially-determined claims, family violence orders made post-separation can be considered.

**Recommendation 21—3** The Australian Government should amend the *Migration Regulations 1994* (Cth) to provide that an applicant can submit any form of evidence to support a non-judicially determined claim of family violence.

**Recommendation 21—4** The Australian Government should repeal reg 1.26 of the *Migration Regulations 1994* (Cth) relating to the requirements for a valid statutory declaration from a competent person.

**Recommendation 21—5** The Department of Immigration and Citizenship should amend its *Procedures Advice Manual 3 Guidelines* to provide that evidence other than from competent person:

- (a) may be relevant to a non-judicially determined claim of family violence; and
- (b) is entitled to weight as is appropriate in the circumstances of the individual concerned.

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## 22. Refugee Law

**Recommendation 22—1** The Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) in relation to family violence in refugee assessment determinations. Such a direction should refer to guidance material on family violence contained in the Department's *Gender Guidelines*.

**Recommendation 22—2** The Department of Immigration should ensure that the *Gender Guidelines* as they relate to family violence are subject to periodic and comprehensive review.

**Recommendation 22—3** The Department of Immigration and Citizenship should amend its instruction *Ministerial Powers—Minister's Guidelines—s 48A cases and requests for intervention under s 48B* in the *Procedures Advice Manual 3* to refer to secondary visa applicants who are the victims of family violence.

